

The Trial
of Zulfikar Ali
Bhutto
And The Superior Judiciary in
Pakistan

Syed Sami Ahmad

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AND
THE SUPERIOR JUDICIARY
IN PAKISTAN**

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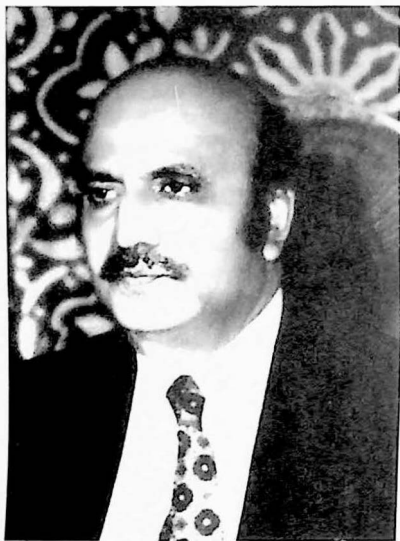
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*This book
is dedicated to the memory of
my reverend father
Syed Muhammad Sabih,
who was a light
as well as a guide
to me*



Syed Sami Ahmad
Author

THE AUTHOR

Syed Sami Ahmad, after graduating in Economics and Political Science, obtained the degree of Law from the University of Karachi in 1953. He comes from the well-known family of judges and lawyers. His Uncles, Sir Ali Imam and Hassan Imam were eminent jurists – jurists of All-India fame; another Uncle Syed Amin Ahmed was the first Muslim ICS Officer from Bihar; his father the late Syed Muhammad Sabih, one of the leading lawyers of Bihar, was a Public Prosecutor and Government Advocate just before the partition of India.

He was enrolled as an Advocate of the Chief Court of Sindh on January 19, 1955; of the Supreme Court of Pakistan on June 30, 1964. He was elected General Secretary, Karachi Bar Association, 1962-63; President,

Karachi Bar Association, 1967-68; Chairman, Executive Committee, Sindh Bar Council, 1979-84; President, Sindh High Court Bar Association, Karachi, 1984-85, 1994-97 (three consecutive terms). He appeared as the sole representative of the Karachi Bar Association before the Law Reform Commission, headed by the late Justice Hamood-ur-Rehman, 1968; founded the Justice Kayani Memorial Law Society, 1969. He represented Pakistan in the International Conference of Jurists, held under the auspices of the United States Educational Foundation (Pakistan) at Karachi, December 9-12, 1987. He was appointed Fellow to Session 269, Salzburg Seminar, Austria, July 3-22, 1988.

Syed Sami Ahmad is a hard-liner as the champion of democracy and upholder of the supremacy of law. Right

from the days of Gen. Muhammad Ayub Khan, till this day, he has not compromised with any regime on the Issue of the independence of judiciary. It is his firm conviction that the salvation of the whole world lies in the rule of law. In addition to the present publication, he has to his credit four books. His first book "Struggle Against Martial Law" was published in 1987 wherein he condemned the imposition of Martial Law by Gen. Muhammad Zia-ul-Haq and described it as one of the greatest calamities that could befall a nation. Then he came out with another publication titled: "The Judgment that brought disaster". This book was published in the year 1991. It is a running commentary, highly critical in nature, on the judgment of Justice Munir in the case of Moulvi Tamizuddin Khan. Syed Sami Ahmad is perhaps the first jurist in the subcontinent who has offered his bold comments on the judgment of the Court of

ultimate jurisdiction. This book has been widely acclaimed within Pakistan as well as abroad. His book "The End of Muslim Rule in India" describes the break up of Muslim India into several sovereign states and finally the disappearance of the mighty Mughal Empire that dazzled the whole world for about three centuries. His fourth publication is the biography of Sir Syed Ahmed Khan, describing him as the Savior of Muslim India.

Syed Sami Ahmad, one of the leading lawyers of Pakistan, is practising in the Supreme Court of Pakistan and the High Court of Sindh. He has the distinction of appearing in a fairly large number of cases of civil liberties and defending many politicians of All-Pakistan fame during the despotic regimes. The leaders defended

by Syed Sami Ahmad include Nawabzada Nasrullah Khan, Shaikh Abdul Majeed Sindhi, Mian Mahmood Ali Kasuri, Z.H. Lari, Maulana Sattar Niazi, Sardar Attaullah Mengal, Ghous Buksh Bizenjo, Mian Tufail, Khawaja Rafiq and many others.

Syed Sami Ahmad was also an Honorary Professor in S.M. Law College, Karachi, 1985-96.

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INTRODUCTION

The history of Pakistan is a history of misfortune. When Pakistan was born, it was the fifth largest and the biggest Islamic State in the world. The creation of Pakistan cost about two million lives of muslim men, women and children and more than twenty million muslims who were living in Hindu majority areas of India were forced to leave their ancestral homes forever. Muhammad Ali Jinnah, who was the founder of Pakistan, lived for a year or so after its creation. He passed away on September 11, 1948. The Almighty God gave him no opportunity to fortify the foundation of our beloved country. The subsequent events of Pakistan completely shattered his health. When Quaid-I-Azam Muhammad Ali Jinnah died, all that remained of him weighed only 70 pounds.

Liaquat Ali Khan, who was the first Prime Minister of Pakistan, after the sad demise of Quaid-i-Azam, took over the control of the country. He, in no time, emerged on the political scene as the most formidable leader of his people. It is indeed very sad that by that time our country had already become a centre of intrigues. The result was that before Liaquat Ali Khan could consolidate the position of his country, he was assassinated. His assassination took

place on October 16, 1951, while he was going to address a public meeting at Rawalpindi. Pakistan, after the assassination of Liaquat Ali Khan, became very unstable.

Khawaja Nazimuddin who was the Governor-General of Pakistan and one of its founders, stepped down as Prime Minister to serve the country. He was the Chief Minister of undivided Bangal and well versed with the administration of the state. Even he was not allowed to work and forced to go back home after being dismissed illegally and unconstitutionally by Ghulam Muhammad who was his appointee as Governor General of Pakistan. The dismissal of Khawaja Nazimuddin was the last nail in the coffin of Pakistan. Thereafter, Gog and Magog were let loose to rule and govern the people of Pakistan ruthlessly for their own political ends. Democratic values evaporated in the air and dictatorship with the help of the members of bureaucracy and the top brass of the Army took over the reins of the country. Despotism prevailed everywhere and the rightful people were denied their rights. General Ayub was the main player who, after taking over the country, framed his own Constitution, depriving the elite of the society to vote for the Presidency of Pakistan. He formed his own electoral college consisting of the basic democrats who later became known as B.D members. Those B.D members were mostly hardened criminals, history sheeters and easily accessible to Police officers and Deputy Commissioners etc. They were equally purchaseable as commodities to those politicians who had lust for power

and money. Ayub Khan, in fact, did not succeed in his mission and the country became a victim of turmoil in every walk of life.

Lastly, he committed a blunder when he attempted in vain to take Kashmir by force which was already in occupation of India. Consequent thereupon, 1965 war broke out between India and Pakistan. Foreign Powers intervened particularly Russia with whom our relations were not very cordial. So far as the war of 1965 was concerned, no tangible results were achieved. Ayub Khan wanted the help of America for the settlement of Kashmir dispute, but he was disappointed. Keeping in view in a such awkward position, he accepted the invitation of Kosygin, the Prime Minister of Russia and went to Tashkent. Lal Bahadur Shastri, the Prime Minister of India was also invited. The delegates of both the countries met to resolve the Kashmir dispute, but Ayub Khan achieved nothing. Lal Bahadur Shastri was the victor at the end. The case of Kashmir was lost when Tashkent declaration was signed. In view of this tragedy, Ayub Khan lost his grip over the country and was ultimately forced to step down in disgrace. He handed over power to another General namely Yahya Khan to save his own skin and went home.

When Yahya Khan came in power, he held free and fair elections in both the wings of the country i.e. East and West Pakistan on the basis of one man, one vote. In East Pakistan, Sheikh Mujib-ur-Rehman captured 160 seats

made his genetic system so much affected that he lost his balance of mind and finally it drove him to his doomsday.

He held the general elections ahead of time just to demonstrate that his People's Party had very strong grass roots across the country. As the date of general elections was announced, the opposition formed a united front known as P.N.A against Bhutto and came on the streets in full strength. The members of the general public were already disgusted with Bhutto, because of his despotic attitude. In addition, he had miserably failed to provide bread and butter to his people, as promised. Further, Bhutto wanted to prove that any attempt or displeasure of America to dethrone him would be an exercise in futility.

The general elections, as scheduled, were held on 7th March, 1977. Although Bhutto's Party had strong grass roots across the country, yet he decided to sweep the polls with the help of the state functionaries. The result was that riggings were done on a massive scale. He used his power to achieve his own target, the object being to push the opposition parties to the walls to disgrace them. Bhutto had to pay a very heavy price for this mistake. The P.N.A leaders made strong protests and launched agitation in every corner of the country. The graph of their popularity reached the optimum. The P.N.A got a new life and more and more people in thousands in every part of the country came on the streets in support of the P.N.A movement. They refused to accept the manipulated results of the elections. Bhutto was relying on the army, headed by General Zia. He

deployed the army to curb the agitation but the people in millions came on the streets face to face before the law enforcement agencies including the army. General Zia was no longer on his side. He had his own ambition and had his own eye on the same throne on which Bhutto was sitting. He gave full freedom to those who were with the P.N.A movement. The result was that the table was turned and Bhutto was forced to sit with P.N.A leaders on the negotiating table.

The session of the talks began with P.N.A leaders. The talks were held between two sides in a very cordial atmosphere. Bhutto himself agreed to hold fresh elections in the disputed constituencies. Briefly speaking, the dialogue between the two sides resolved all the issues and the only left over part was the signing of the accord and its announcement. For some reason or the other, Bhutto was reluctant to sign the accord. General Zia and his close comrades had already decided to seize power and dethrone Bhutto. Their maneuverings were going on in full swing. On July 3, 1977, barely 24 hours before the take over by the army, the American Ambassador came to Bhutto and personally informed him that the troops were in ready position to overthrow him. Bhutto did not believe him and rejected his speculation. Bhutto, on the same day, a couple of hours before the take over of the country by the army, held a press conference and announced that he had decided to sign the accord and the agreement was going to be finalized the next morning.

At 02:30 in the morning, barely two hours after the announcement that he was going to sign the accord, Bhutto was informed that the troops were on the move. General Zia and his comrades without firing a shot seized power and took over the country. In the beginning, Bhutto was taken into protective custody by General Zia. Later, Bhutto was involved falsely in the murder case of the father of Ahmed Raza Kasuri. General Zia was aware of the temperament of Zulfikar Ali Bhutto and knew very well that in case Bhutto was set free, his own life would be at stake. General Zia was aware that Bhutto was a very popular leader of the masses and, in case, fresh elections were held, he was going to sweep the polls. The P.N.A leaders were no match to him. He, therefore, set up four witnesses of Federal Security Force (F.S.F) through his agencies with a direction to induce them to make confessional statements under Section 164 Cr.P.C., implicating Bhutto as the main culprit in the said case.

General Zia exercised his influence at all levels including the superior judiciary. Finally, he managed to secure the conviction of Bhutto in terms of death penalty through the judicial verdict. Bhutto's death sentence was confirmed by the Supreme Court of Pakistan by one vote. It is indeed our misfortune that the court of ultimate jurisdiction sentenced Bhutto to death and gave the order of hanging for the offence which he had not committed. After the confirmation of death sentence, Zulfikar Ali Bhutto was executed in Rawalpindi jail on July 4, 1979.

There is an old proverb, that whatever you sow you shall reap. It is almost a divine Rule. The end of General Zia was no exception to this Rule. Zia was, in fact, guilty of manslaughter under the cover of judicial verdict. He was killed alongwith his close comrades and friends by hidden hands when he was returning in C-130 plane to Islamabad from Bahawalpur. His plane, after taking off, had hardly reached the height of 5000 feet, when it came down and fell straight on the ground and burst into flames. In his case not a pound of flash was found. That is how General Zia disappeared from the face of the earth on August 17, 1988.

Syed Sami Ahmed

Karachi
May, 2008

ZULFIKAR ALI BHUTTO (1971-1977)

Zulfikar Ali Bhutto was a feudal lord. His father Sir Shah Nawaz Khan Bhutto was a well known personality of Sindh as a politician. Zulfikar Ali Bhutto studied politics at Berkeley and read law at Christ Church, Oxford, before becoming a lawyer. After the partition of India, he started his law practice at Karachi. I had the privilege of meeting him in the year 1955 when I had started my own career as an Advocate of the Sindh Chief Court. He remained in the legal profession up to early 1958. It was the same year, that is, on 7th October 1958 that Martial Law was proclaimed in our country by Iskander Mirza whereby he abrogated the Constitution of 1956 and appointed General Muhammad Ayub Khan as Chief Martial Law Administrator. He issued a decree to that effect, as he was the President of Pakistan. Since Mr. Zulfikar Ali Bhutto had his links with those usurpers, he was taken in the first cabinet of Martial Law as its youngest member. Zulfikar Ali Bhutto during his ministership came very close to General Muhammad Ayub Khan.

It has already been recorded by me in my earlier book that within a couple of weeks, Iskander Mirza was

forced to resign at gunpoint and later sent to England to remain in exile for the rest of his life. Thereafter, Ayub Khan became all powerful, having no one to challenge his supremacy. Since Bhutto was a very intelligent person, possessing a great vision and foresight, he became, a “blue eyed” boy of Ayub Khan. A very strong relationship of a Daddy and Son was established between the two. Bhutto later became a foreign minister and, was sent to China and America on special assignments on a number of occasions. When the down fall of Ayub Khan started after 1965 war and particularly after his visit to Tashkent, where his visit ended in a fiasco as he achieved no positive result and India achieved everything under the leadership of Lal Bahadur Shastri, Bhutto by that time had become a polished politician. In view of his political sagacity, he could visualize very clearly that the days of Ayub Khan were numbered. He seized the opportunity and revolted against Ayub Khan. He went to the extent of maligning Ayub Khan and started a campaign of vilification against him, declaring that the case of Kashmir was lost in totality for all times to come because of Ayub Khan. Ayub Khan very clearly estimated that Bhutto was no more loyal to him and, as such, dismissed him as his Minister.

Bhutto's People's Party

Zulfikar Ali Bhutto formed his own political party known as People's Party. In view of the popularity of his political party, he captured 81 seats out of 138 in West Pakistan and the Awami League, headed by Mujib, captured 160 seats out of 162 in East Pakistan. After the creation of Bangla Desh, Bhutto assumed the office as

President of Pakistan, consisting of four provinces, namely Peshawar, Punjab, Sindh and Baluchistan. The biggest province of Pakistan, that is, East Pakistan, after its conquest by India during 1971 war, became Bangla Desh. Although India had conquered this important part of our country, yet she didn't occupy it. India waited for the return of Sheikh Mujib-ur-Rehman who had already become the undisputed leader of his people. His people had already given him the title of the Father of the Nation. India had already accepted his that status, as the popularity of Sheikh Mujib-ur-Rehman, as the Father of the Nation, was undenied and undeniable.

Bhutto Releases Mujib

India, after securing the complete take-over of East Pakistan, restored complete freedom to the people of Bangla Desh. The break up of Pakistan was complete. The military Junta and the bureaucracy of West Pakistan wanted to get rid of this part of our country and eventually they succeeded in their mission. Bhutto played a key role in the 'breakup' of Pakistan, as he wanted his own supremacy in West Pakistan by virtue of the fact that he was the leader of the majority party. When Bhutto took over Pakistan as President, he had the full blessings of Washington. Sheikh Mujib-ur-Rehman, in those days, was languishing in one of the prisons of Pakistan, awaiting his execution. Bhutto released him and sent him to India so that he could take his rightful place amongst his own people. When Sheikh Mujib-ur-Rehman reached India, he was warmly received by the Government of India, acknowledging him as the Father of the Nation of Bangla Desh. He stayed there for a

couple of days and thanked the Government of India for liberating his people from the Pakistan Army. When Sheikh Mujib-ur-Reluman landed at the Dacca airport, millions of people greeted him as the Father of the Nation. He took over Bangla Desh as its first President.

Securing Release of 90,000 Prisoners of War

Bhutto's another achievement was that he secured the release of 90,000 prisoners of war from India. Never before in the history of the world, 90,000 Muslim soldiers had ever capitulated before the enemy. History bears testimony to the fact that our valiant soldiers were sent by air to East Pakistan without heavy weapons. It all happened, because our rulers never thought of making East Pakistan self-sufficient from the defence point of view. That was the reason that no garrison was established in any part of East Pakistan, providing her modern and sophisticated weapons such as heavy artillery, tanks, anti-tank guns and other heavy armor. There was no Air base nor was there a Naval base. It was very unfortunate that we had only 42 tanks and one squadron of F-86- Sabre Jets and four gun-boats, as compared to India. India was well equipped with 200,000 soldiers, supported by heavy artillery and hundreds of tanks. So far as Air force was concerned, we had only one squadron of planes, as compared to India who had ten squadrons of Jet fighters. Our Naval strength was almost nil, as India had one aircraft carrier and several destroyers and frigates. It was under those conditions that our brave soldiers had an encounter with the Indian might and had to face a humiliating defeat, as they were supplied no heavy weapons. Even other wise

the transportation of heavy weapons was not possible, as there was a Naval blockade. Every historian will conclude without mincing words that the Generals of Pakistan Army were wholly and solely responsible for disgracing the nation and further that it was a part of deep-rooted conspiracy.

Constitution of Pakistan, 1973

When Bhutto came in power, in the first instance he assumed office as President of Pakistan and later became the Prime Minister. He believed in Parliamentary form of Government and, that being the reason, he abrogated the Constitution of 1962, framed by Ayub and launched his own Constitution which was in the parliamentary form in nature. Bhutto's own Constitution, framed by him, was not acceptable to the members of the Parliament. He faced great opposition. The stand of the opposition was that a Constitution of a country was of paramount importance and a supra legal document. The document of such nature would not meet the aspirations of the people unless it was debated on the floor of the Assembly and consensus was obtained in the shape of unanimity. Bhutto had to yield before the opposition and all parties representing the people of Pakistan were invited to help him in the framing of the Constitution of Pakistan. The leaders of all parties in the Parliament came forward to join him, as it was equally their responsibility to draw a document which is regarded as sacred and supreme in running the affairs of the state and gives full protection to the people with regard to life, liberty, body, reputation and property of every citizen of the country. The Constitution of 1973 is unique, as it was framed on the floor of the Assembly by obtaining the

consensus of the entire nation and is still holding the ground but not in its original shape.

Bhutto as Despot

No doubt that Bhutto himself was very much a party to the Constitution of 1973. He had willingly accepted the amendments in the Constitution so as to make our country democratic in nature. However, at a later stage, the Constitution of 1973 came in his way. He was a despot by temperament. He wanted to rule the country according to his own whims and individual judgments. He was not prepared to tolerate any kind of opposition. In other words, he wanted to perpetuate his rule as a dictator. The result was that by the time he was removed from the political scene, he had, in fact, virtually destroyed the Constitution of 1973 and left only its skeleton. Bhutto was a man of extra-ordinary caliber. He had the full backing and support of young generation. He was a good orator and capable of attracting large crowds. But he was vindictive by nature and rash by temperament. All those who were around him to assist him in the affairs of the state were sycophants and his cronies. None of them had the courage to oppose him and give him correct advice despite the fact that they were fully aware that Bhutto, by his despotic temperament, was creating enemies and losing friends. He was sincere to the cause of Pakistan, but his pride on every step was making him unpopular. The idea of his pride may be gauged from the fact that he was treating a country of millions of people, as if he was the monarch of all that he could survey.

Bhutto was a duly elected Prime Minister of Pakistan. He was, as such, answerable to his people. The Constitution of Pakistan was binding on him and it was obligatory on his part to perform his duty within the norms of the Constitution. He had taken oath to preserve, protect and defend the Constitution of Pakistan to the best of his ability. Bhutto, after coming in power, completely forgot his constitutional obligations. Bhutto became power drunk to such an extent that he treated the entire machinery of the state including the Constitution of Pakistan as being subservient to him. He considered himself next to Quaid-e-Azam and estimated that the entire nation was a nation of fools. His false vanity drove him mad. He was so much intoxicated with power that he made no distinction between friends and foes. He had natural instincts of humiliating his friends and foes alike. He had some kind of illusion that he was a super man and every one irrespective of his position and status in the country was subservient to him. Levers of power made his genetic system so much affected that he lost his balance of mind and finally it drove him to his doomsday.

Bhutto Pioneer of Making Pakistan Nuke

In spite of many short comings, Bhutto was very much interested in making Pakistan an atomic power. It was his dream which he wanted to fulfil during his own life time. The first atomic explosion of India on 18th May, 1974, left him with no option but to pursue his own scheme of becoming an atomic power. He had taken a firm decision in that direction in spite of many difficulties which were, in

fact, insurmountable in nature. His biggest problem was the allocation of funds for the procurement of reprocessing plant. The reprocessing plant alone was going to cost 300 million dollars for the project. The procurement of this huge amount was one of the biggest hurdles that he had to cross. To achieve that objective, Bhutto approached the Muslim world, particularly the Gulf States and Arab countries. Those countries had become very rich because of the increase in oil prices and had tons of money in the form of dollars. They could easily afford to finance the project, as conceived by Bhutto. When Bhutto approached those countries, the response was very encouraging, especially from Libya, Saudi Arabia, United Arab Emirates, Kuwait and Iraq. All of them were willing to offer every kind of financial assistance. The Arab states were equally confident that Pakistan, as an atomic power, would be a guarantee for their own safety in case of aggression by Israel.

Bhutto negotiated with the French firm in order to purchase the reprocessing plant. The supply of the reprocessing plant by the French firm was not possible without the approval of the French Government. The negotiation took a long time, as Bhutto gave the full assurance that his country needed the reprocessing plant to produce energy for industrial purposes. Bhutto, finally succeeded in concluding an agreement, as he accepted all the conditions, laid down before him. Bhutto kept his mission in complete secrecy. He was, in fact, embarking upon a very difficult journey. His most important task was to find out a Muslim scientist capable as well as reliable to help him in achieving his mission impossible. It was nothing short of a miracle that he received a letter from Holland by Dr. Abdul Qadeer Khan.

As soon as Bhutto received a letter from Dr. Qadeer, he invited him to Pakistan. Dr. Qadeer had already earned fame in the field of enrichment of uranium production. Bhutto met him a number of times. He used to have long sessions with him to satisfy himself as to whether Dr. Qadeer had potentials to fulfil his dream. He soon visualized that Dr. Qadeer was the right person and fully capable to make Pakistan an atomic power. Dr. Qadeer after having a long session with Bhutto returned to his job in Holland and arrived at Karachi in December 1975. He was invited to Islamabad by Bhutto. Dr. Qadeer, during his stay in Islamabad became utterly disgusted, as things were going in the wrong direction. He fully realized that the network of bureaucracy was a source of nuisance. Bhutto's advisors and bureaucrats were bankrupt intellectually. Dr. Qadeer saw them wasting public money and furnishing incorrect information to him vis-à-vis nuclear technology.

Bhutto gave a blank cheque to Dr. Qadeer. He established an autonomous body for Dr. Qadeer under his complete supervision. The foundation of research laboratories were laid in Kahuta, permitting no one to interfere in his work. There was a secret arrangement under which there was a direct link between Bhutto and Dr. Qadeer. It is necessary to mention here that the Kahuta laboratories were established in the month of July, 1976. Dr. Qadeer kept his work rolling but with complete secrecy and committed that he would make Pakistan one of the World's Powers in the field of atomic energy. Although the Kahuta research laboratories were functioning secretly, yet the Americans got a hint that Pakistan was busy in making

itself an atomic power. It was one of the shocking news that President Carter and his advisors received.

Dr. Kissinger Visits Pakistan

Dr. Kissinger landed in Pakistan on 8th August, 1976. He had a talk with Bhutto but in a lighter mood and asked him about the agreement to purchase a reprocessing plant from France. Bhutto replied promptly that his country needed a reprocessing plant for peaceful purposes, that is, to produce energy for industrial purposes. Kissinger, however, was not satisfied with the answer that he received and mildly told Bhutto that he might be a threat to world peace and tranquility. The talk between the two didn't take a serious turn and Bhutto went on playing with him by his words but Kissinger was not satisfied. The Americans were not confident that Bhutto would be able to pursue a policy of becoming an atomic power, yet they had a very strong suspicion. This fact cannot be denied that Bhutto had an obsession of making his country an atomic power. He knew that the Americans would not forgive him for doing that job, yet he was determined to go ahead in the accomplishment of his mission.

This fact is equally true that after the fall of Dacca, power was transferred to Bhutto, because he had the blessings of Washington. Bhutto was highly emotional by temperament. After ascending the throne, he became over confident, forgetting that Washington was very powerful and had their agents every where in our country. It is a matter of record that during his tenure of office, Bhutto summoned a special session of the National Assembly and

without mentioning Dr. Qadeer and the Kahuta laboratories exposed himself not directly but indirectly to the Pentagon by challenging them. It was a big mistake that he committed. It was from that point of time that his misfortune began and ultimately he had to pay a very heavy price. In addition to what I have said before, his pride and highly disgraceful treatment that was meted out by him to his friends and foes alike paved the way for his miserable end.

Mr. J. A Rahim whom he used to call Daddy and one of the founding members of the People's Party, Mian Tufail, and one of the sons of Mahmud Ali Kasuri were his worst victims. Whatever he did to them cannot be described in words. There is an old proverb that "Every pride has a fall", but Bhutto, considering himself that he was second to none in the world, shall not meet that end. That was the reason that he hardly respected anyone and suppressed the opposition by brute force. Bhutto being an elected Prime Minister was expected to pay due respect to his colleagues and the lawmakers. It is a part of our history that whoever opposed him on the floor of the National Assembly, he humiliated them by ordering the sergeants to give them beating and remove them from the floor of the House by dragging. He had a false notion that the whole nation was behind him and they were his blind followers, but human fortune always changes. Who knew that Mary Antonitte and Louis the XVIth of France would be arrested and publicly guillotined, but it did happen and is worth taking a lesson from history. Bhutto, after getting power, became so much power drunk that he became a full fledged dictator. His dictatorial attitude and actions within his own

parameters in dealing with the affairs of the state finally took him to the gallows.

Dr. Abdul Qadeer Khan

Dr. Qadeer is our national hero. He is the Father of the Atomic Power of Pakistan. The whole nation is proud of him. It was a blessing in disguise that Dr. Khan came in contact with Bhutto. Dr. Khan, before coming to Pakistan and taking the responsibility of making an atom bomb for Pakistan, was working in Holland. He had a command over several languages. He was the coordinator of the reports compiled by the Dutch, British and German Scientists. That was the reason that he was aware of minute details of the centrifuge system installations. It was Dr. Khan who apprised Bhutto that before acquiring a reprocessing plant, Pakistan needed three other basic plants to achieve its purposes. Those were (1) Production Reactor which could produce Plutonium (2) Fuel-producing Reactor and (3) Production plant for heavy waters. Dr. Khan further informed Bhutto that it was only afterwards that the reprocessing plant could be of any use for helping to produce an atom bomb.

Bhutto was delighted to know such minute details from Dr. Khan. Before that, his scientists were completely ignorant and furnishing him wrong and misleading information on nuclear technology. History will record with pride that foundation of nuclear technology was laid down by Bhutto. It was his great achievement although his dream of becoming an atomic power could not be fulfilled during his own life time. Many Heads of the state shall come and go, but the name of Dr. Khan shall be written in golden

words in the history of the world for making Pakistan an atomic power. Dr. Khan shall always remain enthroned in the hearts of millions of people of the Muslim world. He is already enthroned in the hearts of present generation and shall equally remain enthroned in the hearts of our posterity. However, it is indeed a matter of great mortification that the treatment which has been meted out to Dr. Khan recently is deplorable and very unfortunate. Be that as it may, Dr. Khan is one of the greatest scientists of the world ever produced.

His contemporary is Abdul Kalam, another scientist of world fame. Abdul Kalam in the early days of his life had come to Karachi but he was shown cold shoulders. As a result, he went back to India. India owned him, as he was a genius. Now, he has the distinction of being the Father of Atomic Power of India. India has rewarded him, being a jewel of a scientist and one of the few rare species in his own field in the world. Today, he is the President of India, whereas Dr. Qadeer Khan, a scientist of the same caliber, is under house arrest. The humiliating treatment that Dr. Khan has received from the persons in authority is a black spot on the history of Pakistan. The future historians will decide as to who is who!

Elections Ahead of Time

Bhutto always over estimated himself. On the 7th of January, 1977, he made an announcement in the National Assembly that the next general elections would be held on 7th March. He had a novel idea in his mind that he, with the help of state functionaries, would sweep the polls. He triumphed in the last elections with the help of masses and

became the majority party leader of West Pakistan. Instead of relying on the devoted party workers, he decided to place reliance on D.Cs, S.Ps, Home Secretaries, Police officers and Members of Bureaucracy. According to Maulana Kausar Niazi, he made his own plan, called "Operation Victory". It was his misfortune that he drifted away from the right path.

Bhutto's dictatorial attitude, arrogance and brute temperament for the achievement of his own objectives had annoyed a large section of the people. At no stage of his tenure as Prime Minister of Pakistan, he was found, pursuing the path of democracy. The opposition, as such, was waiting for an opportunity to demonstrate their strength. That opportunity was provided to them when he decided to hold the General Elections before time. There was already a united group of some political parties known as UDF but Jamiat-ul-Ulema-e-Pakistan and Tehrik-e-Istaklal were not within its fold. The political parties in existence knew that Bhutto was a very shrewd politician. He was equally formidable, as he was in power and the entire machinery of the state was behind him.

Formation of PNA

Soon after the announcement of the date of elections, sincere efforts were made to unite all the political parties of the country against Bhutto. That was the only solution to their problems. In the beginning, when a meeting of all the opposition leaders was held, a number of

difficulties came in their way in spite of their best endeavors and unanimity could not be achieved. Asghar Khan and Maulana Noorani were hard nuts to crack but disappointment did not prevail in their ranks and ultimately the leadership of Nine-Party electoral alliance known as PNA was formed under the leadership of Mufti Mahmud. After the formation of PNA, the opposition became very hopeful. Bhutto was equally happy that PNA under the leadership of Mufti Mahmud would never be able to win the election against him. During the election campaign, Bhutto committed a number of blunders. One of the blunders committed by him was that he permitted the Election Commission to allot the same symbol to all Nine-Parties comprising PNA.

Rigging of Polls

When Bhutto was in power, he was power drunk. In consequence thereof, he went on committing blunder after blunder. His first move to get himself elected unopposed by removing Jan Mohammad Abbasi forcibly from his way was a beginning of his misfortune. He got him arrested and kept in police custody till the filing of his nomination paper. After that, he was released. Jan Mohammad Abbasi was not a formidable candidate at all against Bhutto. Had he contested the election, he would have secured a few hundred votes against Bhutto. Bhutto was so much despotic by temperament that he was not prepared to see beyond his nose. His this blunder turned the table and the opposition got a fair idea that rigging was his main weapon through which he would secure victory by over whelming majority. In addition, he got many of his party candidates elected

during the initial stages of election and thereby got himself thoroughly exposed.

He started the rigging of polls in such a manner that the opposition became more united and formidable. Bhutto's policy of rigging added fuel to the fire and there was a flood of processions and public meetings under the auspices of PNA. Everywhere, the PNA demonstrated its strength by taking out processions and holding public meetings, exposing Bhutto and the members of bureaucracy who were the main players in the process of rigging. The hope of Bhutto and his comrades was completely shattered when they could see that he would not be able to face the flood gate of processions and public meetings of the opposition. The opposition was at its peak and the high handedness of Bhutto energized the members of PNA and PNA became so popular that its name was on the lips of the general public. Bhutto could also see that the popularity of PNA was very much on the increase despite the fact that the entire machinery of the state was operating in aid of Bhutto and his party members.

Rigging is Admitted

Maulana Kausar Niazi, who was very close to Bhutto as his Central Minister quotes Bhutto on the point of rigging in his book "Last Days of Premier Bhutto". His version is reproduced verbatim as under:-

"Uptil that time, I was not aware of Mr. Bhutto's plan called "Operation Victory". Although I knew that he seeks information directly from the D.C or S.P of a district, but I had

just no idea that Rao Rashid and company had hatched a regular plot for rigging the elections. These were the people who formed the rearguard while we remained in the forefront fighting a political battle through political tactics.

The first time that I came to know of the rigging was just two days after March 7th when the PNA had rejected the election results and already launched its agitation.

One evening, Mr. Bhutto was sitting in the PM House with Hafiz Pirzada, Rafi Raza and a couple of other friends. Looking towards Pirzada, he said, "Hafiz, how many seats must have been rigged?"

Sir..... around 30 to 40," was his reply.

"Can't we ask the PNA to have their candidates elected against these seats and assure them that we'll not contest them?"

Since there was a massive scale of rigging, practically every where candidates of People's Party were winning. The radio and TV were at the disposal of Bhutto. They started the announcement of results, showing that nearly in every constituency, People's Party candidates were sweeping the polls. It was around 8pm, on 7th March, 1977 that elections results started pouring in. The same evening PNA rightly rejected the election results, that being prima facie the outcome of fraud and rigging. The rigging was masterpiece, as planned by Bhutto in terms of "Operation Victory". In view of the fraudulent results of the elections, the agitations of PNA gained momentum. On every street of Pakistan, there was agitation, followed by protest rallies against rigging, paralyzing the whole country. PNA had secured only 36 seats. Those 36 elected candidates were asked to hand over their resignations to Mufti Mahmud, the head of PNA. At the same time, there

was an announcement by PNA that they would boycott the Provincial Assembly elections, scheduled to be held on 10th March.

PNA Launches Agitation Movement

Rigging was so apparent that vast majority of the people joined hands with PNA. The movement against rigging was so strong and genuine that even the local administration failed and failed miserably to curb the velocity of their agitation. Bhutto became so helpless that ultimately he sought the help of the Army. Martial Law was imposed in Karachi and Hyderabad. The imposition of Martial Law was challenged in the courts of Superior Judiciary and the superior judiciary held that imposition of so called partial Martial Law was illegal and without any lawful Authority, as there was no such provision in the Constitution. General Zia and other Generals including Corps Commanders were not sincere to Bhutto. They had their own vested interests.

Bhutto committed another mistake. He arrested all the top leaders of PNA and still he could not crush their agitation which had already taken the shape of a mass movement. When the members of the general public were on the streets, raising slogans in favour of PNA and creating law and order problem, the army trucks were simply going round and round and watching every thing as silent spectators. When all efforts of crushing the movement proved futile, Bhutto summoned General Zia and other Generals including Corps Commanders to assess the political situation and read their minds. While he was having a dialogue with them he tried to know whether PNA

movement was under control. In the course of discussion, Service Chiefs particularly General Zia were reading his mind as to how far and to what extent, Bhutto was confident of himself. His generals could easily see that Bhutto was shaky and on the point of losing his nerves. Bhutto was demonstrating not directly but indirectly that he was depending on the Army. Bhutto, after imposing the partial Martial Law, had already opened his door for his generals. In view of this situation, there was an appreciable change in their attitude. Bhutto had a great confidence in General Zia. General Zia was his choice as Chief of the Army Staff. He had elevated him to that position after superseding a number of generals. Unfortunately General Zia had a deceptive look and had his own ambition. He and those Generals who were close to him were unanimous that PNA movement was the most opportune time to seize power.

There is no doubt that PNA movement had already created chaotic conditions throughout the country, as it had taken a heavy toll of lives and people in thousands had been put behind bars. In Karachi alone, 27 people who were coming out of the Mosque were machine gunned and killed. Bhutto's generals behind the scene were, in fact, fanning the movement through their secret agents who were operating in plain clothes. All was happening because of Bhutto's pride and arrogance of the highest degree in his day to day life as Prime Minister of Pakistan. Bhutto always considered himself invincible. Bhutto considered the leaders of PNA as small fries. So far as Generals were concerned, he always tried to impress upon them that he was a man of international fame and any attempt by them to topple him would be a sheer exercise in futility.

Bhutto Sits with PNA on Negotiating Table

The movement launched by PNA took a very serious turn when it was converted into a movement of Nizam-e-Mustafa. Bhutto was not realizing the gravity of the situation. That was the reason that he was not prepared to have a dialogue with PNA leaders. Some of the Muslim countries including Saudi Arabia decided to intervene and eventually persuaded Bhutto to sit on the negotiation table with PNA so that the matter could be sorted out and peace could prevail in Pakistan. The PNA was equally divided on having negotiations with the Government of Pakistan. Asghar Khan, Begum Nasimwali, Sardar Shairbaz Mazari and Maulana Shah Ahmed Noorani were deadly opposed to have a dialogue with Bhutto, because it was their conviction that Bhutto was a man who could never be trusted. All the four were in favour of Martial Law. However, Mufti Mahmud, who was the leader of PNA came forward to sit with Bhutto on the negotiating table to sort out the matter in a peaceful manner and the two others who joined him were Nawabzada Nasrullah Khan and Prof. Ghafoor Ahmed. This decision was taken by them in consultation with those leaders of PNA who were not prepared to have a dialogue with Bhutto. Those PNA leaders who were not consenting to sit on the table and negotiate with Bhutto, however, unanimously agreed, with Mufti Mahmud and his two other comrades to go ahead to have a dialogue with Bhutto. Bhutto came forward to negotiate with PNA leaders and those who assisted him were Kausar Niazi and Hafeez Pirzada.

When the session of talks began, PNA leaders pressed for immediate release of all PNA leaders. They further demanded the lifting of censorship from newspapers, release of all those arrested under Section 144, payment of compensation to all those killed or injured during the agitation and stopping forthwith one sided propaganda over radio and television. The PNA leaders agreed that if their initial demands were accepted, they would suspend their agitation so long the negotiations would remain in progress. When the second round of talks began on June 6, Bhutto accepted all the demands of PNA, as put forth. During the second round of negotiations on June 6, two important proposals came up for settlement of the problem and virtually there was an agreement. It was no less than Bhutto himself who expressed his willingness to declare the elections of March 7, to be null and void and order fresh polls, and in the second one, the idea was of holding fresh elections in the disputed constituencies. It was mutually agreed that both the proposals be kept secret.

On June 7, the PNA gave its acceptance to the formula of holding fresh elections. Meanwhile Martial Law in Karachi and Hyderabad was lifted and those who had been arrested were released, cases against whom had been registered were withdrawn. The demand of PNA was that fresh elections be held by October whereas the PMA House wanted a period of at least one year.

On July 1, the session began at 8:00 pm and ended at 6:30 in the morning. This was the longest session of a dialogue between the two. On July 2, all the issues were

resolved and the only left over part was the signing of the accord and its announcement.

General Zia a Snake in Bhutto's Sleeve

Bhutto was taking PNA leaders lightly. He was not prepared to realize the ground realities. That was the principle reason that he was delaying the signing of the accord already arrived at between the two. Bhutto, on every step of negotiation with PNA, was in consultation with General Zia. He was misguiding Bhutto, as the signing of the accord with PNA was going to frustrate his own evil design. General Zia was assuring the full support of the army to Bhutto, but things were otherwise. General Zia was a snake in his sleeve. Maulana Kausar Niazi and other sincere friends of Bhutto were advising him to sign the accord at his earliest, as they were genuinely apprehending the intervention of the army. Bhutto was not prepared to listen to them, as his own pride was coming in his way. The American Ambassador, Mr. Arthur W. Hermid, met Bhutto at 3 am, barely 24 hours before the final hour and gave him a clear indication that the military was going to take-over. Bhutto rejected outright his indication knowing it fully well in the heart of his heart that American Ambassador could never be wrong.

Final Hour Strikes

In spite of receiving the ultimatum from the American Ambassador, Bhutto was showing no anxiety to sign the accord. On July 4, the cabinet meeting was held in the evening. Maulana Kausar Niazi again advised him to

sign the accord without any further delay. Mumtaz Bhutto held the same view when his opinion was solicited. On the same day at about 11:00 pm, he held a press conference, announcing that he had decided to sign the accord.

Maulana Kausar Niazi has said something very important in this context. It is quoted verbatim as under:-

“The press conference started at 11:30 pm and continued for one hour. During this Mr. Bhutto announced that he had decided to sign the accord and the agreement would be finalized the next morning. He added, “the negotiating team of the Alliance had brought another ten points and were themselves ashamed that they were stirring up fresh issues. They said they were helpless. They may be helpless, but I am not. As such I will sign the accord tomorrow.”¹

At 2:30 in the morning, Bhutto was informed that the troops were on the move. His domestic servant Noora informed his master that the Police guards stationed at P.M House were not there. They had been removed. Thereafter Bhutto tried to contact one or two generals, but in vain. Mr. Bhutto understood what was going on. He asked the operator to get Gen.Zia-ul-Haq in GHQ. After a long wait, Gen. Zia-ul-Haq attended the call. Let us see what General Zia spoke to his master during the final hours when the country had already been taken over by him. The exact words have been quoted by Maulana Kausar Niazi in his book. Maulana Niazi says:-

“What’s happening?” asked Mr. Bhutto, “I hear the army is on the move, is that correct?”

¹ Last days of Premier Bhutto by Kausar Niazi p 232

“What you’ve heard is correct, Sir,” answered Gen. Zia-ul-Haq, most calmly, “I am sorry there was no other way out but this”

Taking some time to explain the situation, Gen. Zia-ul-Haq asked Mr. Bhutto, “Sir, where would you like to go, Murree, Larkana or Karachi?”

“Murree,” said Bhutto. He then enquired about his family.

“Begum Sahiba can go with you.” he said. “But the children will go to Larkana.”

“Begum Sahiba wants to accompany the children to Larkana said Mr. Bhutto.”

“Right Sir,” said Gen. Zia-ul-Haq, “you’ll be conveyed to Murree in the morning after breakfast.”
After that he rang off.²

On 5th July, 1977, the fate of Bhutto was completely sealed. This day proved to be his doomsday.

² Last days of Premier Bhutto by Kausar Niazi pp 232-233

PAKISTAN'S MISFORTUNE BEGINS AGAIN

On 5th July, 1977, Martial Law was imposed on the innocent people of Pakistan. This was the third Martial Law which was inflicted upon the country. In consequence thereof, Gen. Zia-ul-Haq and his comrades took over the country in their grip and thereby dismantled the entire democratic structure of the state. All prominent PNA leaders and leaders of the People's Party including Bhutto were taken into custody. Those who were taken into custody between the night of 4th and 5th July were:-

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|-------------------------------|--------------------------------|
| 1. Maulana Mufti Mahmud | 2. Nawabzada Nasrullah Khan |
| 3. Maulana Shah Ahmed Noorani | 4. Asghar Khan |
| 5. Prof. Ghafoor Ahmed | 6. Sardar Shairbaz Khan Mazari |

Pakistan People's Party

- | | |
|-------------------------|-------------------------|
| 1. Zulfikar Ali Bhutto | 2. Abdul Hafeez Pirzada |
| 3. Maulana Kausar Niazi | 4. Mumtaz Ali Bhutto |
| 5. Dr. Ghulam Hussain | 6. Sheikh Rasheed |
| 7. Gen. Tikka Khan | |

PNA leaders were sent to Punjab House, Murree to be kept there. So far as Bhutto was concerned, he and his close associates were kept in Governor House, just opposite to Punjab House, Murree. Gen. Zia declared that those leaders

who were arrested were, in fact, in protective custody. The most unfortunate part of our history at that point of time was that the country was taken over by our Generals without firing a shot. There was no resistance from any corner. On the contrary, the members of the general public observed the Day of Deliverance and distributed sweets. When I speak of the members of general public, I do not include those members who were associated with the People's Party. It is important to record here that PNA leaders were quite senior and seasoned. Before the Martial Law was proclaimed, many of them were inviting it without realizing as to what would be the consequences of such grave calamity. The only person who was opposed to the idea of Martial Law to disarm Bhutto was Maulana Mufti Mahmud. It is a different matter that he could not prevail upon his other colleagues. Bhutto had another notion. He was immensely proud of his popularity as well as of his personality. He was reluctant to sign the accord with PNA and ruled out the take-over of the country by his generals, as he had an illusion that if any such attempt was made to dethrone him, millions of people throughout the country would be on the streets. His illusion was completely shattered when he could see that there was none on the streets to voice his protest in his favour.

General's Promise for 90 Days

Since the third Martial law had already been well planned, Gen. Zia-ul-Haq through media assured the leaders in his custody as well as the general public that he was going to hold fair and free elections within 90 days from the date of take-over. In the course of his speech, Gen. Zia-ul-Haq firmly committed to the nation on solemn

affirmation that under no circumstances, general elections would be postponed. The general elections would be held on time and immediately thereafter power would be handed over to the people of the country. Gen. Zia-ul-Haq in his speech spoke to the people of Pakistan very softly giving them hundred percent assurance that he and his colleagues had no intention whatsoever to deprive the people of Pakistan of their lawful and constitutional right to rule and govern the state. He further assured that he and his colleagues were forced to seize power in the interest of the country, as its very integrity was at stake. He further elaborated in his speech on July 5, 1977, that they were fully conscious of the fact that they were soldiers and their duty was and is to safeguard the territorial limits of the country. When Gen. Zia-ul-Haq was addressing the nation immediately after imposing Martial law, he was no exception to the general rule of making a sugar coated speech of that kind. History bears testimony to the fact which is undenied and undeniable that once a Military dictator ascends the throne, he never leaves it unless he is killed or removed by force or becomes incapacitated physically. I would like to give you a gist of the speech of Gen. Zia-ul-Haq that he delivered on 5th July, 1977 whereby he made a firm commitment to the nation in the following words:-

“My country men, Assalam-o-Alaikum, we have not assumed power willingly to govern the state. My colleagues and I would like to assure you with all sincerity that we have taken this measure in the larger interest of the country. We have no political ambition nor are we interested in governing the state. Soon after the polls, power would be handed over to the people and we will return to our barracks”.

Political Leaders Are Set Free

On July 28, the political leaders who were in custody of Gen. Zia-ul-Haq were set free. So far as PNA leaders were concerned, they could not maintain their unity. Their unity, in fact, evaporated in the air after the exit of Bhutto from power. They were already divided on a number of issues and their division continued to rise from day to day. So far as Bhutto was concerned, he visited the four provinces in no time. Wherever he went he attracted large crowds of his Party workers. The only problem was that his Party workers believed in rowdism. As a result, on a number of occasions, they created law and order problems. Bhutto never tried to control his Party workers. He never realized that in case his party would create law and order problems, Gen. Zia could get a golden opportunity to postpone the elections, as scheduled.

Gen. Zia, being a military dictator, was never serious to hold the general elections. He had his own ambition vis-à-vis problem. He could clearly visualize the political condition of the country. He could see that PNA leaders were divided. There was no unity in their ranks and they were not expected to win the elections against Bhutto by any stretch of imagination. Gen. Zia knew it very well that in case Bhutto came in power, he and all other generals who were instrumental in over throwing Bhutto will be sent to the gallows. Apart from this fact, I would like to reiterate that when a military dictator once sits on the throne; he doesn't leave it, unless he comes under the clutches of divine punishment.

Bhutto Is Arrested

Zia fixed 18th October, 1977, as the date of general elections. After the fixation of this date, necessary steps were taken in that direction, giving a clear indication that he was going to hold the general elections, as promised. It may be recorded here that much earlier an F.I.R dated November 11, 1974, had been lodged at police station Itchra by Ahmed Raza Kasuri, alleging that his father Nawab Muhammad Ahmed Khan was assassinated and the real culprit was Zulfikar Ali Bhutto. At that point of time, Bhutto was in power as Prime Minister of Pakistan and still his name figured in F.I.R dated November 11, 1974. The details of this case will be commented upon by me at a later stage when I will deal with the judgments of the Lahore High Court and of the Supreme Court of Pakistan. At the time when the preparations of general elections were going on in full swing and the political scenario was at its climax, Bhutto was arrested on September 3 at 4'o clock in the morning from his Clifton house, Karachi. His arrest was ordered by Zia in the murder case of Nawab Muhammad Ahmed Khan. This action of General Zia gave a clear signal that he was terribly afraid of Bhutto. His own political analysis was that Bhutto's Party would get a serious set back in his absence. In spite of the arrest of Bhutto, the People's Party made a clear declaration through Begum Nusrat Bhutto that the People's Party would remain in the field and contest the elections at all levels. Meanwhile an application for the release of Bhutto on bail was moved in the Lahore High Court and it was on December 13, that Zulfikar Ali Bhutto was released on bail.

Justice K.M.A Samdani

Justice Samdani was originally from Madras. He, in his autobiography, mentions the case of Bhutto when he dealt with his bail application. Mr. Justice Samdani says that when he granted bail purely on merit to Bhutto, many of his colleagues were not happy. They advised him in their own words not directly but indirectly that maximum precautions be taken in a case where the government is involved as Party. Justice Samdani has made a clear observation in his autobiography that his colleagues were quite reluctant to pass an order against the government and, according to his own disclosure in his book, Justice Samdani had to pay a heavy price for being just and impartial in the discharge of his duty. His sufferings are well recorded in his autobiography.

Arrest of Bhutto under Martial Law

It has already been brought on record that Bhutto had been released on bail by Justice K.M.A Samdani in a murder case. Zia had a hallucination against Bhutto as a danger to his life as well as to the throne which he was occupying as a usurper. His sole modus operandi was to prevent Bhutto from participating in the general elections and leading his People's Party to victory. This time his arrest was effected on September 17, 1977, under Martial Law Regulation No.12. In terms of Martial Law Regulation No.12, Zia, being the Chief Martial Law Administrator,

was all powerful. He was a monarch of all that he could survey. In terms of this Martial Law Regulation, anyone who, in his opinion, could be a threat to his usurpation as Head of the State, being Chief Martial Law Administrator, could be arrested and, such arrest, could not be challenged in any court of law including the Supreme Court of Pakistan. At this stage, Zia thoroughly stands exposed, demonstrating that at no cost, he will allow Bhutto to come in power. In addition to his own lust for power, his deep rooted prejudices vis-à-vis conspiracy against Bhutto were very much on the surface, showing beyond any shadow of doubt that he and his comrades had taken a firm decision to eliminate him.

Role of PNA Leaders

The PNA leaders, after the imposition of Martial law, changed their strategy. Most of the PNA leaders were of the view that before going to the polls, it was necessary that the process of accountability be completed. This approach of PNA leaders was giving a genuine cause to General Zia for the postponement of elections which he wanted desperately to fortify his own position. Air Marshall Asghar Khan right from the very beginning was already in favour of Martial Law to get rid of Bhutto. He was agitating from day one that free and fair elections would not be possible unless Bhutto was thrown out of power. Pir Pagara and Chaudry Zahoor Ellahi both were asking for good order and safety of the state before holding the general elections. They were quite vocal on the point that peaceful transfer of power through fair and free

elections would be feasible only under the umbrella of peace and tranquility and not otherwise. It was the ardent desire of Zia to postpone the elections and when he did it, these PNA leaders and others endorsed rather hailed his action of postponement of elections.

Maulana Mufti Mahmud

Maulana Mufti Mahmud held a different view. He knew the consequences of the postponement of general elections. He believed in democracy and wanted to defeat Bhutto politically and through ballots. Maulana Mufti was indeed a wise man and a politician in the true sense of the term. He was not prepared to fall in the trap of General Zia. I wish, Maulana Mufti could have prevailed on his other colleagues, but he could not. It was a great victory for Zia.

Professor Ghafoor Ahmed

Professor Ghafoor Ahmed had played a pivotal role along with two other colleagues namely Nawabzada Nasrullah Khan and Maulana Mufti Mahmud in a number of sessions that he had with Bhutto to reach an agreement. At that time he was not a politician of eminence, yet he proved his vision as a politician. He was greatly disappointed when the general elections were postponed for an indefinite period. He offered his bitter criticism on the decision of Zia whereby he postponed the elections without fixing a date as to when the same would be held. Professor Ghafoor Ahmed, while giving an interview on October 18,

to "Daily Dawn", expressed his opinion that iron was hot and the people across the country were anxious to go to the polls to elect their leaders. He regretted that postponement of elections was not a wise step nor was it in the interest of the country particularly when General Zia took a decision to that effect without having any consultation with political leaders.

TRIAL OF BHUTTO

Ahmed Raza Kasuri's Case

When Zia took over the country as Chief Martial Law Administrator, the F.I.R lodged by Ahmed Raza Kasuri, relating to the death of his father, was given a new lease of life, the object being to hang Bhutto, if possible. Since Bhutto was the elected Prime Minister of Pakistan, his case along with others, was sent to the Lahore High Court, to be dealt with on trial side. The Bench, constituting the Trial Court, consisted of Mushtaq Hussain, C.J., Zakiuddin Pal, M.S.H. Qureshi, Aftab Hussain and Gulbaz Khan, JJ. This fact is also known to the whole world that Chief Justice Mushtaq Hussain was very close to Zia. It was Chief Justice Mushtaq Hussain who had been appointed as Election Commissioner by Zia. When Zia was reiterating hundred times a day that the general elections would be held within 90 days and that there would be no postponement, Justice Mushtaq Hussain, while going to Lahore from Islamabad, gave statement as a spokesman of Zia that the general elections would be held only if the conditions of the country would be congenial. This was the first disclosure to the effect that Zia was not going to fulfil his promise of 90 days. This fact was divulged by a person no less than Justice Mushtaq Hussain who had been

assigned the task to try Bhutto and compose the judges of his own choice on the Bench.

Before I deal with the background of the case of Ahmed Raza Kasuri, I would take the liberty of reproducing his case, in brief, as appearing in para 6 of the judgment of the Lahore High Court. It is quoted verbatim as under:-

“The prosecution case is that Ahmed Raza Kasuri who was a founder member of the Pakistan People’s Party and had been elected on the ticket of that Party as Member of the National Assembly in the elections held in December, 1970, developed after the said elections strained relations with the principal accused, who in order to get him assassinated or liquidated, entered into a conspiracy with Masood Mehmood approver through the agency of the Federal Security Force. Mian Muhammad Abbas joined this conspiracy on the direction of Masood Mehmood and directed Ghulam Hussain approver, P.W. 31 to organize the murder of Ahmed Raza Kasuri. Mian Muhammad Abbas also arranged for the supply of arms and ammunition from the armoury of the Federal Security Force for the execution of this design. The other three accused and Ghulam Hussain approver also joined the conspiracy. Ghulam Mustafa obtained the requisite arms and ammunition with the help of Mian Muhammad Abbas to execute the conspiracy. On the night between 10th and 11th of November, 1974 after having received arms and ammunition from Ghulam Mustafa accused, Ghulam Hussain approver, Arshad Iqbal accused and Rana Iftikhar Ahmed accused in furtherance of the common intention fired with automatic weapons at the car of Ahmed Raza Kasuri at the round-about of Shadman-Shah Jamal Colony, Lahore. The firing resulted in the death of Nawab Muhammad Ahmed Khan while the complainant Ahmed Raza Kasuri escaped unhurt”.¹

¹ P.L.D 1978 Lahore Pg. 536

F.I.R

So far as F.I.R, lodged by Ahmed Raza Kasuri is concerned, it is based on presumption and on the solitary statement. There is a direct insinuation against Bhutto without supporting any evidence either ocular or circumstantial. Briefly speaking, the case of Ahmed Raza Kasuri, according to F.I.R, was that Bhutto killed his father, because he had enmity with him. Later on, the allegation was magnified and improved, as Zia had taken over the country and Bhutto was in his captivity. Since I myself have remained for a long time on trial side, dealing with hundreds of murder cases and the cases of civil liberties, I would like to analyse the whole case within a legal frame work. To begin with, it is necessary to mention as to what points were formulated by the court to examine the prosecution case. The points were:-

1. Strained relations and enmity between the principal accused and Ahmed Raza Kasuri resulting in the threat at the floor of the Parliament on 3-6-1974.
2. The conspiracy to murder Ahmed Raza Kasuri between the petitioner and Masood Mahmud P.W.2 and joining of the other accused and Ghulam Hussain approver in that conspiracy.
3. Attack on Ahmed Raza Kasuri as a part of the same conspiracy firstly at Islamabad and later at Lahore, the last occurrence culminating in the death of the deceased.

4. The steps taken by the principal accused and his subordinates to channelise the investigation in a manner so as to exclude the possibility of detection of the actual culprits; and interference in the investigation of the Provincial Police by Central Agencies.
5. Preparation of incorrect record by the police under the direction of the Officers of the Central Government with the object of making the detection of the actual offenders extremely difficult.

Deposition of Ahmed Raza Kasuri

“Ahmed Raza Kasuri P.W.1 stated that he was a founder member of the Pakistan People’s Party which was founded on 1st December 1976. He was elected to the National Assembly of Pakistan in the 1970 Elections on the ticket of this party. The relations between him and the principal accused cooled down and became strained after he found that the principal accused was power hungry and keen either to share power with Sh. Mujib-ur-Rehman or to attain power in West Pakistan. In this connection he referred firstly to statement given by the principal accused in Peshawar in February 1971 making it clear that his party would not be attending the forthcoming session of the National Assembly scheduled to be convened on the 3rd of March 1971 at Dacca because they would be treated as double hostages and would be going to the slaughter house; secondly a speech made by him (the principal accused) on the 28th of February 1971, in a public meeting held at Iqbal Park, Lahore, threatening that “whosoever would go to

Dacca, his legs would be broken, and whosoever would be going to Dacca, would be going on a single fare; and thirdly the speech made by him (the principal accused) on the 14th of March 1971, in a public meeting held at Nishtar Park, Karachi in which he clarified that since his party was the majority party in West Pakistan, and Sh. Mujib-ur-Rehman's Party was a majority party in East Pakistan, the powers should be transferred not to the party having an overall majority, but separately in each wing to the majority party of that wing. He referred to the words used by the principal accused to convey this meaning "تم ادھر ہم ادھر" (You should be there I should be here). This, according to the witness, was the background of the relations between him and the principal accused becoming estranged".²

According to Masood Mahmud approver (P.W.2), he was specially invited by Bhutto to attend the session of National Assembly where he witnessed the threat of Bhutto to Ahmad Raza Kasuri in the following words and the instructions that he received about him (Kasuri). He describes the whole episode in his deposition as under: -

"The witness further stated that in June, 1974 when Ahmed Raza Kasuri P.W.1 was speaking in the National Assembly, the principal accused addressed him directly and not through the Speaker, and asked him to keep quiet. He also stated something to the effect like that he had had enough of him and that he would not tolerate his nuisance any more. A day or two later, the Prime Minister sent for him that he was fed up with the obnoxious behaviour of Ahmed Raza Kasuri and Mian Muhammad Abbas accused knew all about his activities. He

² PLD 1978 Lahore pp 539-40

also told him that Mian Muhammad Abbas had already been given directions through the witness's predecessor to get rid of Ahmed Raza Kasuri. The principal accused went on to instruct the witness that he should ask Mian Muhammad Abbas to get on with the job and to produce the dead body of Ahmad Raza Kasuri or his body bandaged all over. He told him that he would hold him (witness) personally responsible for the execution of this order".³

On the Point of Incident

Ahmed Raza Kasuri as P.W.1 proceeds further and describes the incident regarding the killing of his father in the following words: -

Regarding the incident, P.W.1 stated that he with his parents and maternal aunt went to attend the wedding ceremony of Syed Bashir Shah in Shadman Colony, Lahore on 10th November 1974 at 8:00p.m. It was a dinner-cum-Qawali function. Shortly after midnight when the Qawali was over, he with his parents and aunt started towards his own house in his Right-hand driven Toyota Mark-II car which he himself was driving. His father Nawabzada Muhammad Ahmed Khan deceased was sitting on the front seat towards his left while his mother was sitting on the rear seat behind him with his aunt towards her left. He reached in a few minutes at the Shadman-Shah Jamal Round-about which is about 70 yards from the house of Syed Bashir Shah. He had hardly put his car into the second gear when the first burst of weapons hit the body of his car and damaged its dynamo. Immediately the car's light went off. Then there were repeated bursts with automatic fire-

³ PLD 1978 Lahore Pg 546-47

arms. He managed to drive on and when he cleared the round-about and turned towards F.C College bridge in Shah Jamal Colony and reached near the house of Muzzafar Ali Khan Qazalbash he looked into the driving mirror.

After seeing that there was no car following him he noticed that his father was resting his head on his shoulder. He moved his hand forward towards his father whereby his hands were soaked with blood. Realizing that his father had been hit with bullets, he became panicky and was filled with grief. At that stage, his mother consoled him and told him that "son, you have got to know about your father's injuries now but his blood is already in my feet".

Ahmed Raza, being P.W.1, has made a very long statement in his examination-in-chief. I have covered briefly his statement regarding the whole story of his case. I have, in fact, covered the relevant portions of his statement that he made in examination-in-chief. Whatever I have written above is the crux of the matter on which the foundation of the case of Ahmed Raza Kasuri has been laid. It is, however, important to mention as to what he has stated in his cross-examination.

Admission in Cross Examination

In cross-examination by the learned counsel for the principal accused the witness conceded that he continued to be a Member of the Pakistan People's Party up to the 8th of April, 1977, after he had rejoined it on the 6th April, 1976. He explained that he simply maintained a posture of affiliation with the party as a measure of expediency and self-preservation. He admitted that he had applied for the Pakistan People's Party ticket for election to the National

Assembly in 1977, but it was not awarded to him. He denied that he had adopted his "present stance against Mr. Bhutto" because the party ticket was not awarded to him. He referred in this connection to his speech in the National Assembly made on the 2nd of December, 1974, (Ex. P.W.1/14) the relevant part of which is Exh. P.W.1/14-A, to which reference will be made later. The witness was a Member of the Parliamentary Delegation sent to Mexico in 1976. After his visit to Mexico and several other countries, the witness submitted a report Exh. P.W.1/20-D. He was confronted with this report as under: -

"We found that your image as a 'Scholar Statesman' is emerging and getting wide acceptance".⁴

He admitted to have written this but explained that he was trying to pamper the accused.

Ahmed Raza Kasuri Further Admits

It may be stated that the note Exh. P.W.3/16-D is a note reporting to the principal accused the meetings of the witness with Ahmed Raza Kasuri and that he had realized that his future lay with the People's Party. It also conveyed his request for "an audience with the Prime Minister at his convenience." It also proves that it traveled to the principal accused through his Secretary. The following endorsements are as follows: -

⁴ PLD 1978 Lahore pg 543-44

1. "He must be kept on the rails, he must repent and he must crawl before he meets me. He has been a dirty dog. He has called me a mad man. He has gone to the extent of accusing me of killing his father. He is a lick. He is ungrateful. Let him stew in his juice for some time."⁵

(Sd.) Z.A Bhutto 29.

Modus Operandi of Zia against Bhutto

It would not be out of place if it is recorded that Zia initiated the above case against Bhutto. The arrest of Bhutto was effected during the election campaign. When the election campaign was going on, Zia could clearly see that the wind was blowing against him. Bhutto's election campaign clearly indicated that no one was going to stop him from winning the election and defeating PNA. Zia also knew that in that event, his ultimate end would be on the gallows. The only way through which Zia could save his skin was to deprive Bhutto the right of participating in the election. In order to achieve his object, he maneuvered through his henchmen the availability of four F.S.F officers to make confessional statements against Bhutto, alleging that they were responsible for the murder of Ahmed Raza Khan's father, as they had been instructed to do so. Those witnesses who were chosen for this purpose were (1) Mian Muhammad Abbas, former Director Operation of F.S.F (2) Ghulam Mustafa, former Inspector F.S.F (3) Arshad Iqbal, former Inspector F.S.F and (4) Rana Iftikhar Ahmed, former Sub-Inspector F.S.F. All of them were induced and pressurized to confess their respective guilt in their statements made under Section 164 Cr.P.C

⁵ PLD 1978 Lahore pg 557-58

before the Magistrate. According to Professor Ghafoor Ahmed, "In connection with the murder case of Nawab Muhammad Ahmed Khan registered on November 11, 1974, three officers of F.S.F were arrested from Lahore. All the three in the court of a local Magistrate stated that they had been deputed to kill Ahmed Raza Kasuri in view of the instructions that they had received from Bhutto. On August 29, Assistant Advocate General of Punjab made a statement before the Division Bench of Lahore High Court that in the murder case of Nawab Muhammad Ahmed Khan, challan would be submitted within a week. The Division Bench was further informed that one F.S.F officer Rana Iftikhar Ahmed had already become an approver. In addition, there were a few other officers who had made statements before a Magistrate that they had fired on Ahmed Raza Kasuri by automatic weapons.⁶

Prof. Ghafoor Ahmed's Disclosure on Confessions

Prof. Ghafoor Ahmed makes a very important disclosure on the confessional statements of four F.S.F officers. His disclosure in this behalf throws sufficient light as to what was going on behind the scene. He says: -

"In this case confessional statements of the accused were of great importance. All the four accused in unequivocal terms had admitted their guilt, but their plea was that they were forced to commit the crime. The High Court had sentenced all of them to death. Life is dear to everyone. Those who had committed such a heinous crime could not be regarded as

⁶ Prof. Ghafoor Ahmed in his Book, "An Election Could Not be Held". p 56

persons having any scruples. There was a genuine apprehension that during the proceedings of the case, they might resile from their statements and might abstain from speaking the truth to save their own lives. News were coming from jail that some of the witnesses were showing their weaknesses and were in a fix and were contemplating to adopt some other method to save their own lives. When ever such news was received, some of the high officials of the Martial Law authority used to meet the relatives of the accused and assure them in the presence of respectable persons of their respective localities that if the accused persons gave their statements based on the truth, their mercy petitions would be granted in spite of their convictions by the court. In order to pacify them to their entire satisfaction such assurances were given even after placing hand on the Holy Quran".⁷

The Lahore High Court's Treatment With Bhutto

When the trial of Bhutto began, he was put in a special dock to sit as an ordinary prisoner. This was done to provoke, insult and humiliate him. After all Bhutto was the elected Prime Minister of Pakistan. He never deserved the treatment meted out to him during the proceedings of the case. This fact cannot be denied that Mushtaq Hussain, the Chief Justice of Lahore High Court, who was heading the Bench, appeared to be very much prejudiced against Bhutto for the reasons best known to him. It is a settled principle of law that justice should not only be done but seem to have been done. The violation of this principle by Mushtaq Hussain, C.J, shattered the confidence of Bhutto. He went out of proportion because of the rude treatment of the Chief Justice of Lahore High Court. During the proceedings of

⁷ Prof. Ghafoor Ahmed in his Book, "An Election Could Not be Held".pp 301-302

the case many a time, he was asked to "Shut up" and turned out from the court room in police custody.

Bhutto in his book "If I am Assassinated" has left his own writing as to how he was treated by the Chief Justice Mushtaq Hussain during his trial. This document is a historic one. Whatever Bhutto has written regarding the treatment that he received from the court receives corroboration as well from the judgment of the Lahore High Court that was delivered against him. In the first instance I shall deal with a version of Bhutto, as recorded by him. Bhutto, in this context, says: -

"But the bench, in particular the Chief Justice, was always rude, abrasive and insulting to me. In striking contrast, the Chief Justice was showing kindness to the confessing co-accused. He smiled at them. He enjoyed their rustic sense of humour at my expense. He was patient with them in a fatherly fashion. He would translate the questions in Urdu and Punjabi for them whenever he thought that they were not able to follow the English. The taunts, the frowns and shouts were reserved only for me. I was favoured with the commands to "shut up", "get up", and "take this man away until he regains his senses". In these circumstances, to talk of co-operation is to ask for the patience of a saint".⁸

I will offer my analytical comments in detail on the judgment of the Lahore High Court as well as of the Supreme Court of Pakistan whereby Bhutto was given death sentence and hanged. It is important to quote para 625 of the Judgment of the Lahore High Court. This particular paragraph clearly shows as to how the trial was

⁸ Bhutto in his Book, "If I Am Assassinated" p.195

conducted and what kind of treatment must have been meted out to the Principal accused. It is quoted as under: -

“The conduct of the principal accused has already been reviewed briefly. He had been hurling threats as well as insults on us and at times had been unruly. In addition, he has proved himself to be a compulsive liar. He was allowed thrice to dictate his statement directly to the Typist and he dictated 9 pages on the 25th January 1978, more than 11 pages on the 28th January, 1978 and about 11 pages again on the 7th February, 1978, without the least interference by the Court. All the three statements are full of repetition of false and scurrilous allegations against the Court. The first two statements were made, although they were absolutely irrelevant, in answer to questions under section 342, and the last statement was allowed to be dictated after the close of the defence evidence when all legal avenues for the making of such statement before Court were legally closed and yet he came, out with allegations that the statements were not fully recorded”.⁹

I would like to add in this behalf that the Book “If I am Assassinated” was written by Bhutto when he was in Jail. This book is known as testament of Bhutto. He had a reasonable apprehension that Zia would not spare his life. According to his own showing, it was evident even from his trial. I have already quoted and I would like to quote further one or two passages from his book in support of his apprehension concerning his life. He expresses his apathy and apprehension in these words: -

“The sensitivity of the trial judges on the exposure of their bias was more important to them than my life. If a trial for murder can be held in camera, there is no need to hold any trial in public. There is no need to record any evidence or to write any order or judgement. If that practice is followed,

⁹ PLD 1978 Lahore p. 666

justice will turn from the majesty of law to the tyranny of law. It would mean the legislation of murder".¹⁰

"Yet even in that convoluted and closed court, I was not permitted to put forward my defence. Orally I was informed in Kot Lakhpat jail that my request to address the court after the Prosecution was rejected. I was not a practising lawyer. From 9th January 1978, I was not being defended by lawyers. I had not heard the prosecution witnesses during my long illness and absence from the court. I had been insulted and humiliated by the court during the open trial for three months. The prosecution case had received the full blast of publicity. The trial had been converted into a secret conclave. The dice was completely loaded against me. But with all those harrowing handicaps when I sought to address the closed court in defence of my life, I was not permitted because I wanted to hear the Prosecution before replying as a layman, without legal notes, without the aid of law books and legal rulings".¹¹

Nature of Evidence against Bhutto

Before I offer my comments on the judgment of Lahore High Court I would like to discuss the evidence appearing against Bhutto. It will be for the reader to decide whether there was any evidence against him on the basis of which he could be convicted and sentenced to death. It is a settled principle of law that every accused shall be presumed to be innocent till his guilt is proved. If there is any doubt or lacuna in any piece of evidence, led by the prosecution, the benefits thereof shall go to the accused and not to the prosecution. It is equally a settled law that the burden of proving the guilt of the accused lies squarely on the prosecution and conviction is permissible only when the guilt of the accused is proved by evidence of

¹⁰ Bhutto in his Book, "If I Am Assassinated" p.194

¹¹ Bhutto in his Book, "If I Am Assassinated" p.195

unimpeachable character. Keeping in view these principles of law, we have to analyse and see as to what kind of evidence was adduced by the prosecution, connecting Bhutto with the commission of the offence, as alleged, and to what extent, it was proved, leaving no room for any doubt.

The Hon'ble trial court framed the following synopsis of evidence: -

1. Evidence regarding conspiracy to murder complainant and admissibility of certain other evidence relevant to charge.
2. Proof of strained relations of principal accused with complainant.
3. Principal accused's pressurizing F.S.F officers to carry out plan.
4. Attempts to win over complainant.
5. Motive for commission of murder lay with principal accused.
6. Confessional statement of Masood Mahmud, approver.
7. Statement of Saeed Ahmed Khan, Chief Security Officer.
8. Statement of Mervyn Ruper Welch, Director F.S.F.

9. Confessional Statement of Ghulam Hussain, approver.
10. Statements of other prosecution witnesses.
11. Confessional statement of Ghulam Mustafa.
12. Confessional statement of Arshad Iqbal.
13. Confessional statement of Rana Iftikhar Ahmed.

Zia implicates Bhutto

Zia involves Bhutto in the murder case of Nawab Muhammad Khan. He sets up five F.S.F. officers as witnesses against Bhutto to establish his involvement in the case. They were those officers who made confessional statements, admitting their participation in the murder of Nawab Muhammad Ahmad Khan. All the five came forward to play their role as witnesses under the promise of protection, threat, loss of service and life. Now, I proceed to appraise and analyse the judgment of Lahore High Court to show whether there was any evidence against Bhutto on the basis of which he could be convicted and sentenced to death.

The Lahore High Court has laid great emphasis on the enmity of Ahmad Raza Kasuri with Bhutto, describing it as a motive. When this aspect of the case is taken up, the deposition of Masood Mahmud approver (P.W.2) figures

very prominently in the judgment. His deposition appears to be the crux of the matter in the opinion of the Hon'ble judges of the High Court. Let us see whether any reliance could be placed on that piece of evidence or treated as spear head to hold Bhutto guilty in the case. To appreciate this point that I am raising, a Judge has to satisfy himself on the following points: -

1. Whether the complainant Ahmad Raza Kasuri was a politician of any eminence?
2. Whether the lone voice of the complainant in the National Assembly could be a threat to Bhutto to destabilise his Government or bring his down fall?
3. Whether the threat given publicly to the complainant in one of the sessions of the National Assembly by Bhutto finds any place in F.I.R or in the written complaint by the complainant?
4. Whether this piece of evidence of Masood Mahmud approver figures in the disposition of the complainant when he appeared in court and gave a long statement against Bhutto?
5. Whether Masood Mahmud's statement has received any corroboration from any independent source?

Confessional statements of F.S.F officers: -

The judgment of Lahore High Court, in fact, is based on confessional statements of F.S.F officers. It may be recorded that in the beginning of trial, all those officers who had made confessional statements had pleaded not guilty at the trial by resiling from their previous statements of confession recorded under section 164 Cr.P.C. Before I deal with the conclusion of the judgment of Lahore High Court, I would like to deal with the statement of Muhammad Abbas on whom the entire planning of the execution of the order of the Prime Minister, as alleged, is based.

It is important to mention here that the status of Muhammad Abbas as a witness for the prosecution cannot be denied. This witness has remained through out hostile during the trial by declining to support the statement of approver Masood Mahmud. In view of this fact, the entire case of conspiracy, as alleged, by Masood Mahmud in his statement, stands completely shattered. That being so, the case of the prosecution at the trial stage miserably fails. In view of this complex situation, it becomes incumbent on my part to produce para 318 of the Judgment where the Hon'ble judges of High Court have admitted that Mian Muhammad Abbas had retracted from his confession. I am indeed surprised to take note of the fact that in spite of retraction of Muhammad Abbas in detail from his confessional statement, the Hon'ble judges have placed reliance on his statement not expressly but impliedly.

The retraction of Mian Muhammad Abbas from his confession is reproduced as under: -

“Mian Muhammad Abbas accused had already retracted his confession before the opening of the trial. He stated that his statement under section 164, Cr.P.C was obtained under duress as well as promises. He denied the charge in every respect. He stated that he did not have good relations with Masood Mahmud P.W.2 . In fact Masood Mahmud did not have good relations even with his predecessor since the latter had been given an ad hoc promotion to the rank of D.I.G. of Police whereas Masood Mahmud was ignored.”

“He denied having assigned to Ghulam Hussian the task of organization of and running of a Commando Course on the ground that during the time of P.W.2, even a constable could not be transferred without his oral orders. Regarding the supply of arms, he stated that it was under the charge of the Deputy Director (Equipment and Stores). Accordingly if any arms and ammunition were issued, they must have been issued under the orders of the Deputy Director Incharge or the Deputy Director-General.”

“He further denied having sent for Ghulam Hussain and having asked him about Ahmad Raza Kasuri or having placed a jeep at his disposal or having supplied to him the addresses of Ahmad Raza Kasuri. He said that he was sick during those days and had himself been examined by a heart specialist. He stated that he submitted his resignation Exh.P.W. 2/13-D and then another resignation Exhs. P.W.2/12-D but they were returned to him because Masood Mahmud P.W.2 did not agree to his quitting the Department and Saeed Ahmad Khan P.W.3 also tried to persuade him to continue service”.¹²

Zia was after the life of Bhutto. He must have received one of the greatest shocks of his life when Muhammad Abbas must have been reported that he had resiled from his previous statement. It has already been recorded by me that

¹² PLD Lahore pp598-599

Zia's emissaries were very active and they had been assigned the task to keep all those witnesses who had made confessional statements under their control and influence under all circumstances. That was the reason that when his appeal was pending before the Supreme Court, he was persuaded vis-a-vis induced to move an application before the Hon'ble judges of the Supreme Court of Pakistan wherein he confessed that he was guilty of the crime that he had committed, but he pleaded that he was forced to do it. That is how the mechanism of Zia was operative to achieve his objective. According to the set Rules, an accused, convicted by the trial court, is not allowed to appear before the appellate court particularly to make a confessional statement from which he had already resiled during his trial before the trial court.

Statements of three remaining F.S.F officers.

Ghulam Mustafa was a former Inspector of F.S.F. He had also pleaded not guilty at the trial and had resiled from his previous statement recorded under Section 164 Cr.P.C. So was the case of other co-accused namely Arshad Iqbal and Rana Iftikhar. They had also made statements of confession under Section 164 Cr.P.C. but had resiled therefrom by pleading not guilty at the trial. At a later stage, all the three above-named accused were forced to stick to their confessional statements initially made by them under Section 164 Cr.P.C. They were, in fact, brought round through the mechanism of emissaries of Zia.

Those three accused persons are those who had actually participated in the commission of the offence, as

alleged. In view of the finding of the trial court, they were a party to conspiracy under which Ahmad Raza Kasuri had to be eliminated physically. The evidence of those three self-confessed accused carries no weight unless their evidence is corroborated by independent evidence – evidence of unimpeachable character.

The own witness of the prosecution, that is, Muhammad Abbas on whom the prosecution was relying by virtue of his confessional statement under Section 164 Cr.P.C. lends no support to the statements of the above-named three co-accused. On the contrary, they are contradicted on every step and the link of conspiracy is broken in totality. Even other wise, Bhutto does not figure any where in their pursuit. Admittedly, all the three played their role under the specific orders of their superiors.

Kasuri's Status as Politician

Now, I proceed to evaluate the evidence of the prosecution in terms of five points that I have already raised. The first point which ought to have been taken into consideration by the Lahore High Court was whether the complainant Ahmad Raza Kasuri was a politician of any eminence? The admitted position is that Ahmad Raza Kasuri was born as a politician under the flag of the People's Party. He became a member of the National Assembly on the ticket of the People's Party. At that time, Bhutto was at the climax of his popularity in West Pakistan and his party was immensely popular in the new generation. It was for the first time that Ahmad Raza Kasuri came forward to contest the election for a seat in the

National Assembly of Pakistan. I have no hesitation in recording this fact that Ahmad Raza Kasuri, as a politician, was the offspring of the People's Party.

The trial court has laid great emphasis on the statement of Masood Mahmud approver (P.W.2) on the threat, extended to Ahmad Raza Kasuri, while speaking in the National Assembly, by the Prime Minister Bhutto. This witness stated that Bhutto directly and not through the speaker asked Ahmad Raza Kasuri to keep quiet, saying that he had had enough of him and further that he would not tolerate his nuisance any more. This witness further alleged that a day or two later the Prime Minister sent for him and told him that he was fed up with the obnoxious behavior of Ahmad Raza Kasuri and directed him to get in touch with Mian Muhammad Abbas who had already been briefed to get rid of him.

Masood Mahmud

I have already pointed out that this piece of evidence of Masood Mahmud approver cannot be relied upon, as no member of the National Assembly or any other independent person from any quarter has come forward to corroborate him. Mian Muhammad Abbas is the one who disowned his statement recorded under Section 164 Cr.P.C before the opening of the trial. He categorically stated before the trial court that his statement was recorded under Section 164 Cr.P.C. under duress as well as promises. Further, Mian Muhammad Abbas remained firm and inflexible on the stand taken by him till the conclusion of the trial. In addition, even Ahmad Raza Kasuri does not

corroborate or lend any support to Masood Mahmud on the allegation of the life-taking threat, extended to Ahmad Raza Kasuri, as alleged, by the Prime Minister on the floor of the Assembly.

Apart from this fact, Mian Muhammad Abbas refuses point-blank to support self-oriented version of conspiracy of Masood Mahmud. It is here that the whole scheme under cover to kill Ahmad Raza Kasuri in pursuance of the execution of the order of Prime Minister Bhutto, as alleged, faces a total collapse. In my humble opinion, the entire thrust of the judgment of the Lahore High Court is on the testimony of self-confessed F.S.F. officers. It, therefore, suffers from a great fallacy in terms of Section 114(b) of the Evidence Act, 1872. It is a rule of prudence, which has virtually become a rule of law, recognised by illustration (b) of Section 114 of the Evidence Act. This particular provision of law clearly lays down that an accomplice / approver is unworthy of credit, unless his evidence is corroborated in material particulars by independent evidence, connecting the accused with the commission of the crime. The judgment of the Lahore High Court looks for independent evidence, but finds none. There is no doubt that the Hon'ble judges of the trial court hold the view of the well settled principles of law that corroboration in such cases is a must, but hardly attaches any importance to ' independent corroborative evidence'.

The Hon'ble judges have found corroboration in the evidence of self-confessed officers of the same department from where a false case against Bhutto originates and finally an attempt is made to fortify the judgment by holding motive like other evidence, circumstantial or direct

does play a part in the administration of criminal justice. I have already given my own reasonings, relying on the evidence on record on both the points. It is my well considered view that neither corroboration by independent evidence has been found nor motive has been proved. I shall further elaborate both the points when I shall deal with the judgment of the Supreme Court of Pakistan.

Finding on Motive

Since the trial court could not find independent corroborative evidence, an attempt was made to take refuge behind the allegation of motive to eliminate Ahmad Raza Kasuri. The finding of the trial court in brief on the question of motive is based on enmity because of bitter criticisms against Bhutto by Ahmad Raza Kasuri. A very pertinent question arises whether political differences of Ahmad Raza Kasuri with Bhutto or his criticisms against him (Bhutto) were of any significance or effectiveness. Whether such criticism could be a threat to Bhutto or destabilise his government or bring his down fall. The Hon'ble judges of the Lahore High Court completely ignored the fact that, admittedly, Kasuri was the lone voice in the National Assembly. He had no following anywhere of his own as a politician. Whatever Kasuri was in his individual capacity, it was all due to his association with the People's Party. It is obvious that Bhutto had no reason to take notice of criticisms or attacks on his political life, launched by Ahmad Raza Kasuri. Every one could see that it was an exercise in futility, still the trial court came to the conclusion that it was a strong motive on the part of Bhutto to eliminate Ahmad Raza Kasuri. This finding of the trial court, with utmost reverence to the Hon'ble judges, does

not stand to reason. Common sense dose not believe that Bhutto will go to the extent of killing such a small segment of his political party after taking so much pains, as alleged.

In spite of such weaknesses in the evidence of the prosecution case, the trial court came to the conclusion that the principal accused was liable to deterrent punishment. Consequent there upon, Prime Minister Zulfikar Ali Bhutto was convicted under Section 302 P.P.C and sentenced to death. The other co-accused namely (1) Mian Muhammad Abbas, (2) Gulam Mustafa, (3) Arshad Iqbal and (4) Rana Ifikhar Ahmad, met the same fate. All five were ordered to be hanged by the neck till they were dead.

APPEAL BEFORE SUPREME COURT

Justice G. Safdar Shah

Justice Safdar Shah was one of those three judges of the Supreme Court who held that Prime Minister Bhutto was not guilty and the case against him was not proved. It was a minority view. The majority view was otherwise. That was the reason that Bhutto was hanged. When the matter came up before the Supreme Court by way of confirmation and appeal against the death sentence given by the trial court, initially this important case was heard by the Full Court of nine judges up to the 30th of July, 1978 on which date Qaisar Khan J., retired from the court on attaining the age of superannuation. Thereafter, Justice Waheeduddin Ahmad was taken ill and he requested to wait for three weeks, but Anwarul Haq, C.J., did not wait for his recovery and decided to proceed with out him. There were four judges who gave the finding against Bhutto and the remaining three gave their dissenting judgements, holding that Butto was not guilty. Since motive to kill Ahmad Raza Kasuri is the crux of the matter and revolves around the judgment, I deem it necessary in the very beginning to deal with this issue in the light of the judgment of the Supreme Court. It would not be out of place if I reiterate that the issue of motive on the part of Bhutto to eliminate Ahmad Raza Kasuri has already been

dealt with at length when I assailed the judgement of the trial court. However, the judgment of the Supreme Court is also based on the same issue on which the fate of Bhutto has been decided. To begin with, I take up the observation of Safdar Shah J., about the volatile nature of Ahmad Raza Kasuri. The Hon'ble judge has given details of fifteen incidents in which Ahmad Raza Kasuri, as alleged, was attacked between May, 1971 and November, 1974. The details in respect thereof are as under: -

“The first attack was made on him on May 2, 1971, at Habib Mahal Cinema, Kasuri, when Mr. Bhutto came to address the PPP workers there, resulting in injuries to score of people as well as to himself in which his arm was fractured. Of this incident a case was registered at the Kasuri City Police Station. The second attack was made on him by the PPP workers in June, 1971 at the Karachi Railway Station in which again many people were injured. The third attack was made on him in April, 1971, in his house, during the night, by unknown persons (who had their faces muffled), but instead of him his brother Khizar Hayat Khan was caused more than 100 injuries, respecting which incident a case was registered at the Kasuri City Police Station. The fourth attack was made on him in August, 1971, at Habib Hotel, Peshawar, when he was addressing a press conference respecting which again a case was registered by him at the local Police Station. The fifth attack was made on him in October, 1971 during a Press conference at the house of friend at Karachi, when the PPP workers ransacked the house. This matter also was reported by him at the Ferozabad Police Station, Karachi. The sixth attack was made on him at the Old University Campus, The Mall, Lahore, but the police present there refused to register a case. The seventh attack was made on him in Jauary, 1972, by the PPP workers, and one MPA, at Kasuri with fire-arms in which he received bullet injuries and his brother Khizar Hayat Khan also was injured. This matter was also reported at the local Police Station. The eighth attack was made on him in April, 1972, when he was addressing a public meeting at Khudian.

Of this incident also he laid information at the Khudian Police Station. The ninth attack was made on him in December, 1972, when he led a procession along with retired Air-Marshall Asgar Khan, on the Mall, Lahore, but the Police did not arrest any of the assailants. The tenth attack was made on him in July, 1973, when he was addressing the members of the Vehari Bar Association. The eleventh attack was made on him during the month of Ramazan, 1973 in Gowalmandi, Lahore, where he had gone to attend an Iftar party, hosted by the workers of Tehrik-e-Istaklal. The twelfth attack was made on him in December, 1973, at Mirpur, Azad Kashmir, with firearms while he was addressing a huge public meeting. The thirteenth attack was made on him again in December, 1973, at Islamabad, but instead the FSF jeep which was meant to overrun him actually overran another MNA, namely, Chaudhry Muhammad Iqbal, who later died. The fourteenth attack was made on him in January, 1974, when some unknown person fired at his house at Kasur. Of this incident also a report was made to the local administration, and the matter also discussed by him on the floor of the National Assembly of Pakistan, which forms part of the debates of January, 1974. Thereafter in June, 1974, on the floor of the National Assembly when appellant Bhutto, was addressing the House, the witness interrupted him at which Mr. Bhutto, pointing his finger at him, said "I have had enough of you. Absolute poison. I have had enough of this man. I will not tolerate your nuisance". Soon there after, i.e. on August 24, 1974, he was fired upon from a blue coloured jeep with automatic weapons at Islamabad but somehow he escaped. And lastly, he was ambushed at the Roundabout of Shah Jamal, Shadman Colony, Lahore, between the night of November 10/11, 1974, and fired upon with automatic weapons, as a result of which his father was killed. In this connection he moved a privilege motion in the National Assembly of Pakistan and made an emotionally charged speech demanding that appellant Bhutto should resign and submit himself before the process of law, because he had mentioned his name in the F.I.R".¹

¹ PLD 1979 Supreme Court p. 537-538

Mr. Justice G. Safdar Shah proceeds further on this point. While elaborating, the learned judge goes deeper into the matter and shows that the whole case of Ahmad Raza Kasuri against Bhutto is based on suspicion. When his father was killed, he lodged an F.I.R., alleging in simple words that Bhutto was the assassin of his father. Justice Safdar Shah in this context says and is quoted verbatim as under: -

“Now bearing this principle in mind, it would be evidently ridiculous to contend, much less to believe, that the fifteen attacks made on the witness during the course of about three years, in every part of the country, including the territory of Azad Kashmir, were engineered by appellant Bhutto. The fact that he was attacked at every place from Peshawar to Karachi, whenever he criticised appellant Bhutto or his policies, would rather show that it was the random work of the rank and file of the PPP, who seems to have become allergic to him because he had rebelled against the party and its Chairman. The board day-light attack made on him by Mr. Yaqub Maan and his partymen at Kasur, as a result of which he suffered three bullet injuries, and the other attack made on him at his house during the night by unknown persons, as a result of which, his brother Khizar Hayat suffered as many as hundred injuries, would seem to support the said conclusion. In point of fact, this is how the witness himself had understood the position, as in none of the F.I.Rs lodged in the said cases nor indeed in the privilege motions moved by him in the National Assembly, he accused appellant Bhutto or even voiced his suspicion against him. It should be significant to note that in the F.I.R. lodged by him in respect of the Islamabad incident of August 24, 1974, he again neither accused nor named appellant Bhutto. From this it would follow that if there was the slightest doubt or suspicion in his mind about the complicity of Mr. Bhutto in that plot, obviously he would have readily accused him, as he had

already been subjected to about fourteen attacks by PPP workers at various places in the country”.²

I have already recorded and given a gist of the back ground of Ahmad Raza Kasuri as a politician. Being a young politician, he became very ambitious and at the same time aggressive in his expression. His emotionalism added fuel to the fire. The result was that he created many enemies. Justice Safdar Shah has already quoted a number of incidents in which he was attacked, received injuries, his house was ransacked, and his brother was injured etc. etc., by his adversaries.

Justice Safdar Shah gives his own opinion in this regard in his judgment. His finding, relying on the evidence on record, is quoted verbatim as under: -

“Now this is all the evidence of Ahmad Raza Kasuri. His evidence would seem to provide sufficient material not only to have a peep into his personality; it also reveals the set pattern of his politics leading to certain irresistible conclusions. As a young politician, having been elected as a member of the National Assembly of Pakistan, on the PPP ticket, in 1970, seemingly without much effort, as the PPP had swept the polls in West Pakistan by a very great majority, he seems to have become ambitious, and in the process earned for himself political enmity in his home town. It is his evidence that due to political enmity, on many occasions, he was attacked by Yaqub Maan and his party, in which he was fired upon and injured, as also that an attempt was made on his life during the dark hours of the night at his house in which his brother received as many as 100 injuries”.³

² PLD 1979 Supreme Court Pg. 539

³ PLD 1979 Supreme Court Pg. 534

Justice Safdar Shah further elaborates the efforts of Ahmad Raza Kasuri to approach Prime Minister Bhutto for his personal gains. It is indeed a matter of great surprise that he earnestly desires to go back to his master despite alleging that Bhutto had killed his father instead of killing him. His whole statement in the case as P.W.1 becomes highly doubtful. Justice Safdar Shah has taken up this point and has referred to his letter dated January 10, 1977, addressed to Prime Minister Bhutto, begging for an audience, the object being to secure a PPP ticket to enable him to have a seat in the National Assembly.

Justice Safdar Shah expresses his own view and gives his own finding on this aspect of the case. I must say regretfully that the majority view of the Supreme Court has omitted to take due notice of this important aspect of the case and has drawn conclusion in that behalf, keeping in view the conduct of the complainant, after the assassination of his father by Prime Minister Bhutto, as alleged. In my humble opinion, the dubious conduct of the complainant changes the whole complexion of the case.

Justice Safdar Shah analyses this aspect of the case and his analysis is reproduced as under: -

“But in the subsequent letter Exh. PW. 1/19-D. dated January 30, 1977, the witness addressed appellant Bhutto as “My dear Prime Minister” and proceeded to express himself thus: -

“Earlier I have requested over half a dozen times to your M.S. for an interview with you, but to this date I have not received any reply from him. I wonder whether Major General Imtiaz Ali ever made it known to you? I am taking this liberty to write to you and to request you personally to kindly grant me

an interview at your earliest convenience. I have to discuss many matters, which concern the party and the Government.

You will be happy to know that I have gone back to Law profession as a whole time. Pray for my success and well-being.

I met Mr. Abdul Hafiz Pirzada on 25th of this month in Lahore and had a detailed talk with him. I hope he must have informed you about that.

I trust this letter finds you and Begum Bhutto in best of health, happiness, and prosperity.

With warm regards.

Yours sincerely,
Ahmad Raza Kasuri."

"Now a casual look at the said letter would show: (1) that the witness stood on no formality with appellant Bhutto; (2) that he claimed a share of his personal attention even in regard to his private affairs such as "You will be happy to know that I have gone back to Law profession as a whole time. Pray for my success and well-being"; (3) that he had met Mr. Abdul Hafiz Pirzada at Lahore and had a detailed talk with him about which he hoped Mr. Pirzada had informed Mr. Bhutto; and (4) that he requested for an interview with Mr. Bhutto saying "Earlier I have requested over half a dozen times to your M. S. for an interview with you, but to this date I have not received any reply from him. I wonder whether Major-General Imtiaz Ali ever made it known to you." This being the tenor of his said letter, the question is as to under what compulsion he had written the same? It is very well to say that he had written it as a matter of expediency. But this ipse dixit of the witness seems to be clearly absurd in view of the language employed by him in the said letter. It is obvious to me that by writing the said letter, in which he complained that he had already asked for an interview for more than half a dozen times, the effort of the witness clearly was to curry favour with appellant Bhutto, in which respect he finally succeeded, because Mr. Bhutto

noted on the margin of the letter "I will see him when it is convenient. Please return this letter after you have noted my remarks".

The evidence would show that Mr. Bhutto finally granted to the witness an interview in March, 1976, and he rejoined the PPP in April, 1976. On the dissolution of the National Assembly of Pakistan, on January 7, 1977, in view of the forthcoming General Elections, scheduled to be held in March, 1977, the witness again met appellant Bhutto; thereafter he made an application for the grant of a PPP ticket to enable him to contest election for a seat to the National Assembly, but the same was rejected and instead the ticket from his Constituency was awarded to Sardar Ahmad Ali. Now if appellant Bhutto had anything to do with the murder of his father, surely the witness should have, declined to contest election on a PPP ticket, even if the same had been offered to him, much less to have aspired for the same by making a formal application in that behalf. The type of person, which according to the evidence, he is, he should have rather exploited the opportunity offered to him by the General Election to expose appellant Bhutto not only for his alleged dictatorial designs, but also that he was responsible for the assassination of his father. This in my view ought to have been the only natural and honourable course open to the witness, more so when during the period of about three years between May, 1971, and November, 1974, he had been subjected to about fourteen attacks by the PPP workers".⁴

Justice Safdar Shah, after analysing and appraising the evidence of the whole case of the prosecution came to the following conclusion: -

"In the present case Mr. Bhutto had not participated in the actual attack carried out on the car of Mr. Kasuri at Lahore, and consequently in law he was only an 'abettor' and not the

⁴ PLD 1979, Supreme Court pp541-542

“principal accused”. In fact the said appellation would be applicable to Arshad Iqbal and Rana Ifikhar Ahmad, who had actually fired on the car of Mr. Kasuri, as also to approver Ghulam Hussain who claimed to have been present supervising the whole operation. In this behalf reference may be made to any standard commentary on Chapter V ‘of Abetment’ beginning with Section 107, P.P.C. and ending with Section 120 P.P.C.

“Now as to the conclusion, I have not the slightest doubt in my mind that the prosecution has totally failed to prove its case against Mr. Bhutto and Mian Muhammad Abbas. Their appeals are accordingly accepted with the result that the conviction and sentences recorded against them by the High Court are set aside, and it is directed that both of them shall be released forthwith unless required in connection with some other case”.⁵

Justice Dorab Patel

Justice Dorab Patel also came out with a clear verdict in favour of Prime Minister Bhutto, holding him not guilty of the crime charged. In his Judgment, I have discovered that the Hon’ble judge has taken up the point of Bhutto’s trial in his absence by the trial court. Bhutto was humiliated, insulted and tortured mentally to such an extent by Maulvi Mushtaq Hussain C.J., that he boycotted the proceedings of the case and fell ill. Bhutto has described the treatment that he received from Chief Justice Mushtaq Hussain during his trial in a very pathetic way in his testament. I will quote at a later stage his own writings on this point. It is a settled law that such trial suffers from

⁵ PLD 1979 Supreme Court p. 707

illegality, as it violates the fundamental right of the accused.

Justice Dorab Patel, while taking up the point of Bhutto's trial in his absence, opened his mind on the merit of the case as well and, in a nutshell, decided the case in the following terms: -

"Now, as I indicated, according to Mr. Yahya Bakhtiar, the High Court had erred in proceeding with Mr. Bhutto's trial in his absence because he was too sick to give instructions and because his illness was a calamity beyond his control which entitled him to an adjournment. This submission would have required examination if I had been of the view that Mr. Bhutto's defence had suffered on account of his absence from the trial, but as in my opinion, the prosecution has failed to prove his guilt, it follows that no prejudice was caused to Mr. Bhutto by the fact that the Court decided to proceed with the case in his absence. In these circumstances, it is not necessary to examine Mr. Yahya Bakhtiar's submission, but I would clarify that I am not examining his submission only because I am of the view that Mr. Bhutto's defence was not prejudiced because of his absence during a part of his trial.

Mr. Yahya Bakhtiar also criticised the construction placed by the High Court upon Sections 164, 337 and 342 of the Criminal Procedure Code. But I am not impressed by his submissions on this aspect of the case and I agree with the observation in the judgment of my Lord the Chief Justice on the proper construction of these Sections.

Mr. Yahya Bakhtiar had also filed an application for examining witness, but I would dismiss this application on the short ground that the prosecution has failed to prove Mr. Bhutto's guilt.

Finally Mr. Yahya Bakhtiar criticised the personal observations made against Mr. Bhutto in paragraph 610 to 616 of the High Court's judgment and submitted that they should

be expunged. I have read these observations. They are not supported by any evidence and I have to state with very great regret that they are totally irrelevant to the question of Mr. Bhutto's guilt. Accordingly, I would expunge them.

In the result, I hold that the prosecution has failed to prove beyond reasonable doubt the guilt of Mr. Bhutto and of Mian Abbas, and I would, therefore, allow their appeals and order their release. But, for the reasons given herein, I would dismiss the appeals of the other three appellants".⁶

Muhammad Haleem J.

Justice Muhammad Haleem did not write a comprehensive judgment in the case. He concurred in totality with the reasons and conclusions arrived at in the judgment by Justice Safdar Shah. However, he added a short note whereby he also held that Zulfikar Ali Bhutto was not guilty and acquitted him along with Mian Muhammad Abbas.

Justice Muhammad Haleem assailed the evidence of approver Muhammad Masood, pointing out in clear terms that the High Court has misconstrued the substantial omissions and improvements in his evidence which were brought on record. Mr. Justice Haleem finally concludes on this point as under: -

“In my opinion these omissions and improvements vitally affect his truthfulness; and, therefore, in resolving it in favour of the prosecution the High Court has given an illusory value to his evidence. If I may say so with

⁶ PLD 1979 Supreme Court p.510

respect, this was wholly unjustified, for, the benefit of doubt in the evidence must, in law, go to the accused as that is the elementary principle of criminal jurisprudence".⁷

Conspiracy Not Proved

The above remarks of Muhammad Haleem J., against the High Court are quite serious in nature. He has made a clear observation that the High Court has deviated from the elementary principles of criminal jurisprudence in appraising and evaluating the evidence on record. The whole case of the prosecution is based on the alleged conspiracy, but Haleem J. has clearly discovered, after going through the evidence, that important links of evidence, constituting conspiracy, as alleged, are missing, resulting in total failure on the part of the prosecution to connect Zulfikar Ali Bhutto with the commission of the offence. Justice Muhammad Haleem proceeds further and says: -

"The learned Public Prosecutor next contended that in assessing the guilt of appellant Zulfikar Ali Bhutto, the evidence should be read as a whole but I may point out that before such evidence can be taken into consideration the law requires that each piece of evidence should be free from doubt which is not the case here. Enough has been said to raise doubt on its authenticity in the judgment of my learned brother G. Safdar Shah J. Apart from it the other pieces of evidence do not directly involve the appellant, Zulfikar Ali Bhutto, as a conspirator. Such being the case, the prosecution has failed to establish its case against Zulfikar Ali Bhutto".⁸

⁷ PLD 1979 Supreme Court p.511

⁸ PLD 1979, Supreme Court p.512

Conspiracy Behind Confessions

The observation of Justice Haleem regarding confessional statements is very meaningful. It reflects the inner side of the story. He is perfectly justified in observing that this part of the prosecution case might be another conspiracy.

Muhammad Haleem J., with reference to the context of the case, says: -

“As for Mian Abbas, he has been absolved from the crime for the very justifiable reasons given in the said judgment and I do not think it necessary to go into this question again. The other three appellants, Ch. Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar have not only stuck to their confessions but have admitted their guilt when examined under Section 342 of the Code of Criminal Procedure. There can, therefore, be no manner of doubt so far as their guilt is concerned. As to why they implicated themselves it is not for me to answer this hypothetical question. It might be that there was another conspiracy apart from the one the prosecution had relied on”.⁹

Upholder of Majority View

Chief Justice Anwar-ul-Haq and his three companion judges dismissed the appeal, upheld the conviction and confirmed the death sentence awarded to Prime Minister Bhutto and to each of the four remaining co-accused. I must reiterate that, in the beginning, there were nine judges who were hearing the appeal and out of nine, five judges on the bench were expressing their opinion on the quality of evidence against Bhutto and rejecting it as not being sufficient to prove the case.

⁹ PLD 1979, Supreme Court p.512

Anwar-ul-Haq C.J, for some reason or the other was not inclined to agree with those five judges and decided to clear them out from his way. In order to achieve his objective, Anwar-ul-Haq prolonged the proceedings of the case and suddenly in June adjourned the court and went to Jakarta to attend a conference. This was, in fact, a pretext to deprive Qaisar Khan J., to remain on the bench, as he was on the verge of retirement in November, 1978. Qaisar Khan J. was very vocal in favour of Bhutto. After the retirement of Qaisar Khan J, there was another judge namely Justice Waheeduddin Ahmad who was taken ill and requested the Hon'ble Chief Justice to wait for a brief period for his recovery, but the C.J, refused to allow him to complete the hearing and proceeded with the hearing of appeal. In view of the present composition of the judges on the bench, three were in favour of Bhutto and the remaining four judges including C.J were against him. In this way, we clearly see that Bhutto was sent to the gallows by one vote. The remaining three co-accused who had made confessional statements on the specific promise made by the Martial Law Authority on solemn affirmation by placing hand on the Holy Quran that they would be set free met the same fate. They were hanged on the specific order of Zia one day before the Holy month of Ramzan.

Finding of High Court

Chief Justice Anwarul Haq has summarised the finding of the High Court in the following words: -

“After reviewing the entire evidence at length, the High Court has held that the prosecution has succeeded in proving that Zulfikar Ali Bhutto had strained relations with Ahmad Raza Kasuri, thus constituting a motive to get him eliminated; that this appelland had entered into a conspiracy with Masood

Mahmood (P.W.2), in which plan the other accused also joined at different levels to execute the mission along with Ghulam Hussian approver; that the attack on Ahmad Raza Kasuri in Islamabad was a part of the same operation; that the attack launched on Kasuri's car in Lahore, during the course of which his father was killed, was also in furtherance of the same conspiracy ; and that the initial investigation in the case was not honest, and efforts had been made at various levels to divert its course for the purpose of screening the real offenders. The High Court has expressed the view that sufficient evidence, circumstantial and documentary, has been brought on the record to provide corroboration necessary for the purpose of placing reliance on the statements of the two approvers Masood Mahmood and Ghulam Hussain. It has also taken note of the fact that the appellants Arshad Iqbal, Ghulam Mustafa and Rana Iftikhar Ahmad had stuck to their confessions throughout the course of the trial. Finally, the High Court has observed that there were no extenuating circumstances in favour of the appellants, as Zulfikar Ali Bhutto was the Prime Minister of the country and it was his duty to protect the life and liberty of the citizens of Pakistan, and not to use the Federal Security Force for eliminating his political opponents; that the other appellants were under no obligation to obey the unlawful commands of their superiors, and such a plea could not afford a valid defence in law".¹⁰

Main Points are Formulated

In order to assail the finding of Anwarul Haq C.J., the main points are required to be dealt with are as under: -

1. Whether Zulfikar Ali Bhutto entered into conspiracy with Masood Mahmood to eliminate Ahmad Raza Kasuri?

¹⁰ PLD 1979 Supreme Court Pg.64-65

2. Whether the retracted statement of Mian Muhammad Abbas was considered by Chief Justice Anwarul Haq? If not, why?
3. Whether the statement of Mian Muhammad Abbas contradicts Ghulam Hussain and shatters the chain of conspiracy?
4. Whether a conspiracy, placing 100% reliance on approvers without looking for corroboration from an independent source, could be established or proved?
5. Whether or not the trial court was prejudiced against Bhutto? If so, was it competent to try him?

The Case was Manipulated

Before I proceed to point out the fallacies in the finding of Anwarul Haq C.J, I feel it necessary to invite the attention of the reader that Prime Minister Bhutto was a very strong dictator. He was all powerful. If he wanted to eliminate some one physically, his simple order in confidence to a single individual would have taken away even the life of Zia under some cover without being known to any one. His mission would have been accomplished within a few seconds, as it happened to Zia when he was killed in pursuance of a conspiracy and not even a piece of flesh was found. I shall deal with the departure of Zia from this world in a separate chapter. Here, it will suffice the purpose, if I say that what ever you reap, you shall sow. The entire story of murder case against Bhutto was cooked up and manipulated.

Appraisal of Bhutto's Case

Now, I proceed to appraise the evidence in the case of Bhutto in terms of the points already formulated by me in the light of the finding of Chief Justice Anwarul Haq and his companion judges. The first point that figures prominently in his finding is the point of conspiracy. The view of Anwarul Haq C.J., regarding the application of Section 10 of the Evidence Act to the present case is quoted verbatim as under: -

“Now, the question is whether the prosecution has succeeded in establishing reasonable grounds to believe that there was a conspiracy in this case, so as to attract the application of Section 10 of the Evidence Act. Mr. Ijaz Hussain Batalvi submitted that if the evidence of the two approvers is taken into account, then this requirement is amply fulfilled. In the preceding paragraph I have reached the conclusion that there is no legal impediment in the way of considering the direct testimony of an approver, who appears at the trial as a competent witness, for the purpose of determining whether there is reasonable ground or not within the meaning of Section 10 aforesaid”.¹¹

The finding of Anwarul Haq C.J, clearly demonstrates that in order to uphold the conviction of Bhutto, he has taken refuge behind the Judgment of the trial court. His finding of conspiracy is also based on the evidence of approvers without going in search of independent evidence and the evidence of unimpeachable character by way of corroboration. The Section 114 of the Evidence Act by itself postulates that an accomplice is unworthy of credit, unless he is corroborated in material particulars. I will say with due respect to the Chief Justice Anwarul Haq that in this case he has completely ignored the rule of caution. His

¹¹ PLD 1979 Supreme Court P.104

finding comes in direct conflict with the rule of prudence. It is a settled rule of prudence that the evidence of an approver should be supported by independent corroborative evidence connecting the accused with the commission of the crime. In order to prove conspiracy, Anwarul Haq C.J., places reliance on the evidence of all those who are the birds of same feather and could not afford to disobey the person sitting on the throne and his henchmen without endangering their own lives and the lives of their family members.

Evidence of Approvers

The evidence of two approvers Masood Mahmood and Ghulam Hussain figures prominently in the finding of the Hon'ble Chief Justice, holding that they have given sufficient details of the manner in which the conspiracy was initiated, and subsequently executed through the agency of Federal Security Force. The evidence of these two main players of conspiracy to kill Ahmad Raza Kasuri is full of contradictions. This fact may be kept in mind that Masood Mahmood (P.W.2) is contradicted by Mian Muhammad Abbas. He categorically denied before the trial court that Masood Mahmood P.W.2 used to be present in the Assembly when he attended the session because he did not need any such Rustam-i-Zaman for his defence. I have already mentioned that Main Muhammad Abbas, when appeared before the trial court clearly stated that his statement under Section 164 Cr.P.C was extracted under duress and coercion in support of the prosecution case. He, in fact, denied the charge in every respect. So far as Ghulam Hussain (approver) is concerned, he is completely

disowned by Mian Muhammad Abbas. He denied having assigned to Ghulam Hussain any task. He also denied having sent for Ghulam Hussain and having asked him about Ahmad Raza Kasuri. In view of these discrepancies in their statements, the entire story of conspiracy stands demolished.

Confessional Statements Filed in Court

It was rightly contended by Mr. Yahya Bakhtiar, counsel for Zulfikar Ali Bhutto that the High Court was in error in taking into the consideration confessional statements of the co-accused which were in fact self-exculpatory or were not proved as confessions, as required under Section 30 of the Evidence Act, but were made during the course of the trial when the co-accused were examined under the provisions of Section 342 Cr.P.C, at a stage when the appellant had already been examined under this section and had no opportunity of rebutting or explaining those statements. In view of this admitted position, the learned counsel submitted that in the circumstances the so-called confessions and statements should be altogether excluded from consideration.

It was further contended that the written statements filed during trial or during the hearing of appeal, by some of the accused, particularly by appellant Mian Muhammad Abbas, could not be taken into consideration by the court against the accused other than makers thereof. In support of this contention, a number of authorities as case law were cited.

C.J. Accepts the Contention

Chief Justice Anwarul Haq accepts the contention of Mr. Yahya Bakhtiar. His finding with regard to the position of confessions and 342 Cr.P.C statements in this case is quoted verbatim as under: -

“Acting in accordance with the principles brought out in the preceding paragraphs, I would exclude from consideration against appellant Zulfikar Ali Bhutto and Mian Abbas the statements made during the trial by appellants Soofi Ghulam Mustafa, Rana Iftikhar and Arshad Iqbal in answer to questions put to them under Section 342 of the Criminal Procedure Code at the close of the prosecution evidence, and after the other two appellants had already been similarly examined. Although, these statements could be said to be proved in terms of Section 3 of the Evidence Act, having been made before the trial court, and although they are self-inculpatory affecting the makers of the statements as well as the other two appellants, yet they cannot be used against the latter for the reason that they were not afforded any opportunity to rebut or explain them. It appears that the High Court has, in fact, used these statements only against Mian Abbas, and not against appellant Zulfikar Ali Bhutto, but even that was erroneous in the light of the legal position explained above.

For the same reasons, I would also exclude from consideration against appellant Zulfikar Ali Bhutto, the written statement filed by appellant Mian Abbas in this Court, admitting all the allegations made against him by the prosecution. Appellant Zulfikar Ali Bhutto had no opportunity of rebutting this statement, as it could not be formally put to him in terms of Section 342 of the code; on the contrary at the trial Mian Abbas had pleaded not guilty.

As regards the confessional statements made by Soofi Ghulam Mustafa, Rana Iftikhar Ahmad and Arshad Iqbal, I find that they were duly proved at the trial by the Magistrates who had recorded them under the provisions of Section 164 of the Code. They were also put to the non-confessing accused

during their examination under Section 342 of the Code at the close of the prosecution case. I further find that these confessional statements fully implicated the makers thereof and also affected the other two appellants. It is true that these three accused have pleaded that they did all the guilty acts, attributed to them by the prosecution, under orders and pressure from their superiors, but this plea does not detract from the self-inculpatory nature of their statements, as they admitted substantially all the incriminating circumstances of the offences with which they were charged at the trial. These three confessions have therefore, been rightly taken into consideration by the High Court in terms of Section 30 of the Evidence Act.

A perusal of the confessional statement made by appellant Mian Abbas under Section 164 of the Code shows that he tried to exculpate himself by laying the blame on approvers Masood Mahmood and Ghulam Hussain and incidentally implicating appellant Zulfikar Ali Bhutto in this crime. In the circumstances, this statement cannot be treated as a confession for the purpose of Section 30 of the Evidence Act and was rightly not used as such by the High Court".¹²

Summary of Conclusions

In spite of excluding the confessional written statement filed by appellant Mian Abbas before the Supreme Court, admitting all the allegations, putting the entire blame on Zulfikar Ali Bhutto for the commission of the crime, Chief Justice Anwarul Haq upheld the conviction and confirmed the death sentence recorded against him by the High Court. While confirming the death sentence of Prime Minister Zulfikar Ali Bhutto, Chief Justice Anwarul Haq attached no importance to the fact that the entire evidence which was very flimsy on the face of it

¹² PLD 1979 Supreme Court p. 109

was collected against him after the imposition of Martial Law by General Zia-ul-Haq. It is also true that the Martial Law authority was very active in securing the conviction of Zulfikar Ali Bhutto. Prof. Ghafoor Ahmad has rightly pointed out in his book that the maneuverings were in full swing to collect evidence in the shape of confessional statements against Bhutto.

Main Thrust

The main thrust of the finding of the Supreme Court is based on the evidence of approvers and the confessional statements of those four co-accused who appeared in person before the Apex Court and pleaded guilty. One of the co-accused, that is, Mian Abbas had throughout of his trial contested his case and had refused to own his confessional statement under Section 164 Cr.P.C. It was at the last moment that he was persuaded by the Martial Law authority to submit a written application to the Supreme Court through the Jail authorities, duly attested by his counsel, confessing his guilt in respect of the prosecution allegations against him. That is how Mian Abbas who was about sixty five years of age and critically ill was crucified at the altar of Justice.

Ghulam Mustafa and His Two Accomplices

Anwarul Haq C.J., finally concluded the case against Bhutto by placing reliance on the confessional statements of Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad recorded under Section 164 Cr.P.C. They were those co-accused who had stuck to their confessional

statements during their trial as well as during their appearance before the Apex Court. According to the own showing of the prosecution, they had never come in touch with Bhutto nor had they received any kind of instructions either directly or indirectly from him. Their case was that they were innocent as they had acted strictly under the orders of their superiors. This fact may be kept in mind that they were those co-accused who had actually participated in the commission of the crime, as alleged. On the face of it, their statements deserved no credibility. It is indeed a matter of great surprise that the statements of these three co-accused form a formidable link to drag Bhutto in the planning to kill Ahmad Raza Kasuri. A person no less than the Chief Justice Anwarul Haq treats their statements as the back bone of his finding.

The evidence of all players in the commission of the offence, as alleged, has already been discussed by me. I have particularly discussed in minute detail the evidence of Ahmad Raza Kasuri. The appraisal of the evidence of Ahmad Raza Kasuri and his conduct after the assassination of his father leaves no room for any doubt that he is not a trustworthy witness. Honestly speaking, the whole case of the prosecution depends upon testimony of Ahmad Raza Kasuri. What role he has played after the assassination of his father to improve his relationship with Bhutto by re-joining the People's Party and applying for a ticket for a seat in the National Assembly has been given no weight as important piece of evidence either by the trial court or by the Judges of the Supreme Court who held majority view.

Now, I revert to confessional statements of Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar for further appraisal when they were persuaded to appear before the

Apex Court. These three persons, when appeared before the Supreme Court, further expanded the parameter of their confessional statements, blaming Bhutto, the former Prime Minister of Pakistan, as the main culprit and the main source of the unhappy episode. Here, I am reminded of a very keen observation of Justice Haleem. While referring to their confessional statements, Justice Haleem says: -

“As to why they implicated themselves it is not for me to answer this hypothetical question. It might be that there was another conspiracy apart from the one that prosecution had relied on”.¹³

The case of Bhutto is indeed very pathetic. The battle for the life of Bhutto was fought in the court of law. The people of this country as a whole have not accepted the verdict of the Supreme Court. The jurists of this country have been equally disappointed. This is the reason that the decision of the Apex Court in the case of Bhutto is not cited as a precedent in any case although it contains more than 600 pages. Be that as it may, Bhutto was killed by a judicial verdict.

The remaining three companion Judges of Chief Justice Anwarul Haq concurred with his Judgement in the following terms: -

- 1- **“MUHAMMAD AKRAM, J.-** I have had the benefit of reading the detailed judgement proposed to be delivered by my Lord the Chief Justice and I agree with his conclusions both on questions of law and facts. Accordingly, I am of the view that all the three appeals be dismissed, convictions and sentences recorded by the High Court be upheld and confirmed, as proposed by him.

¹³ PLD 1979 Supreme Court p. 512

- 2- **KARAM ELAHEE CHAUHAN, J.-** I am in respectful agreement with the conclusions reached by my Lord the Chief Justice in his detailed judgment and would dismiss all the three appeals, and uphold and confirm the convictions and sentences recorded by the High Court against all the five appellants in these three appeals, as proposed by him.
- 3- **NASIM HASAN SHAH, J.-** I am in respectful agreement with the conclusions reached by my Lord the Chief Justice in his detailed judgement and would dismiss all the three appeals, and uphold and confirm the convictions and sentences recorded by the High Court against all the five appellants in these three appeals, as proposed by him".¹⁴

Benazir Speaks Out

Benazir gives the inner story of the elimination of her father through the judicial verdict. She describes the mind and the heart of Chief Justice Anwarul Haq with reference to her father's case, pending before him.

She says: -

"There were constant rumors that the decision from the Supreme Court was coming any minute. At the beginning of the hearing the Chief Justice Anwarul Haq, had announced that the appeal would be completed as soon as possible, and my father's lawyers had been optimistic. Of the nine judges on the bench, five were asking questions and reviewing the testimony in a way that seemed dismissive of the Lahore judgement. But, suddenly in June, Anwarul Haq had adjourned the court and gone to Jakarta for a conference. We all felt the appeal was prolonged and postponed until the judge most obviously in favour of acquittal and the only one on the bench with extensive murder trial

¹⁴ PLD 1979 Supreme Court p. 709

experience, had been required to retire at the end of July. Despite our request, Chief Justice Anwarul Haq refused to allow him to complete the hearing. Another independent minded judge was forced to drop out in September when a haemorrhage behind his eye left him temporarily dizzy and weak. His request that the court to adjourn briefly until he recovered was also denied. That left the balance against us, four to three".¹⁵

She further says: -

"The Chief Justice of the Supreme Court was as biased as his counterpart of the Lahore High Court had been. Like the Chief Justice of the High Court, with whom he was very friendly; Anwarul Haq was also from Zia's home area of Jullandar in India. And again there was no pretence of separation between the executive and judiciary. When Zia went to Mecca on pilgrimage in September, 1978, Anwarul Haq was sworn in as acting President. There was even a hotline from the Chief Justice's chambers to the office of the Chief Martial Law Administrator.

"I learned just how prejudiced Anwarul Haq was years later in exile from one of the other Supreme Court Justices, Safdar Shah. Anwarul Haq had taken Justice Shah aside during the appeal. We know Bhutto is innocent. But he must be eliminated if Pakistan is to be saved, he had told him. Safdar Shah had gone on to vote for my father's honourable acquittal, and was himself persecuted by Anwarul Haq and the regime and forced into exile. Yet during the Supreme Court hearing, both Zia and Anwarul Haq continued to claim my father's appeal was being held in front of an independent judiciary. We are going through the evidence with an open mind, insisted Anwarul Haq".¹⁶

¹⁵ Benazir Bhutto, *Daughter of East* p. 26 (First Edition)

¹⁶ Benazir Bhutto, *Daughter of the East*, p.126 (First Edition)

Kasuri's Tour Abroad

It was reported in the press and Benazir also corroborates this fact that Ahmad Raza Kasuri was having a tour of America and Europe to invite their focus on his case and the just trial of Bhutto. He was staying in expensive hotels and holding press conferences, the object being to poison the minds of world media against Bhutto. He was having this exercise at whose behest, it is not for me to answer.

Benazir in this context says: -

“At the same time, my father's accuser Ahmad Raza Kasuri launched on a tour of Europe and America, staying at expensive hotels and holding press conferences about the ‘just trial’ my father was receiving in Pakistan. Kasuri claimed he was paying for everything himself, but the financial disclosures he and every other member of the PPP had been required to file under Zia's Martial Law regulations didn't support his claim. Where was the money coming from if not from the regime?”¹⁷

QCS's Observations at Bhutto's Trial

Two eminent lawyers, one from England and the other from the United States came to Pakistan to observe the trial of Bhutto, conducted by the Chief Justice Mushtaq Hussain and his companion Judges. They were thoroughly disappointed by the trial court and the manner in which the trial of Bhutto was proceeding. Their observations are quite

¹⁷ Benazir Bhutto, *Daughter of the East*, p.127 (First Edition)

relevant to the controversy – controversy to the effect that justice was denied to Bhutto.

Benazir speaks of their observations and they are quoted verbatim as under: -

“John Matthews, QC, a lawyer from England who came to attend the trial in November, was shocked by the proceedings.

“Particularly I was concerned at the way a witness's favourable answer would be the subject of immediate interruptions from the Bench, who would take over the case and cause him to whittle down or change his answer’ he told an English journalist later. The defence lawyers were even more concerned. At the end of the trial, not one of the objections they raised or the contradictions in the evidence they pointed out appeared in the record of 706 pages of testimony”.¹⁸

“Ramsey Clark, the former Attorney General of the United States, came to observe my father’s court proceedings. Later he wrote an article about it in The Nation. The prosecution case was based entirely on several witnesses who were detained until they confessed, who changed and expanded their confessions and testimony with each reiteration, who contradicted themselves and each other, who, except for Masood Mahmood (the Director General of the FSF) were relating what other said, whose testimony led to four different theories of what happened, who were absolutely uncorroborated by an eyewitness, direct evidence, or physical evidence, he wrote”.¹⁹

¹⁸ Benazir Bhutto, Daughter of the East, p.106 (First Edition)

¹⁹ Ibid, Pg.106

5

THE LAST DAYS OF BHUTTO

Bhutto in Death Cell

Benazir Bhutto describes the last days of her father. Zia demonstrated extreme brutality to torture Bhutto. In the case of Bhutto, there was application of torture both physical and mental. He was kept in solitary confinement for months together. Finally, he was kept in death cell after the rejection of his appeal before the Supreme Court.

Benazir Visits Sihala Jail

It was 1st March when Benazir Bhutto visited her father at Sihala Jail. She found him in a very pitiable condition. Bhutto, after the dismissal of his appeal by the Supreme Court, lost his weight at an alarming rate. He was virtually taking no food nor was he taking any medication.

Benazir says: -

"I visited my father at Sihala at the beginning of March. I don't know how he kept going. He had refused all medical treatment since the death sentence had been upheld, and had stopped taking any medication. He had also stopped eating, not only because of the pain in his gums and teeth, but as a protest against his treatment. He was being kept locked in his cell now, unable to use the commode the prison officials had set up for him in another cell".¹

Benazir Describes Last Moments of Bhutto

The final hour has arrived. Benazir and her mother were taken to their last meeting. It was April 3, 1979. There were clear signs that all arrangements for the execution of Bhutto had already been made. His death cell was made almost empty. There were a few pieces of furniture not worth mentioning in his death cell. All were removed from there including his bed, giving him no option but to sleep on the floor on his roll of bedding. In spite of such pathetic scenes, no body knew as to what was going to happen. One may believe or not, it was crystal clear that fate of Prime Minister Zulfikar Ali Bhutto had already been sealed and he was going to be taken to the scaffold. He was executed during the early hours of April 4, 1979. All was over for Zia but not for posterity.

Benazir Bhutto describes the last journey of her father in the following words: -

"The signs were increasingly ominous. In Rawalpindi Central Jail, what pitiful pieces of furniture there were in my father's cell were taken away, including his bed. He was left to sleep on the floor on his roll of bedding. They even took away his

¹ Benazir Bhutto, *Daughter of the East* p.135 (First Edition)

razor, leaving my usually cleanly-shaven father with a stubble of grey beard on his face. He was ill and very weak. No body knew what was going to happen. Would Zia actually go ahead and hang my father in spite of world condemnation and the recommendation of the court? If so when? The answer seemed tragically clear on April 3, when my mother and I were taken to our last meeting.

Yasmin! Yasmin! They are going to kill him tonight!

Amina! You hear, too. It's tonight! Tonight!

The lawyers drew up another review petition. Amina flew to Karachi where she and one of my father's lawyers, Mr Hafiz Lakho, tried to submit it to the court. The registrar refused to accept it. Give the petition to the judges, the registrar told them, but the judges wouldn't accept it either. One judge even slipped out of the back door of the court house to avoid them. Amina and Mr Lakho went to the senior judge's private house and pleaded at the gate. The judge refused to see them. Broken-hearted, Amina flew back to Islamabad.

April 3, 1979.

Tick. Tick. The Martial Law forces are cordoning off our family graveyard, cutting off all the roads to Garhi Khuda Bakhsh. Tick. Tick. Amina goes directly to the Niazi's house from the airport, not wanting to be alone. Tick. Tick. It's tonight, Dr Niazi is saying quietly into the phone over and over again, as Yasmin and Amina lie silent and wide awake in the darkened house. Tick. Tick.

An army truck pulls away quickly from Rawalpindi Central Jail in the early morning. A short time later, Yasmin hears a small plane fly across Islamabad. She convinces herself that it belongs to one of the Arab leaders who has got into the prison and is spiriting my father away to safety. But the plane she hears in taking my father's body home to Larkana".²

² Benazir Bhutto, *Daughter of the East* p.136-137 (First Edition)

Conscience Pricks

Justice Nasim Hasan Shah Speaks Out

In the very recent past, Justice Nasim Hasan Shah appeared on the screen of Geo Television and admitted very frankly that Bhutto had made them biased and annoyed. Still they wanted to give him life term instead of capital punishment. Keeping this fact in mind, he met those three judges who had already written dissenting Judgments in favour of Bhutto, holding him not guilty and suggested that it would be desirable to give a unanimous verdict of life term.

The judges, holding minority view, declined to do so, as they had already exonerated Bhutto in clear words. Be that as it may, what prevented Dr. Justice Nasim Hasan Shah and his companion judges from converting the death sentence of Bhutto into life term? He was sent to the gallows for the crime which he had not committed. That is how the judicial verdict of ultimate Court of jurisdiction played its role. There is an old proverb that what is fixed by fate must come to pass.

Further Cofession in Rapid Fire

Justice Nasim Hasan Shah appeared on the screen of television in Geo on 22nd July, 2007, under a weekly programme ‘جوابدہ’ (Answerable) where under a rapid fire by a moderator, his attention was invited to his previous statement wherein he had admitted that Bhutto was

innocent and further that had he given a dissenting Judgement, his life would have been saved. He, however, regretted with a broken heart for the mistake that he had committed. He also blamed the army rule. In this context, Justice Nasim Hasan Shah said: -

“So long the army rule is there, no judge can afford to be independent. No judge would like to be crucified.”

Here, I have taken a beautiful passage from a Book ‘The Holy Quran and The Religion of the World’ written by my reverend father, the late Syed Muhammad Sabih. This beautiful passage is quoted as under: -

“Deny or ignore the day of Judgement, it shall come. You shall be brought before your Lord with the record of your doings. He shall take the accounts. God has counted everything, each and all. Every act, done by man, is recorded. He shall not miss anything. Nothing shall slip from Him. He is the swiftest at reckoning. He is the All-Knowing, the All-Seeing, the All-Hearing, the All-Pervading. He is the Master. He is the Maker. He is the Creator. His is the Kingdom. His is the Power. His is the Night. His is the Sun. His is the Moon. His is the Universe. His are angles. His are matters. His are souls. Men are His. Spirits are His. Heavens are His. Stars are His. All are His.

“Men do right; men do wrong. Men are honest; men do lie. Men are selfless; men are selfish. Men do believe; men disbelieve. Men are faithful; men are faithless. Men are good; men are wicked. God has given the man the option of being one or other. It is the choice of men. It is the responsibility of men. Be as you like. Do as you choose. But the consequences, you must meet”.

DECLINE OF OUR JUDICIARY

The decline of judiciary of Pakistan begins with the case of Tamizuddin Khan. The judgment of the Federal Court in this case paved the way for despotism. Since then, Gog and Magog have been let loose to suck the blood of the people of this country. After this judgment, we have already been subjected to four full-fledged Martial Laws, leaving no room for democracy to flourish. Bhutto's case was not the first case which became controversial from the justice point of view. In addition to this case, there are many cases in which the political battles were fought in the court of law. Since democracy was not allowed to play its role in our country, the judiciary failed to play its part in the administration of justice and could not come up to the expectations of the people. Now, I proceed to deal with the cases one by one in which the judgments of the superior judiciary disillusioned the people of this country.

In the first instance, I shall deal with the two cases which changed the course of our history and fortified the hands of those who were opposed to the rule of law. Firstly, I shall proceed to deal briefly with the case of Tamizuddin Khan and secondly, with the case of Dosso.

Justice Munir in Tamizuddin Khan case (1954)

It was the 24th October, 1954, when the Constituent Assembly of Pakistan was dissolved. It was dissolved by a Proclamation of October 24, 1954, issued by Ghulam Muhammad in his capacity as the Governor-General of Pakistan. The Constituent Assembly was the supreme legislature of our country. It was the creation of a supra-legal document known as the Indian Independence Act, 1947. Chief Justice Munir and his companion judges, prior to its dissolution, were unanimous in their view that the Constituent Assembly of Pakistan, much like the British Parliament, could make or unmake any kind of law and no question of vires with regard to any legislation made by it under its plenary powers could be raised. The whole world became dumb-founded when Ghulam Muhammad who was a heritage of British tutelage dissolved this Assembly and assumed to himself all powers.

Maulvi Tamizuddin Khan, the then President of the Constituent Assembly challenged the Proclamation of dissolution by invoking the writ jurisdiction of the Chief Court of Sindh. He filed a petition wherein he prayed for the issuance of a writ in the nature of mandamus, restraining the usurpers from giving effect to the Proclamation of October 24, 1954, and from interfering or obstructing him in the exercise of his functions and duties as the President of the Constituent Assembly. The petition

was heard at length. The Chief Court of Sindh by its historic judgment dated February 9, 1955, held that the dissolution of the Constituent Assembly by the Governor-General Ghulam Muhammad was a nullity in the eye of law, and both the Assembly and the office of its President still existed. The Federation of Pakistan went in appeal before the Federal Court, challenging the historic judgment of the Chief Court of Sindh. Our Federal Court by its judgment dated April 3, 1955, set aside the judgment of the Chief Court of Sindh, holding that Section 223-A of the Government of India Act, 1935, under which the power to issue writs was conferred upon the superior courts including the Chief Court of Sindh was not a valid piece of legislation, as it did not receive the assent of the Governor-General.

Chief Justice Munir was the chief architect of the judgment of the Federal Court of Pakistan and so far as other judges were concerned, they just concurred with him without writing anything worth reading. The only exception in that behalf was Justice A. R. Cornelius. It is a matter of history that while giving this finding, Justice Munir completely ignored the fact that the jurisdiction of his own Court as a Court of finality was resting on a constitutional instrument which was holding the ground without receiving the assent of the Governor-General. The jurists of this country were taken aback when they discovered that although the Chief Justice came out with a very comprehensive judgment in the case of Maulvi Tarnizuddin Khan, yet he was silent on the point of his own jurisdiction.

The judgment of Mr. Justice Munir in the case of Maulvi Tamizuddin Khan came down like an avalanche and swept away the entire democratic structure of the State. In consequence of this judgment, 46 Acts, passed by the Constituent Assembly, became invalid for want of assent of the Governor-General. The Acts which were declared invalid included the constitutional enactment on which the jurisdiction of the Federal Court was resting. The result was that there was a complete constitutional and administrative deadlock. In view of that precarious situation, the Federation of Pakistan sought the remedy from the Federal Court of Pakistan by invoking its jurisdiction under Section 213 of the Government of India Act, 1935. Mr. Justice Munir provided a solution to the "constitutional impasse" created by him by placing a crown on the head of Ghulam Muhammad. Mr. Justice Munir held in the Reference that he was as good as the King of England. He was, therefore, armed with the power to use the Royal prerogative to validate those laws which were declared invalid for want of assent of the Governor-General.

There was another consequence that emanated from that judgment. A new Constituent Assembly came into being and was put into motion to frame a constitution. When the Constitution of 1956 was finally passed, Iskander Mirza was the Governor-General. He was another civil servant who had taken over the country after the exit of Ghulam Muhammad. In view of the judgment of Mr. Justice Munir in the case of Maulvi Tamizuddin Khan, the assent of the Governor-General was necessary on the Constitution before it could be launched. Iskander Mirza insisted that he would give the assent to the Constitution

provided he was elected as the President of Pakistan. The members of the newly elected Constituent Assembly had no choice, hence they agreed. That is how Iskander Mirza became the first President of the Islamic Republic of Pakistan. Iskander Mirza wanted to perpetuate his rule. He and his close comrades were not prepared to hold the general elections. When he came to the conclusion that he was no longer in a position to hold the scepter in his hand, he abrogated the Constitution of 1956, dismissed the National Assembly, declared Martial Law throughout the country by his Proclamation of October 7, 1958, and appointed General Muhammad Ayub Khan as the Chief Martial Law Administrator. In view of the fact that General Muhammad Ayub Khan became the supreme authority in the country, he took Iskander Mirza into custody and forced him to abdicate in his favour. Since Iskander Mirza had no option, he abdicated gracefully in his favour. Thereafter, he and his wife both were sent to London where Iskander Mirza passed the rest of his life in exile. That is how the era of Martial Law began in the country.

Exchange of Secret Messages Between Justice Munir and Ghulam Muhammad

Qudratullah Shahab, Private Secretary to Governor-General Ghulam Muhammad, specifically quotes his Deputy Secretary Farrukh Ameen, playing the role of a special emissary, exchanging messages in code words between the Governor-General and Chief Justice Munir.

He says: -

“In those days when the Reference was pending before the Federal Court, he observed that his Deputy Secretary Furrugh Ameen after every two or three days with out his permission was going to Lahore. One day he admonished him as to why without his permission he was going to Lahore every time. He admitted very frankly before him that he was delivering secret messages in code words from Governor-General to Chief Justice Munir and in the same way he was delivering secret messages of Chief Justice to Governor-General. He further disclosed that Governor-General had given strict instructions not to disclose this exercise to anyone. However, he did not know what kind of messages were being exchanged between the two. He was not in a position to say whether such messages were having any effect on the case, pending before the Federal Court but undoubtedly it was not the least desirable that the Head of the state and Chief Justice of the Federal Court should communicate secretly through CODE WORDS”.¹

Allen McGrath throws further light by way of corroboration on this point and says: -

“There are reasons to believe that Ghulam Muhammad made it quite clear to Munir just what decision he wished the Court to reach in Tamizuddin, and that he applied pressure on Munir to obtain the desired result. According to a Private Secretary of Ghulam Muhammad, while the case was pending before the Federal Court, Ghulam Muhammad communicated with Munir by coded written messages on a regular basis. Delivery was allegedly made between the two men by one of Ghulam Muhammad’s Private Secretaries”.²

¹ Qudratullah Shahab, *Shahabnama*, p. 654

² Allen McGrath, *The Destruction of Pakistan’s Democracy*, p. 196

Allen also speaks of Ghulam Muhammad's visit to Justice Munir at his residence, going there in his official car with flags flying, ignoring completely the fact that the case of Tamizuddin Khan was pending at that time. He further refers to Justice Cornelius who, in later years commented that the Governor-General had been effective in influencing not only Munir but also other Justices in the case of Tamizuddin Khan to get a decision in his favour.

Allen McGrath says: -

"Ghulam Muhammad also made at least one visit to Munir at his home. He drove to Munir's residence in his official car with flags flying and escort. With Tamizuddin pending at the time, this was effective notice to Munir and the political community of the Governor-General's involvement in the issues which were pending before the court. The visit caused comment in the legal community as it was a breach of the carefully-adhered-to rule of separation of the judiciary from contact with the executive or the legislative branches of the government. So strict was this rule of conduct in practice that the first Chief Justice of the Federal Court had declined to associate with Liaquat when he was Prime Minister even on a social basis. In later years, Justice Cornelius was to comment that the Governor-General had been effective in influencing not only Munir but also the other Justices who voted in the Tamizuddin majority. It is easy to understand what Munir meant when he said years later that Tamizuddin Khan came to court with a case he could not win".³

³ Allen McGrath, *The Destruction of Pakistan's Democracy*, p. 196

Justice Munir's Role During Ayub Khan's Martial Law

The constitution of 1956 was a perfect document, but it was abrogated. Ayub Khan, immediately after becoming the President of Pakistan, announced the appointment of a Constitution Commission under Justice Shahabuddin, with five members from each province. The abrogation of the Constitution of 1956 was haunting him. That was the reason that, from the very first day of the assumption of power as the Chief Martial Law Administrator, Ayub Khan began showing his anxiety as to how a new constitution be framed, suiting his genius and the genius of his plan that he had drawn in 1954. His plan of 1954 has already been illustrated in my earlier book. Muhammad Asghar Khan, who was at that time the Commander-in-Chief of the Pakistan Air Force, makes a pointed reference to the presence of Chief Justice Muhammad Munir in the meeting, held the following day or the day after the proclamation of Martial Law. That was the first meeting of the newly appointed members of Ayub Khan's cabinet. He is giving an eye-witness account, as he was present in that meeting. Iskander Mirza was in the Chair. The presence of Chief Justice of Pakistan in that meeting clearly demonstrates that he was hand in glove with those who seized power.

Justice Munir Attends First Meeting of Ayub's Cabinet

According to Asghar Khan, while the meeting was in progress, Justice Munir was asked by Ayub Khan as to how a new constitution be propounded and in what way the approval of the people be sought? Justice Munir's reply was highly disappointing. All those who were present in the meeting were shocked to hear his line of thinking. It was not expected of the Chief Justice of Pakistan to project such a novel idea of primitive age. Justice Munir said to Ayub Khan that it was very simple. He suggested that approval of the proposed Constitution be sought by 'public acclaim'. All those who were present in the meeting became curious and wanted to know as to what he actually meant by the expression 'public acclaim'. The reply of Justice Munir was that a draft constitution, when prepared, should be sent to all the national newspapers for publication. According to Munir, the publication was to be followed by Ayub Khan, addressing public meetings at Nashtar Park in Karachi, Paltan Maidan in Dacca, Mochi Gate in Lahore and Chowk Yadgar in Peshawar, asking them to say whether the draft constitution, already published in the newspapers, was acceptable to them? Justice Munir assured Ayub Khan that the answer would be in the affirmative. Justice Munir asserted that it would be the best way for launching the draft Constitution of Pakistan and securing the approval of the people.

No one expected that a person no less than the Chief Justice of Pakistan would be suggesting something totally

absurd in all seriousness. The result was that almost all those present in the meeting burst into laughter and Ayub Khan laughed the most. Asghar Khan has written a beautiful paragraph on 'public acclaim', as suggested by Justice Munir in his book 'Generals in Politics' and the same is reproduced as under: -

"The following day or the after, I attended a meeting presided over by Iskander Mirza at which Ayub Khan, the Chief Justice of Pakistan and the newly appointed members of Ayub Khan's cabinet were present. At this meeting, the Chief Justice, Muhammad Munir was asked by Ayub Khan as to how he should go about getting a new constitution approved by the people. Justice Munir's reply was both original and astonishing. He said that this was a simple matter. In olden times in the Greek States, he said, constitutions were approved by 'public acclaim' and this could be done in Pakistan as well. Ayub Khan asked as to what was meant by 'public acclaim' to which Justice Munir replied that a draft of the constitution, when prepared, should be published in the national newspapers. This was to be followed by Ayub Khan addressing public meetings at Nashtar Park in Karachi, Paltan Maidan in Dacca, Mochi Gate in Lahore and Chowk Yadgar in Peshawar, at which he was to hold up the draft of the constitution that had been published in the newspapers a few days earlier and seek the public's approval. The answer, the Chief Justice said, would definitely be in the affirmative. This he said was approval by 'Public Acclaim'. Most of those present laughed and Ayub Khan laughed the loudest. Although this advice was not followed by Ayub Khan for the approval of his constitution, this is what the Chief Justice of Pakistan had suggested in all seriousness. No wonder that Pakistan has found it difficult to shake off martial law ever since".⁴

⁴ Muhammad Asghar Khan, *General in Politics*, p.7

Munir's Intimate Relationship with Mirza and Ayub

Allen McGrath throws sufficient light on this aspect of Munir's life. According to this author, Munir, being the Chief Justice of Supreme Court of Pakistan, was a frequent visitor to the Government House. His relations with Iskander Mirza became more and more intimate. After the exit of Iskander Mirza from the political scene, Munir cultivated the same friendship and intimacy with Ayub Khan. Munir's decision in Dosso case for giving a constitutional cover to Ayub Khan's military take-over was the direct outcome of that friendship and intimacy. Allen McGrath has described in a very authentic manner Munir's informal and intimate relationship with those Heads of State in the own words of Justice Munir. Allen illustrates: -

“When I used to be in Karachi either on my way to Europe for vacation or for a Supreme Court Session at Karachi, it was my practice to sign the Visitors' Book at the Government House, and I invariably received an invitation for a meal. Thus my relations with Iskander Mirza became more and more intimate, and whenever I happened to be in Karachi and he went out on hunting excursions, of which he was very fond, I was often asked to join.

And as the present President [Ayub Khan] was then the Commander-in-Chief, was also a close friend of Iskander Mirza and was equally fond of shooting, he was always a member of the shooting party.

Munir was aware of the significance of his relationship with Mirza.

... I had been a judge for six years before Independence but in accordance with the traditional requirements which governed the conduct of pre-Independence judges I had never sought or cultivated friendship or familiarity with any member of the executive. We were following the traditions of the British judiciary and strictly adhered to some generally accepted rules of conduct.

In those days a judge was almost a social recluse. He hesitated in joining or going to a club, never sought an elective office, seldom attended a wedding or a private dinner and did not go about speech-making or addressing or participating in seminars, symposiums, debates, inaugurating or attending or presiding over every conceivable function. Cards he never played outside his house...

I was conscious of the fact that being the head of the judiciary, it was not right for me to have such close associations with the head of the executive...

He offered the following justification.

When Pakistan came into being, the shortage of manpower was acutely felt, and judges began to be put on different special assignments. Special assignments were entrusted to me, and I accepted them unhesitatingly, because I then felt that we could no longer maintain an attitude of detachment or isolation and whenever and wherever required had to put our shoulders to the wheel. It was this sense of duty that brought me in close contact with Heads of State including General Iskander Mirza".⁵

⁵ Allen McGrath, *The Destruction of Pakistan's Democracy*, p.213

Justice Munir in Dosso Case (1958)

When Martial Law was proclaimed on 7th October, 1958, after abrogating the Constitution of 1956, President Iskander Mirza, on the 10th, promulgated the laws (Continuance in Force) Order, 1958, empowering all the courts in existence immediately before the proclamation, to continue in being and exercise their powers and jurisdiction subject to any order of the President or regulation made by the Chief Martial Law Administrator. It will serve the purpose if it is brought on record that it was no other person but Justice Munir himself who had a hand in the drafting of the Laws (Continuance in Force) Order, 1958, as admitted by the learned Chief Justice in his Article published in the Pakistan Times on 11th of November, 1968.

While the Laws (Continuance in Force) Order, 1958, was operating under the umbrella of Martial Law, a criminal appeal in the case of Dosso came up for hearing on October 13 and 14, 1958, before the Supreme Court of Pakistan. In that case, a constitutional point was raised as to whether or not all proceedings for the enforcement of fundamental rights, pending before the superior courts including the Supreme Court between the Proclamation and the promulgation of the Laws (Continuance in Force) Order, 1958, had abated. The answer was obviously in the affirmative. It, is, however, revealed from the judgment of the Supreme Court in the case of Asma Jilani that Justice Munir on his own, that is, *suo moto*, without giving an opportunity of being heard to the counsel, appearing for the parties, took up the point of according constitutional recognition to the revolution brought about in the shape of first Martial Law. He applied the doctrine of "legal

positivism” as propounded by Hans Kelsen and held that a successful revolution by itself was a law-creating organ.

Justice Munir had every reason to give a legal cover to the imposition of Martial Law, as he was very close to those who were responsible for our misfortune. Three days later, was promulgated by the President the Laws (Continuance in Force) Order, 1958. Justice Munir was the main player behind this piece of legislation. He played his highly deplorable role despite the fact that he was the Chief Justice of Pakistan. He laid down a novel juristic principle of far-reaching importance in the case of State versus Dosso. Kelsen’s theory was, by no means, a universally accepted theory nor was it a theory which could claim to have become a basic doctrine of the science of modern jurisprudence. Justice Munir, however, placing reliance on the doctrine of “legal positivism”, as enunciated by Hans Kelsen, quotes the following passage on this subject. Kelsen’s says: -

“From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated. Usually, the new men whom a revolution brings to power annul only the constitution and certain laws of paramount political significance, putting other norms in their place. A great part of the old legal order remains valid also within the frame of the new order. But the phrase ‘remains valid’, dose not give an adequate description of the phenomenon. It is only the contents of these norms that remain the same, not the reason of their validity. They are no longer valid by virtue of having been created in the way then old constitution prescribed. That constitution is no longer in force; it is replaced by a new constitution which is not the result of a constitutional alteration of the former. If laws which are introduced under the old constitution continue to be valid

under the new constitution, this is possible only because validity has expressly or tacitly been vested in them by the new constitution".⁶

Justice Munir legalised the taking-over of Pakistan by Ayub Khan and his comrades through the due process of law. A successful revolution was characterised as 'legalised illegality', by Munir. In other words, Justice Munir legitimised the despotic regime and accorded a constitutional cover to Ayub Khan. Justice Munir was the product of a judicial system the foundation of which had been laid on a very strong footing. He was not expected to deviate from the norms of the judicial system established by the British Raj – but he did it. The people of Pakistan will never forgive him for being the part and parcel of Ayub's Martial Law. We have already witnessed an irreparable damage that his judgment in the case of Tamizuddin Khan did to our judicial system.

Justice Munir had established a close relationship with Ghulam Muhammad who was the Governor-General of Pakistan and later he maintained the same kind of relationship with Iskander Mirza who had become the President under the Constitution of 1956. He traveled far beyond and came in contact with Ayub Khan who was the Commander-in-Chief of Pakistan and later became the Chief Martial Law Administrator after a coup d'etat. Munir's informal and intimate relationship with such important functionaries of the State caused a great damage to our judicial system and shook its very foundation.

⁶ Syed Sami Ahmad, HISTORY OF PAKISTAN AND ROLE OF THE ARMY pp. 259-261

JUSTICE HAMOODUR REHMAN IN ASMA JILANI's CASE (1972)

Summary of Case

Asma Jilani challenged the detention of her father, Malik Ghulam Jilani who had been arrested at Karachi under an Order dated 22nd of December, 1971, issued in exercise of powers conferred by Clause (b) of Sub-Rule (1) of Rule 32 read with Rule 213 of the Defence of Pakistan Rules, 1971.

The petition was filed earlier in the High Court, but it was rejected, relying on the decision of the Supreme Court in the case of State V. Dosso, holding that the Order of 1969 was a valid and binding law and, as such, it had no jurisdiction in the matter by reason of the provisions of Clause 2 of the above-mentioned Order.

The matter came up before the Supreme Court for judicial review. In this case, the seizure of power by General Yahya Khan was the crux of the matter. The Supreme Court declared him a usurper and rejected outright the doctrine of "legal positivism", as enunciated by Mr. Justice Munir in the case of Dosso. The Chief Justice Hamoodur Rehman disagreed with Justice Munir in totality and held that recourse could be taken to that doctrine of

necessity when the ignoring of it was going to result in the disastrous consequences and upset the social order of the society but not to validate the illegal acts of usurpers.

In the case of Asma Jilani, it was further revealed that Justice Munir himself was associated with the drafting of Laws (Continuance in Force) Order 1958. When the judgment of Justice Munir in the case of Dosso was assailed during the proceedings of Asma Jilani's case, one of the grounds urged by Mr. Sharifuddin Pirzada was that the decision was vitiated, as Mr. Justice Munir had a hand in the drafting of the laws (Continuance in Force) Order 1958. In support of his contention, he invited the attention of the Supreme Court to an Article of the learned Chief Justice, published in 'The Pakistan Times' newspaper on the 11th of November, 1968.

Justice Hamoodur Rehman Assails

Doctrine of Hans Kelsen

Asma Jilani's case was the first case wherein the Supreme Court refused to accept any limitation on their power of judicial review in spite of orders and regulations, issued by the Martial Law Authority. Chief Justice Hamoodur Rehman clearly observed that usurpers had no authority to silence the voice of superior judiciary. Chief Justice Hamoodur Rehman outright rejects the application of the doctrine of Hans Kelsen as a weapon to usurp the fundamental rights of the people at large. He is clearly of the view that it is invoked in aid of those power hungry

persons who believe in despotism and usurpation of power for their own political ends.

Chief Justice Hamoodur Rehman bitterly criticises Justice Munir, observing in clear words that he not only misapplied the doctrine of Hans Kelsen but also fell into error in thinking that it was a generally accepted doctrine of modern jurisprudence. Hans Kelsen magnified the parameter of his doctrine to such an extent that even his disciples hesitated to go that far.

Chief Justice Hamoodur Rehman's

Finding on Kelsen's Doctrine

"Kelsen's attempt to justify the principle of effectiveness from the standpoint of International Law cannot also be justified, for, it assumes "the primacy of International Law over National Law." In doing so he has, to my mind, overlooked that for the purposes of International Law the legal person is the State and not the community and that in International Law there is no "legal order" as such. The recognition of a State under International Law has nothing to do with the internal sovereignty of the State, and this kind of recognition of a State must not be confused with the recognition of the Head of a State or Government of a State.

Hamoodur Rehman C.J.,

Further Holds

I am also unable to agree with the learned Chief Justice that upon the principles of International Law if the territory and the

people remain substantially the same there is "no change in the corpus of International entity of the State and the revolutionary Government and the new State are, according to International Law, the legitimate Government and the valid Constitution of the State". With great respect I must point out that this proposition does not find support from any principle of International Law. According to Oppenheim's view as propounded in his book on International Law if the revolutionary Government is ineffective and/or has no "reasonable expectancy of permanence" and/or does not "enjoy the acquiescence of population", then the international community may well refuse to recognise it, even though its territorial integrity remains unchanged and its people remain substantially the same.

With the utmost respect, therefore, I would agree with the criticism that the learned Chief Justice not only misapplied the doctrine of Hans Kelsen, but also fell into error in thinking that it was a generally accepted doctrine of modern jurisprudence. Even the disciples of Kelsen have hesitated to go as far as Kelsen had gone.

Upon this analysis, I am, with the utmost respect for the then learned Chief Justice, unable to resist the conclusion that he erred both in interpreting Kelsen's theory and applying the same to the facts and circumstances of the case before him. The principle enunciated by him is, in my humble opinion, wholly unsustainable, and I am duty bound to say that it cannot be treated as good law either on the principle of *stare decisis* or even other wise".¹

¹ PLD Supreme Court 1972, pp. 181&183

Mr. Sharifuddin Pirzada Attacks Decision in Dosso Case

Mr. Sharifuddin Pirzada, appearing as Amicus curiae in this case, attacked the decision of Chief Justice Munir in the case of Dosso on a number of grounds which are summarised and reproduced as under: -

- (1) "The decision was given in haste and against the principles of natural justice, because, no opportunity at all was given to learned counsel appearing for the respondents to argue the contrary.

- (2) The decision was vitiated by bias at least in the learned Chief Justice who, as he himself has subsequently disclosed, had a hand in the drafting of the Laws (Continuance in Force) Order (vide Article of the learned Chief Justice published in the Pakistan Times newspaper on the 11th of November 1968). It is contended that he should not have sat on this Bench, as he had already committed himself to granting legal recognition to the Regime and its Laws (Continuance in Force) Order.

- (3) Being a Municipal Court it should not have made a rule of international law regarding recognition of States the basis of its decision.

- (4) The Court's interpretation of Kelsen's doctrine was absolutely incorrect.

- (5) In any event, the theory of Kelsen is not a universally accepted theory and should not have been applied to the circumstances then prevailing in Pakistan.
- (6) The doctrine of necessity as a validating factor was not even noticed".²

Hamoodur Rehman on Law of Necessity

"I too am of the opinion that recourse has to be taken to the doctrine of necessity where the ignoring of it would result in disastrous consequences to the body politic and upset the social order itself but I respectfully beg to disagree with the view that this is a doctrine for validating the illegal acts of usurpers in my humble opinion, this doctrine can be invoked in aid only after the Court has come to the conclusion that the acts of the usurpers were illegal and illegitimate. It is only then that the question arises as to how many of his acts, legislative or otherwise, should be condoned or maintained, notwithstanding their illegality in the wider public interest. I would call this a principle of condonation and not legitimization".³

I have already offered my comments on the Law of Necessity, as propounded by Munir, C.J., in my earlier book in the following terms: -

² PLD Supreme Court 1972, pp. 171-172

³ PLD Supreme Court 1972, pp. 206&207

“Munir, C.J., being confronted with a situation of an extraordinary magnitude, could finally lay his hands on the Law of Necessity. It was under the law of necessity, as propounded by Mr. Justice Munir, that a crown was placed on the head of Ghulam Muhammad and, consequent there-upon, he was allowed to assume to himself all powers –the powers which only the Kings in the Middle Ages could assume and exercise. The Law of Necessity, as propounded, is based on the maxim *salus populi suprema lex* (the welfare of the people is the supreme law) and *salus republicae suprema lex* (the safety of the state is the supreme law). Justice Munir while elaborating the said legal maxims takes a start from the statement of Cromwell – the worst dictator of England. The fate of this dictator, however, became an eye opener when out of sheer hatred his body was dug out from the grave after twelve years of his death and hanged at a public square for the atrocities that he had committed. Justice Munir found the best statement under-lying the Law of Necessity in Cromwell’s utterance. “If nothing should be done but what is according to law, the throat of the nation might be cut while we send for someone to make a law.”

Munir, C.J., to prove that the said legal maxims were good maxims takes us to the English Kings in the middle ages and refers to cases when in times of war questions relating to acquisition of the subject’ property were decided in favor of the Crown under the Law of Necessity. His own observations on the cases on which he placed reliance are reproduced verbatim:

“It is true that most of the case mentioned above relate to the acquisition of the subjects’ property for the defence of the realm in times of war, but it seems to me that the same principle must be applicable, and as I shall presently show, has been applied where the State is in danger of a collapse due to other factors”.

Justice Munir, therefore, proceeded to refer to Chitty in the 1820 Edition of his book 'Prerogatives of the Crown' at p. 68 and then took his companion judges to the Lord Mansfield and his address to the jury, dealing with the law of civil necessity. The case of Mansfield, as relied upon, by Justice Munir, related to proceedings against top English military brass whose defence was that they acted under necessity to preserve the constitution. We must search our hearts to see whether the constitution of our country, as a result of the decision in this Reference, was preserved or perished. Munir, C.J., however, held that the principle that dearly emerged from the address of the Lord Mansfield was that subject to the condition of absoluteness, extremeness and imminence, an act which would otherwise be illegal might be deemed to be legal provided it was done bona fide under the stress of necessity – the necessity being referable to an intention to preserve the constitution. A very pertinent question arises whether the principle, as propounded above, was applicable to the case of Ghulam Muhammad. The question has already been answered in a very comprehensive and elaborate manner. Justice Munir, in view of the doctrine of the state necessity, as propounded, answered Question No. 2 in the affirmative and left the present generation as well as the posterity to ponder over his acumen – both legal and constitutional".⁴

Law of Necessity

Justice Munir's Conclusion

"Before I conclude, I should like to dispel the impression, which this opinion may produce on the mind of a layman, that while seeking in Common Law the origin of a jurisdiction exercisable in Pakistan, I have assigned to the Governor-General of this country a position analogous to that of English Kings in the middle ages. Nothing that I have said here in any

⁴ Syed Sami Ahmad, *The Judgment That Brought Disaster*, pp.98-99

way affects the independence of Pakistan or is inconsistent with the constitutional position of the Governor-General described at length by me at pp. 23-26 and 77-79 of my opinion in Mr. Tamizuddin Khan's case (1)".⁵

Justice Hamoodur Rehman's Observation on Usurpers

"A person who destroys the national legal order in an illegitimate manner cannot be regarded as a valid source of Law-making. May be, that on account of his holding the coercive apparatus of the State, the people and the Courts are silenced temporarily, but let it be laid down firmly that the order which the usurper imposes will remain illegal and Courts will not recognize its rule and act upon them as de jure. As soon as the first opportunity arises, when the coercive apparatus falls from the hands of the usurper; he should be tried for high treason and suitably punished. This alone will serve as a deterrent to would be adventurers".⁶

Justice Hamoodur Rehman has written a beautiful paragraph on usurpers, holding them guilty for high treason. His Lordship has held in clear words that acts done by those who grab power and assume unlawful authority cannot be treated as valid or acted upon on the principles of necessity.

⁵ Syed Sami Ahmad, *The Judgment That Brought Disaster*, p113

⁶ PLD Supreme Court 1972, p145

In the case of Asma Jilani, Hamoodur Rehman C.J., has held: -

“The grabbing of power and installing himself as the President and Chief Martial Law Administrator of Pakistan by General Agha Muhammad Yahya Khan by the Proclamation of 1969 having been declared by the Supreme Court to be entirely illegal. The question arose whether everything (legislative measures and the other acts) done during his illegal regime, whether good or bad, can be treated in the same manner and branded as illegal and of no effect.

Held: Grave responsibility, in such circumstances, rests upon Courts not to do anything which might make confusion worse confounded or create a greater state of chaos if that can possibly be avoided consistently with their duty to decide in accordance with law. Acts done by those actually in control without lawful authority may be recognized as valid or acted upon by the Courts within certain limitations, on principles of necessity. There is no doubt that a usurper may do things both good and bad, and he may have during the period of usurpation also made many Regulations or taken actions which would be valid if emanating from a lawful Government and which may well have, in the course of time, affected the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer of property and similar subjects. All these cannot be invalidated and the country landed once again into confusion? Such a principle, has also been adopted in America in various cases which came up after the suppression of the rebellion of the Southern States and the American Courts too adopted the policy that where the acts done by the usurper were “necessary to peace and good order among citizens and had affected property or contractual rights they should not be invalidated”, not because they were legal but because they would cause inconvenience to innocent persons and lead to further difficulties”.⁷

⁷ PLD Supreme Court 1972, pp. 153-154

Justice Yaqub Ali on Military Dictatorship

Justice Yaqub Ali also attacked the judgment of Justice Munir in the case of Dosso for legitimising the Government of usurpers, pointing out that the Judgments in the cases Maulvi Tamizuddin Khan; Governor-General Reference 1 of 1955 and the State V. Dosso caused an irreparable damage to the constitutional developments in Pakistan. Justice Yaqub Ali is perfectly correct when he held that Pakistan became a laughing stock and the country, in fact, eventually degenerated into military dictatorship.

“Held: The judgment in State V. Dosso set the seal of legitimacy on the Government of Iskander Mirza though he himself was deposed from office by Muhammad Ayub Khan, a day after the Judgment was delivered on the 23rd October 1958, and he assumed to himself the office of the President. The judgments in the cases Maulvi Tamizuddin Khan; Governor-General Reference 1 of 1955 and The State V. Dosso had profound effect on the constitutional developments in Pakistan. As a commentator has remarked, a perfectly good country was made into a laughing stock. A country which came into being with a written Constitution providing for a parliamentary form of Government with distribution of State power between the Executive, Legislature, and the Judiciary, was soon converted into an autocracy and eventually degenerated into military dictatorship. From now onwards people who were the recipients of delegated sovereignty from the Almighty, ceased to have any share in the exercise of the State powers. An all omnipotent sovereign now ruled over the people in similar manner as the alien commander of the army who has conquered a country and his “will” alone regulates the conduct and behavior of the subjugated populace. Martial

Law remained in force till the 7th of June 1962, when in pursuance to a Mandate he had obtained by some kind of referendum Muhammad Ayub Khan gave a Constitution to the country. Under it he himself became the first President; revoked the Proclamation of 7th October 1958, and lifted Martial Law. By and large the people accepted the Constitution and among others the Judges of the Supreme Court and High Courts took oath of office under this Constitution. All legislative and administrative acts of Martial Law authorities and the President between 7th October 1958, and 7th June 1962, were validated by this Constitution. Some were continued as Central Acts while others were repealed. Article 250 inter alia provided: Where a law is repealed; the repeal shall not affect the previous operation of the law or anything duly done or suffered under the law, affect any right, privilege or liability, any penalty etc. Action taken under all Martial Law Orders, Martial Law Regulations, Presidential Orders and Ordinances issued between 7th October 1958 to 7th June 1962, were thereby validated".⁸

Justice Salahuddin Ahmad Speaks of Kelsen's Theory

Mr. Justice Salahuddin Ahmad in the case of Asma Jilani fully endorsed the views of Hamoodur Rehman C.J., on the doctrine of Hans Kelsen, agreeing with him that Dosso's case must be reviewed in the light of his finding vis-à-vis analysis. Justice Salahuddin Ahmad observes: -

"I, therefore, fully agree that Dosso's case must be reviewed on the grounds mentioned by my Lord the Chief Justice.

⁸ PLD Supreme Court 1972, p.219

Dosso's case came up for decision during the regime of General Muhammad Ayub Khan and it was decided therein that a successful revolution was entitled to the allegiance of the Courts of Law. The decision is based on what the learned Judges thought was Kelsen's Theory of Jurisprudence. This theory was interpreted to provide the legal justification for the acceptance by the domestic Court of the success of an internal revolution within the State. It was not borne in mind, as it should have been that Kelsen's was a 'pure theory of law' as distinguished from the 'law' itself. It is the overlooking of this obvious position that has caused the basic fallacies in the judgment. Kelsen himself was aware of the fact that this theory did not form part of any legal system. Furthermore the Court had assumed that there was a revolution and the revolution had succeeded. Both these questions were questions of fact and required to be decided upon evidence and upon issues raised before the Court. There is nothing to show that there was any rebellion or insurrection. The Proclamation of the 7th October 1958, by President Iskander Mirza made no mention of any rebellion or insurrection".⁹

Conclusion

In this case two detention cases of Ghulam Jilani and Altaf Gauhar under Martial Law Regulation No. 78 were challenged before the Supreme Court by filing two appeals —one by Asma Jilani for the release of her father and the other by Zerina Gauhar for the release of her husband, challenging the detention as being without any lawful authority and asserting that the action taken against the said two detenus were illegal arbitrary and capricious. The said two appeals were heard at length by the Full

⁹ PLD Supreme Court 1972, pp.269-270

Court, comprising. Hamoodur Rehman C.J., Sajjad Ahmad, M.R Khan, Waheeduddin Ahmad and Salahuddin Ahmad, JJ.

The judgment in this case was unanimous. All other judges agreed with Hamoodur Rehman C.J. The order of detention in both the cases was declared void and of no legal effect. The concluding para of the judgment of Hamoodur Rehman C.J., is reproduced as under: -

“In these circumstances, I have, for the reason given above, come to the conclusion that both these orders were not only illegitimate but were also incapable of being maintained on the ground of necessity. The result which follows from this conclusion is that both the detentions were, in my view, illegal and the High Court should have declared the impugned orders of detention to be void and of no legal effect”.¹⁰

“In the result, therefore, I would allow both these appeals and declare both the impugned orders of detention to be void and without legal effect. The detenus should now be set at liberty forthwith unless they are being detained under any other order passed under any valid law”.¹¹

¹⁰ PLD Supreme Court 1972, p208

¹¹ PLD Supreme Court 1972, p 209

GENERAL ZIA-UL-HAQ (1977-1988)

Zia Ascends the Throne

Zia, after dethroning Bhutto, ascended the throne as Chief Martial Administrator. He occupied the throne on 5th July 1977, with the intention that he would be there till the Day of Judgment. Bhutto appointed him as Chief of the Army under the illusion that he would remain docile, submissive and faithful to him. Bhutto was sadly mistaken from that point of view. Zia had a deceptive face and a dubious character. He pretended to be very simple, very humble and more loyal than the King himself. Zia hypnotised Bhutto as his great admirer and the most obedient servant. Zia was the master of deception and fraud. He was extremely cunning and highly unscrupulous. His outward humility and sycophancy enabled him to betray his master. His betrayal had the backing of Washington as well. Zia, as a General, had a poor personality. He looked more like a band master than a general. That is how he succeeded in his evil design and a very strong Prime Minister like Bhutto was thrown out of the ring and finally sent to the gallows.

I met Ziaul Haq twice as chairman of the Executive committee of Sindh Bar Council. In my second meeting, I had a long discussion with him on the problems of judiciary in the presence of Mr. Sharifuddin Pirzada and Late Justice

S.A. Nusrat who was the then Law Secretary, Government of Pakistan. I formed a very poor opinion about him. In the course of discussion, I invited his attention to the corruption prevailing in the judiciary vis-à-vis the country and requested him to eliminate it, if not, at least steps be taken to minimise it. He asked me outright to suggest as to how it could be done. My reply was, "Sir, you are at the helm of affairs, you know better as to how this menace can be tackled". The General insisted that I should come out with some kind of suggestion as to how it can be minimised. My reply was, "Sir, those who are found guilty of accepting illegal gratification they should be hanged before the public. I further said, "Sir, if you hang ten persons whose guilt of taking bribe is proved beyond any shadow of doubt, you will not find the eleventh man who will have the courage to accept bribe". Hearing this, the General laughed, saying that he had not come in power to hang persons. History bears testimony to the fact that he hanged not a so few but so many including the Prime Minister of the Country. However, his time also came, when his time came, not a pound of flesh of his body was found. It was manifestly a divine punishment.

Zia's First Address to the Nation

Zia-ul-Haq, immediately after seizing power, addressed the Nation as Chief Martial Law Administrator through television and radio, admitting that the Army take-over was not a pleasant act, yet the Martial Law through out the country was proclaimed. According to him, this action was taken to save the country, assuring the people that the elections would be held within 90 days from the

date of his announcement and the power would be handed over to the duly elected representatives of the people. This promise was made to the nation on solemn affirmation which he never fulfilled. The imposition of Martial Law was a well-planned conspiracy by Zia and his comrades and the promise solemnly made that as soon as the job was done, the members of the armed forces would go back to the frontiers to perform their duties, was farce and a fraud.

Every military dictator after take-over makes a promise of this kind and never hands over power to the people unless killed or removed by force. At this stage, I would simply reproduce Zia's address to the nation and it is going to be reproduced verbatim: -

"My dear countrymen

"Assalam-o-alaikum":

I deem it a singular honour to address the great nation of this great country. I am grateful to God Almighty for this. You must have learnt by now that the Government of Mr. Zulfikar Ali Bhutto has ceased to exist and an Interim Government has been established in its place. This change-over which began at about midnight last night, was completed by this morning. I am grateful to God Almighty that the process of change-over has been accomplished smoothly and peacefully. This action was carried out on my orders. During this period the former Prime Minister Zulfikar Ali Bhutto and some of his colleagues have been taken into protective custody. Likewise, all the prominent leaders of the Pakistan National Alliance except Begum Nasim Wali Khan have also been taken into custody.

The reactions to this take-over have so far been very encouraging. A stream of congratulatory messages has been

pouring in from different quarters. I am grateful for this to my nation as well as to the buoyant and 'momin' armed forces of Pakistan.

It is necessary to add here that some people have expressed misgivings that the Army take-over may have been at the behest of someone. Could it be that General Zia had secretly concerted with the former Prime Minister? On this I can only say that truth can never remain unexposed. In fact, such an air of distrust has been created during the past few months that even well-meaning people also get bogged down in doubts and apprehensions.

You must have heard from the morning news bulletin that the armed forces of Pakistan have taken over the administration of the country. The Army take-over is never a pleasant act because the armed forces of Pakistan genuinely want that the administration of the country should remain in the hands of the representatives of the people who are its real masters. The people exercise this right through their elected representatives who are chosen in every democratic country through periodic elections.

The elections were held in our beloved homeland on 7th March last. The election results, however, were rejected by one of the contending parties. They alleged that the elections had been rigged on a large scale and demanded fresh elections. To press their demand for re-election, they launched a movement, which assumed such dimensions that people even started saying that democracy was not workable in Pakistan, but I genuinely feel that the survival of this country lies in democracy and democracy alone.

It is mainly due to this belief that the armed forces resisted the temptation to take-over during the recent provocative circumstances in spite of diverse massive political pressures. The armed forces have always desired and tried for the political solution to political problems. That is why the armed forces stressed on the then Government that they should reach a compromise with their political rivals without any loss of time. The Government needed time to hold these talks. The

armed forces bought them this valuable period of time by maintaining law and order in the country.

The armed forces were subjected to criticism from certain quarters for their role in aid of the civil administration, but we tolerated this criticism in the hope that it was a passing phase. We hoped that when this climate of agitational frenzy came to an end, the nation would be able to appreciate the correct and constitutional role of the armed forces and all fears would be allayed.

I have just given you a very brief outline of the situation obtaining in the country. It must be quite clear to you now that when the political leaders failed to rescue the country out of crisis, it is an inexcusable sin for the forces to sit as silent spectators. It is primarily for this reason that the army had to intervene to save the country.

I would like to point out here that I saw no prospects of a compromise between the People's Party and the PNA, because of their mutual distrust and lack of faith. It was feared that the failure of the PNA and PPP to reach a compromise would throw the country into chaos and the country would thus be plunged into a more serious crisis. This risk could not be taken in view of the larger interests of the country.

The Army had, therefore, to act as a result of which the Government of Mr. Bhutto has ceased to exist. Martial Law has been imposed through out the country. The National and Provincial Assemblies have been dissolved and the Provincial Governors and Ministers have been removed.

But the Constitution has been abrogated. Only the operation of certain parts of the Constitution has been held in abeyance. Mr. Fazal Elahi Chaudhry has very kindly consented to continue to discharge his duties as President of Pakistan as heretofore under the same constitution. I am grateful to him for this. To assist him in discharge of his national duties, a four-member Military Council has been formed. The Council consists of Chairman, Joint Chief of Staff and Chief of Staff of the Army, Navy and Air-Force.

I will discharge the duties of the Chief of the Army Staff and Chief Martial Law Administrator. Martial Law Orders and instructions, as and when required, will be issued under my orders.

I met Mr. Justice Yaqub Ali, Chief Justice of Pakistan this morning. I am grateful to him for the advice and guidance on legal matters.

I want to make it absolutely clear that neither I have any political ambitions nor does the Army want to be taken away from its profession of soldiering. I was obliged to step in to fill in the vacuum created by the political leaders. I have accepted this challenge as a true soldier of Islam. My sole aim is to organise free and fair elections which would be held in October this year.

Soon after the polls, power will be transferred to the elected representatives of the people. I give a solemn assurance that I will not deviate from this schedule. During the next three months, my total attention will be concentrated on the holding of elections and I would like to dissipate my powers and energies as Chief Martial Law Administrator on anything else.

It will not be out of place to mention here that I hold the judiciary of the country in high esteem. I will do my best to refrain from doing any thing which is likely to restrict the power of the judiciary. However, under unavoidable circumstances, if and when Martial Law Orders and Martial Law Regulations are issued, they would not be challenged in any Court of Law.

I will soon announce the modalities and detailed time table for holding of elections. I hope and expect that all political parties will co-operate with me in this behalf. A good measure of tension had been created in the country during the recent political confrontation. It had, therefore become imperative to allow time to cool off emotions. I have, therefore, banned all political activities from today till further orders. Political activities, however, will be allowed before the polls.

My dear countrymen I have expressed my real feelings and intentions, without the slightest ambiguity. I have also taken you into confidence about my future plans. I seek guidance from God Almighty and help and co-operation from my countrymen to achieve this noble mission. I also hope that the judiciary, the administration and the common man will extend whole-hearted co-operation to me.

It would be my utmost endeavor to ensure that the Martial Law Administration not only treat the people in a spirit of justice and equality but also makes them feel so. The civil administration, too, has to play an important role in this behalf. I am, therefore, pleased to announce that the Chief Justices of the Provincial High Courts have, on my request, consented to become the Acting Governors of their respective provinces.

The officers in the civil administration, who have any apprehensions about their future, are hereby assured that no victimisation will take place. However, if any public servant fails in the discharge of his duties, shows partiality or betrays the confidence of the nation, he will be given exemplary punishment. Similarly, if any citizen disturbs law and order in the country he will also be severely dealt with.

So far as foreign relations are concerned, I want to make it absolutely clear that I will honour all the agreements, commitments and contracts signed by the outgoing Government.

In the end, I would appeal to all the officers and men of the armed forces to discharge their duties justly and impartially. I hope they will deal with every situation without showing any undue lenience. I will also expect them to forgive those who have ridiculed or harassed them.

This will be in the true Islamic tradition. I call upon them to preserve their own honour and that of their profession in the discharge of their duties. I am sure they will acquit themselves of their new responsibility honourably. This will certainly enhance their prestige and position in the society.

I will like to enumerate the following few points: -

- (1) The Civil Courts will continue to discharge their duties as before;
- (2) The Federal Security Force will soon be reorganised;
- (3) Large-scale transfers of civil servants, which have been ordered recently, will be reviewed;
- (4) The organisation of the Interim Government is as follows:-
 - (a) President Fazal Elahi Chaudhry will be the Head of the State;
 - (b) The important administrative matters will be dealt with by the Military Council mentioned earlier;
 - (c) The Chief Martial Law Administrator will be the Chief Executive;
 - (d) Secretary-General Defence, Mr. Ghulam Ishaq Khan, will coordinate the functioning of all Federal Ministries and Departments;
 - (e) The Federal Secretaries will continue to head their respective Departments;
 - (f) The Chief Justice of the Provincial High Courts will be the Acting Governors of their respective provinces;
 - (g) The Provincial Administration will be headed by the Provincial Martial Law Administrators and the Provincial Secretaries will continue to hold charge of their respective Departments.

(5) I sincerely desire:

- (a) The civil administration to discharge its duties without any fear or apprehension;
- (b) The police to develop a spirit of selfless service;
- (c) The Press to live up to its claims as the advocate of "Freedom of the Press" without violating the "Code of Conduct";
- (d) The nation to develop a sense of sanity and reasonableness;
- (e) The life, honour and property of every citizen to be safe;
- (f) Peace and tranquility to prevail and 'goondaism' to come to an end ; and
- (g) Educational institutions not to become political arenas.

(6) I want to assure you that the frontiers of Pakistan are fully guarded and the armed forces are there to discharge their duties.

(7) To conclude, I must say that the spirit of Islam, demonstrated during the recent movement, was commendable. It proves that Pakistan which was created in the name of Islam will continue to survive only if it sticks to Islam. That is why; I consider the introduction of Islamic system as an essential prerequisite for the country.

Comments on His Address

I have already discussed in detail that Zia was playing a game with the nation to perpetuate his rule. When he was the Chief of the Army, he pretended as if he knew nothing about politics. The subsequent events proved otherwise to the utter surprise of so many. He planned well, with due care and caution, to seize power behind the back of Bhutto but in a disguised form. The premature date of elections and subsequent rigging on a massive scale by Bhutto provided a golden opportunity to Zia to come out in his true colour. The agitation was launched by the political parties and soon it was converted into Nizam-i-Mustafa. The situation went out of control of Bhutto. Zia took full advantage of the situation that enabled him to capitalise his ultimate objective of placing a crown on his head.

Master of Maneuverings

Zia on the question of elections took a summersault. The elections were not held. The promise of holding elections within 90 days was a sheer bluff. He pleaded the cause of Nizam-i-Mustafa to take those political parties into confidence who were actively participating in the movement. Zia-ul-Haq in his first address to the nation emphasized categorically that Pakistan was created in the name of Islam, Islamic teachings and Islamic system alone would be the source of their salvation.

Aftermath of Take-over

Zia in order to stabilize his own position took refuge behind the Islamic Ideology of Pakistan. The reason was obvious. The rightist parties were in the forefront in the movement of Nizam-i-Mustafa. He picked up their slogan, being the right weapon to be used for his own personal aggrandisement. He was neither interested in Nizam-i-Mustafa nor was he interested in holding the elections. His sole object was to have a smooth sailing in his own pursuit, designed to practice deception upon the people by assuring them that Nizam-i-Mustafa was the only solution to the problem. He laid so much emphasis on Nizam-i-Mustafa that many top ranking leaders of the rightist groups went to the extent of saying that if Zia was going to materialise this dream, why should there be any agitation or demand for Anglo-Saxon democracy. The result was that they completely deviated from their original demands and many of them joined Zia as Central Ministers of his Cabinet. The leaders of the leftist groups declined to accept his offer. That was how Zia fortified his position as a Military dictator.

Zia, during his tenure of rule, mutilated the norms of superior judiciary including the Supreme Court. He also mutilated the Constitution of 1973 for his own political ends by making such amendments that enabled him to have a free hand to act in the administration of the State as a despot. In addition, he introduced a culture of extremism, based on religion; of drugs and weapons. He brought

Ulema and Mashiakh in the forefront as main players to play their part to support him in his endeavors to satisfy the innocent people of Pakistan that he was quite sincere in his mission. Now, I proceed to discuss the historical events that took place during his despotic regime. The assassination of Bhutto at his behest has already been recorded by me in detail.

BEGUM NUSRAT BHUTTO CASE (1977)

Petition of Begum Nusrat Bhutto

Begum Nusrat Bhutto filed a petition under Article 184 (3) of the 1973 Constitution of Pakistan, challenging the detention of her husband, Zulfikar Ali Bhutto, deposed Prime Minister of Pakistan and ten other leaders of the People's Party under Martial Law Order No.12 of 1977. The matter was heard by Anwarul Haq, C.J, Waheeduddin Ahmad, Muhammad Afzal Cheema, Muhammad Akram, Dorab Patel, Qaisar Khan, Muhammad Haleem, G.Safdar Shah and Nasim Hasan Shah, JJ. The petition raised several questions of far-reaching constitutional importance. The Martial law that was imposed upon the people of Pakistan was a third one. This calamity was inflicted upon us despite the fact that Article 6 had been incorporated in the Constitution of Pakistan under which the proclamation of Martial Law dated 5th July 1977, was a flagrant violation of human dignity. This flagrant violation was a serious offence punishable with death. The Article 6 in the Constitution was a clear safeguard against future Martial Law, yet it came and engulfed the whole nation. I deem it

necessary to reproduce this Article for the sake of our reader. It is reproduced as under: -

Article 6

‘Any person who abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subvert the Constitution by use of force or show of force or by other unconstitutional means shall be guilty of high treason’.

Mr. Yahya Bakhtiar, learned counsel for Begum Nusrat Bhutto, in the course of his argument, relied mainly on the Full Court Judgment of this court in the case of Asma Jilani and Article 6 of the Constitution. The decision in Begum Nusrat Bhutto’s case clearly demonstrates the sharp decline of our judiciary, as the finding of this Court comes in direct conflict with the full Court judgment in the case of Asma Jilani, decided in 1972. The minute study of two important cases of constitutional importance shows a sharp division amongst the Supreme Court judges and a complete deviation from their earlier views that they had taken in the case of Asma Jilani.

Justice Munir’s Theory

In the case of Asma Jilani, this very Hon’ble Court – the Court of ultimate jurisdiction, had in clear terms rejected Justice Munir’s theory of Law of Necessity, as enunciated by him, in the case of Tamizuddin Khan, holding that the Law of Necessity based on the maxims

salus populi suprema lex (the welfare of the people is the supreme law) and salus republicae suprema lex (the safety of the state is the supreme law) could not be applied to validate those laws which had been declared invalid. In this context, I would like to repeat the observation of Hamoodur Rehman C.J., on the Law of Necessity, the object being to show a sharp division between the two Chief Justices on such a constitutional issue of vital importance. I am going to quote both the versions of the learned Chief Justices. At this stage, it will suffice the purpose if I quote Hamoodur Rehman C.J., on this issue. It is quoted as under: -

“I too am of the opinion that recourse has to be taken to the doctrine of necessity where the ignoring of it would result in disastrous consequences to the body politic and upset the social order itself but I respectfully beg to disagree with the view that this is a doctrine for validating the illegal acts of usurpers. In my humble opinion, this doctrine can be invoked in aid only after the Court has come to the conclusion that the acts of the usurpers were illegal and illegitimate. It is only then that the question arises as to how many of his acts, legislative or otherwise, should be condoned or maintained, notwithstanding their illegality in the wider public interest. I would call this a principle of condonation and not legitimization”.¹

Justice Munir's decision in the case of Dosso was another calamity that befell the nation. Justice Munir, because of his intimate relationship with Ayub Khan, gave a legal cover to Martial Law imposed upon the people of this country and legitimised his despotic regime, taking the

¹ PLD Supreme Court 1972, pp. 206&207

cover of Kelsen's doctrine. Chief Justice Hamoodur Rehman in the case of Asma Jilani expressed his total disagreement with Chief Justice Munir, holding that it was a case of misapplication of Kelsen's doctrine of legal positivism. He clearly observed that Kelsen's theory was not sacrosanct – it was never accepted universally. The facts and circumstances of Pakistan were totally different. I am also quite clear in my mind that there was absolutely no justification to apply the theory of legal positivism to legalise vis-à-vis constitutionalise a Martial Law, forcibly imposed by usurpers for their own selfish and political ends.

In the present case also, the crux of the matter was the imposition of Martial Law by Ziaul Haq. Chief Justice Anwarul Haq has authored the leading judgement. His judgment manifestly shows that he was all out in support of Ziaul Haq's Martial Law. That was the reason that he ignored the full court judgment in the case of Asma Jilani and went back to the Law of Necessity, as propounded by Chief Justice Munir in the case of Maulvi Tamizuddin Khan as well as in the case of Dosso.

Article 6 of the Constitution

I see that the full court judgment of this court in this case is silent on Article 6 of the Constitution. There are no legal comments on this important piece of constitutional enactment particularly when there is a clear finding that the Constitution of 1973 was still holding the ground as the

supreme law of the land. The silence on Article 6 of the Constitution is quite meaningful. The seizure of power by usurpers was the main issue. How the Martial law brought about by Ziaul Haq and his henchmen could be legalised in the face of Article 6 of the Constitution? I will take up this point at a later stage. Here, I am of the view that the Laws (Continuance in Force) Order, 1977 be quoted verbatim. It is quoted as under: -

“In pursuance of the Proclamation of the Fifth day of July 1977 and in exercise of all powers enabling him in that behalf, the Chief Martial Law Administrator is pleased to make and promulgate the following Order:

1. -(1) This Order may be called the Laws (Continuance in Force) Order, 1977.
 - (2) It extends to whole of Pakistan.
 - (3) It shall come into force at once.

2. -(1) Notwithstanding the abeyance of the provisions of the Constitution of the Islamic Republic of Pakistan hereinafter referred to as the Constitution, Pakistan shall, subject to this Order and any order made by the President and any regulation made by the Chief Martial Law Administrator, be governed as nearly as may be in accordance with the Constitution.
 - (2) Subject as aforesaid, all Courts in existence immediately before the commencement of this Order shall continue to function and to exercise their respective powers and jurisdictions:

Provided that the Supreme Court or a High Court shall not have the power to make any order of the nature mentioned in Article 199 of the Constitution against the Chief Martial Law Administrator or a Martial Law

Administrator or any person exercising power or jurisdiction under the authority of either.

- (3) The Fundamental Rights conferred by Chapter I of part II of the Constitution, and all proceedings pending in any Court, in so far as they are for the enforcement of any of those rights shall stand suspended.
3. —(1) the President shall act on and in accordance with the advice of the Martial Law Administrator.
- (2) The Governor of a Province shall act on, and in accordance with, the advice of the Martial Law Administrator appointed by the Chief Martial Law Administrator for the Province.
4. —(1) No Court, tribunal or other authority shall call or permit to be called in question the proclamation of the Fifth day of July, 1977, or any Order or Ordinance made in pursuance thereof any Martial Law Regulation or Martial Law Order.
- (2) No judgment, decree, writ, order or process whatsoever shall be made or issued by a Court or tribunal against the Chief Martial Law Administrator or any Martial Law Authority exercising powers or jurisdiction under the authority of the Chief Martial Law Administrator.
5. —(1) Notwithstanding the abeyance of the provisions of the Constitution, but subject to any order of the President or regulation made by the Chief Martial Law Administrator, all laws, other than the Constitution, and all Ordinances, Orders-in-Council, Orders made by the President, Rules, by-laws, regulations, notifications, and other legal instruments in Pakistan or any part thereof, or having extra-territorial validity shall, so far as may be and with such adaptation as the President may see fit to make,

continue in force until altered, amended or repealed by competent authority.

- (2) In clause (1) "in force", in relation to any law, means having effect as law whether or not the law has been brought into operation.
6. Subject to Clause (2) of Article 3, the powers of a Governor shall be those which he would have had the Federal Government directed him to assume on its behalf all the functions of the Government of the province under the provisions of Article 232 of the Constitution.
7. —(1) An ordinance promulgated by the President or by the Governor of a province shall not be subject to the limitation as to its duration prescribed in the Constitution.
- (2) The provisions of Clause (1) shall also apply to an Ordinance which was in force immediately before the commencement of this Order.
8. All persons who, immediately before the commencement of this Order, were in the service of Pakistan as defined in Article 260 of the Constitution and those persons who immediately before such commencement were in office as Judge of the Supreme Court or a High Court or Auditor-General, shall continue in the said service on the same terms and conditions and shall enjoy the same privileges, if any.
9. Any provision in any law, providing for the reference of a detention order to a Review Board shall be of no effect.
10. The Proclamation of Emergency referred to in Article 280 of the Constitution, as in force immediately before the commencement of this Order, shall continue in force".²

I have quoted the Laws (Continuance in Force) Order, 1977 in extenso. I have already pointed out that, according to Chief Justice Anwarul Haq, the Constitution

² PLD Supreme Court 1977 pp. 718-719

of 1973 was still the Supreme Law of the land. In view of that finding, it was expedient in the interest of justice to justify as to why Article 6 of the Constitution of Pakistan was not discussed. The later part of his finding clearly shows that in spite of the promulgation of Martial Law by Ziaul Haq, the Apex Court was competent to have the power of judicial review to judge the validity of any act or action of Martial Law Authorities, if challenged. He further held that all superior Courts shall have the same power of judicial review. In spite of this finding of Chief Justice Anwarul Haq and his companion judges, they did not take the trouble of attaching any importance to Article 6 of the Constitution. Instead of that, the Doctrine of Necessity, as propounded by Kelsen, became the subject matter of discussion. It may be recalled that Chief Justice Hamoodur Rehman in clear terms had held in the case of Asma Jialni that Kelsen's theory of the Law of Necessity could not be applied to give a legal cover to Martial Law. If it was done, he further held, it would be the case of misapplication particularly in the face of factual State affairs of the country.

The Hon'ble judges in this case have applied the doctrine of Kelsen in a very limited sense, yet it is still there. It is there with reservations. Justice Nasim Hassan Shah admits in this judgement that in the facts and circumstances of the situation, as confronted, Kelsen's theory dose not appear to be strictly applicable to the change-over that occurred on 5th July, 1977.

How ever, it is necessary that the views of Justice Nasim Hassan Shah be quoted on the Law of Necessity. His own views in terms of the doctrine of Kelsen are quoted verbatim: -

“I may now briefly comment upon the stand taken up by Mr. Brohi on this point. According to him the legal effect of the intervention was to be adjudged with reference to the new Legal Order, namely, the Laws (Continuance in Force) Order, 1977, and not the old Legal Order, namely the Constitution of 1973, because, the aforesaid Order had been effectively replaced by the new Legal Order, the efficacy of the change being the basis of its validity. In this connection Mr. Brohi relied upon the doctrine of Kelsen enunciated in his works on the Pure Theory of Law and the General Theory of Law and State. The views of Kelsen advocated by him in these works were explained to us by Mr. Brohi in some detail. However, in the facts and circumstances of our situation the doctrines propounded by Kelsen do not appear to be strictly applicable as the change-over which occurred on the 5th July 1977 cannot qualify as a “revolution” in Kelsenian terms. Although the Armed Forces are undoubtedly in effective control of the administration, it is neither their intention nor indeed have they established a new Legal Order in super session of the existing Legal Order. The Constitution of 1973 remains the supreme law of the land, subject to the condition that certain parts thereof have been held in abeyance. The President of Pakistan and the superior judiciary continue to function under the Constitution, subject to any limitations placed on their jurisdiction. The change is only in the nature of a constitutional deviation rather than the destruction of one Legal Order and its replacement by another. Even otherwise, the doctrines of Kelsen cannot be accepted in their entirety by Courts of Laws. Whereas for Kelsen the efficacy of a revolution creates a new reality of which the pure science of law must take account for the Courts involved in practical decisions the efficacy of a revolution creates a new legal situation which they must take note of and proceed to decide the matter as raised before them by the contesting parties. In doing so they will have to take into account not only the

efficacy of the change, but other values, such as the desirability of maintenance of peace, order, justice or good Government, to fill the vacuum in law and to avoid chaos, presumption in favour of the old regime because of its original legal status or against it because of its record of unconstitutional actions and conduct. In short, the responsibility of the Judge is not to the "objective reality" that exists for the academic observer but to the peace, order, justice, morality and good government. In fact, for Judges involved in practical decisions acceptance of the changed Legal Order is not so much on account of its efficacy as such but rather on necessity in the sense of "ID QUOD ALIAS NON EST LICITUM, NECESSITAS LICITUM FACIT" (that which otherwise is not lawful necessity makes lawful)".³

Application of Kelsen's Doctrine

The law of necessity in terms of Kelsen's doctrine has been discussed at length in the case of Asma Jilani as well as in the present case. Hence, it is necessary on my part to define his theory and its application to the facts and circumstances of the case. Elaborately speaking, Kelsen's doctrine does not come into play to give a legal cover to a Martial Law or any kind of dictatorial regime, as has been persistently done in Pakistan. It has been rightly held by Chief Justice Hamoodur Rehman in the case of Asma Jilani that the doctrine of Kelsen in terms of "legal positivism" as propounded by him, was not correctly interpreted by Chief Justice Munir in the case of Dosso. It was always used in favour of usurpers to legalise their illegal acts. The application of Kelsen's theory may be summarised as under: -

³ PLD Supreme Court 1977 p.763

- (1) It speaks of International Law.
- (2) It does not apply to Municipal Law.
- (3) It applies when the fabric of social order of the society has collapsed or is likely to collapse.
- (4) It applies when ignoring such national calamity would cause disastrous consequences to the body politic.
- (5) It applies when there is a threat to the integrity of a country.
- (6) It applies when there is a war between the two countries.
- (7) It is not used to legitimise a regime of a despot who subjugates the people to perpetuate his own rule.
- (8) Kelsen's theory is not universally accepted.

Sharifuddin Pirzada Takes

U Turn on Kelsen's Theory

It has already been recorded by me in the previous chapter that Mr. Sharifuddin Pirzada had strongly assailed Kelsen's doctrine in the case of Asma Jilani. At that time when he did it, usurpers were not in the field. They were no longer the monarchs. They had gone back to their pavilions where they ought to have been. The sun of Martial Law had set in. The scepters of self-imposed rulers had evaporated in the air. That was the reason that Mr. Sharifuddin Pirzada pulled his muscles and spoke freely in favour of freedom of expression. When he came under the umbrella of Martial Law and became one of the beneficiaries, he was a different person as a lawyer. He completely changed his

stand on Kelsen's theory. Anwarul Haq C.J., sums up his argument on Kelsen's theory with reference to two well-known cases of Dosso and Asma Jilani in the following words: -

"Mr. Sharifuddin Pirzada, the learned Attorney - General, appearing as the Law Officer of the Court, has supported Mr. Brohi's submission that the change which took place in Pakistan on the 5th of July 1977 did not amount to usurpation of State power by the Chief of the Army Staff, but was in fact intended to oust the usurper who had illegally assumed power as a result of massive rigging of the elections of the 7th of March 1977. It was also intended to displace the illegally constituted legislative assemblies both at the Center and in the Provinces, as majority of the members had succeeded in the elections by corrupt and criminal practices. Mr. Pirzada accordingly contends that the present situation is not governed by the dicta of this Court in the two well-known cases of Dosso and Asma Jilani for the reason that the circumstances here are radically different, in that in those cases the change brought about by the military intervention was of a permanent nature, whereas the avowed purpose of the present Chief Martial Law Administrator is to remain in power only for a limited and temporary period so as to hold free and fair elections for the restoration of democratic institutions.

Mr. Sharifuddin Pirzada next submits that although he would generally support Mr. Brohi's submissions as to the legal character of an effective revolution, yet he does not wish to adopt a position contrary to the one he took up while appearing as *amicus curiae* in Asma Jilani's case, regarding the validity and applicability of Kelsen's pure theory of law relating to the meta-legal character of the change and the birth of a new *grundnorm*. He submits that there are several renowned jurists who do not fully subscribe to Kelsen's view and consider that effectualness alone, to the exclusion of all considerations of morality and justice cannot be made a condition of the validity of the new Legal Order. The learned counsel, however, submits that the circumstances culminating

in the imposition of Martial Law on the 5th of July 1977 fully attract the doctrine of State necessity and of *salus populi suprema lex*, with the result that the action taken by the Chief Martial Law Administrator must be regarded as valid, and the Laws (Continuance in Force) Order, 1977, must be treated as being a supra-Constitutional instrument, now regulating the governance of the country. The learned Attorney-General contends that the doctrine of necessity is not only a part of the legal systems of several European countries, including Britain, but is also recognised by the Holy Qur'an. He contends that consequently all actions taken by the Chief Martial Law Administrator to meet the exigencies of the situation and prepare the country for future elections with a view to the restoration of democratic institutions must be accepted by the Courts as valid, and there can be no question of condonation, which concept can apply only in the case of the acts of a usurper. On this view of the matter, Mr. Sharifuddin Pirzada submits that the Court cannot grant any relief to the detenus, under Article 184 (3) of the Constitution, as the Fundamental Rights stand suspended by virtue of Clause (3) of Article 2 of the Laws (Continuance in Force) Order, 1977".⁴

Brohi and Sharifuddin Pirzada on Oath of Allegiance

"Mr. Brohi as well as Mr. Sharifuddin Pirzada was also asked to address the Court on the possible effect and implications of the new oath of office administered to the Judges of the Supreme Court and the High Courts after the imposition of Martial Law. They both stated that, in their view, the new oath has not in any manner restricted the independence of the superior judiciary, nor affected their obligation to perform their judicial functions according to law; it only indicates that

⁴ PLD Supreme Court 1977 pp. 673-674

the superior judiciary, like the rest of the country, has accepted the fact, which is even otherwise also evident, that on the 5th of July 1977, a radical transformation took place in the pre-existing Legal Order. Both the learned counsel have agreed, and Mr. Yahya Bakhtiar, learned counsel for the petitioner, joins them, that the taking of the fresh oath by the Judges of this Court does not in any way preclude them from examining the question of the validity of the new Legal Order and decide the same in accordance with their conscience and the law'.⁵

When Mr. Sharifuddin Pirzada deviated from his previous stand in the case of Asma Jilani, he supported the usurpation of power by Chief of the Army Staff, asserting that Chief of the Army Staff was not a usurper, but a savior of Pakistan, as he had ousted a usurper who had illegally assumed power as a result of massive rigging in the elections. Before making this statement, Mr. Sharifuddin ought to have searched his heart, as he knew that when the elections of 7th March 1977, were challenged by the opposition parties, Bhutto came on the negotiating table with the leaders of P.N.A. Finally, the dialogue ended in a compromise. Bhutto agreed to hold fresh elections at the centre and in the provinces. According to Prof. Ghafoor Ahmad, both the parties agreed in totality on all points. On the 4th of July, 1977 at about 11 p.m. Bhutto held a press conference, declaring in clear words that he was going to sign the accord tomorrow. Hardly one hour had passed after this announcement, when our country was hit by Martial Law. It was exactly 12 o'clock that Ziaul Haq seized power, declared Martial Law and assumed the office of Chief Martial Law Administrator. The proclamation of Martial Law was of 5th of July, 1977. I have already dealt

⁵ PLD Supreme Court 1977 p 674

with this aspect of our calamity in minute detail in the previous chapters.

I have reiterated and would like to reiterate again that a Military man, after seizing power and taking-over the country as absolute master, does not step down, unless he is killed or forced to abdicate in disgrace. Historically speaking, this fact is universally true through out the whole world. It is the lust of power that shows him the path to perpetuate his rule for his own pomp, show and glory. Mr. Sharifuddin Pirzada was arguing his case and giving emphasis that Zia had taken-over the country as Chief Martial Law Administrator to remain in power for a limited period so as to hold free and fair elections for the restoration of democratic institutions. In view of his this submission and assurance to the Supreme Court, I pose the following questions: -

1. Did Zia remain in power for a limited period?
2. Did he hold elections within 90 days, as he promised?
3. Did he or did he not mutilate the entire democratic structure of the State during his rule?
4. Did he ever come forward to face the people to get himself elected as President of Pakistan?
5. Is it not a fact that he assumed the status of President by holding a referendum?
6. Is it not a fact that the referendum held by him was a farce and a fraud?

7. Did he not commit an offence of high treason, punishable with death, by violating Article 6 of the Constitution.

I am positive that Ziaul Haq's misdeeds are well known to the whole world and Mr. Sharifuddin Pirzada is one of the eye witnesses to his misdeeds, as we are. The seeds of misdeeds sown by him left the country bleeding and bleeding still continues. Anwarul Haq C.J., accepted the arguments, advanced by Mr. A.K. Brohi and Mr. Sharifuddin Pirzada, justifying the imposition of Martial Law by Ziaul Haq in terms of the Law of Necessity, as propounded by Chief Justice Munir in Reference No. 1 by H.E. Governor-General.

Chief Justice Anwarul Haq observes as under: -

“A review of the concept of the Law of necessity, as recognized in various jurisdictions, clearly confirms the statement made in this behalf by Muhammad Munir, C.J. in reference by H.E. Governor-General (1) to the effect that an act which would otherwise be illegal becomes legal if it is done bona fide under the stress of necessity, the necessity being referable to an intention to preserve the Constitution, the State or the society and to prevent it from dissolution. The principle has been reiterated by the Supreme Court in Asma Jilani's case with the difference that where the Court is dealing with the acts of a usurper, such acts may be condoned and not validated by the application of the law of necessity. It seems to me, therefore, that on facts, of which we have taken judicial notice, namely, that the imposition of Martial Law was impelled by high considerations of State necessity and welfare of the people, the extra-constitutional step taken by the Chief of the Army Staff to overthrow the Government of Mr. Z.A. Bhutto as well as the Provincial Governments and to

dissolve the Federal and the Provincial Legislatures stands validated in accordance with the doctrine of necessity".⁶

Finding of Justice Anwarul Haq

Anwarul Haq C.J., analyses the legal position and comes to his conclusion which emerges as under: -

- (i) That the 1973 Constitution still remains the supreme law of the land subject to the condition that certain parts thereof have been held in abeyance on account of State necessity;
- (ii) That the President of Pakistan and the superior Courts continue to function under the Constitution. The mere fact that the Judges of the superior Courts have taken a new oath after the Proclamation of Martial Law, does not in any manner derogate from this position, as the Courts had been originally established under the 1973 Constitution, and have continued in their functions in spite of the proclamation of Martial Law;
- (iii) That the Chief Martial Law Administrator, having validly assumed power by means of an extra-Constitutional step, in the interest of the State and for the welfare of the people, is entitled to perform all such acts and promulgate all legislative measures which have been consistently recognised by judicial authorities as falling within the scope of the law of necessity, namely: -

 - (a) All acts or legislative measures which are in accordance with, or could have been made

⁶ PLD Supreme Court 1977 p. 712

under the 1973 Constitution, including the power to amend it;

- (b) All act which tend to advance or promote the good of the people;
- (c) All acts required to be done for the ordinary orderly running of the State; and
- (d) All such measures as would establish or lead to the establishment of the declared objectives of the proclamation of Martial Law, namely, restoration of law and order, and normalcy in the country, and the earliest possible holding of free and fair elections for the purpose of restoration of democratic institutions under the 1973 Constitution;
- (iv) That these acts, or any of them, may be performed or carried out by means of presidential Orders, Ordinances, Martial Law Regulations, or Orders, as the occasion may require; and
- (v) That the superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Martial Law Authorities, if challenged, in the light of the principles underlying the law of necessity as stated above. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any Martial Law Regulation or Order, Presidential Order or Ordinance".⁷

Chief Justice Anwarul Haq proceeds further and holds;

⁷ PLD Supreme Court 1977 p. 715

“The final Position as emerging from this somewhat lengthy discussion of the various questions arising in this case may briefly be summed up as follows: -

- (1) That the legal character and validity of any abrupt political change, brought about in a manner not contemplated by the pre-existing Constitution or Legal Order, cannot be judged by the sole criterion of its success or effectiveness, as contemplated by Kelsen's pure theory of law. Not only has this theory not been universally accepted, or applied, it is also open to serious criticism on the ground that, by making effectiveness of the political change as the sole condition or criterion of its legality, it excludes from consideration sociological factors or morality and justice which contribute to the acceptance or effectiveness of the new Legal Order. The legal consequences of such a change must, therefore, be determined by a consideration of the total milieu in which the change is brought about, including the motivation of those responsible for the change, and the extent to which the old Legal Order is sought to be preserved or suppressed;
- (2) That in any case the theory of revolutionary legality can have no application or relevance to a situation where the breach of legal continuity is of a purely temporary nature and for a specified limited purpose. Such a phenomenon can more appropriately be described as one of constitutional deviation rather than of revolution;
- (3) That examined in this light, the Proclamation of Martial Law on the 5th of July 1977, appears to be an extra-Constitutional step necessitated by the complete break-down and erosion of the constitutional and moral authority of the Government of Mr. Z.A. Bhutto, as a result of the unprecedented protest movement launched by the Pakistan National Alliance against the alleged massive rigging of elections to the National Assembly, held on the 7th of March 1977. It was a situation for which the Constitution provided no solution, and the Armed Forces had, therefore, to intervene to save the country from further chaos and bloodshed, to safeguard its integrity

and sovereignty, and to separate the warring factions which had brought the country to the brink of disaster;

- (4) That the imposition of Martial Law, therefore, stands validated on the doctrine of necessity, and the Chief Martial Law Administrator is entitled to perform all such acts and promulgate all legislative measures which have been consistently recognised by judicial authorities as falling within the scope of the law of necessity;
- (5) That it has also become clear from a review of the events resulting in the culmination of Martial Law, and the declaration of intent made by the Chief Martial Law Administrator, that the 1973 Constitution still remains the supreme law, subject to the condition that certain parts thereof have been held in abeyance on account of State necessity; and the President of Pakistan as well as the superior Courts continue to function under this Constitution. In other words, this is not a case where the old Legal Order has been completely suppressed or destroyed, but merely a case of constitutional deviation for a temporary period and for a specified and limited objective, namely, the restoration of law and order and normalcy in the county, and the earliest possible holding of free and fair elections for the purpose of the restoration of democratic institutions under the 1973 Constitution;
- (6) That, accordingly, the superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Martial Law Authorities if challenged in the light of the principles underlying the law of necessity as set out in this judgement. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding any thing to the contrary contained in any Martial Law Regulation or Order, Presidential Order or Ordinance; and
- (7) That the provisions contained in clause (3) of Article 2 of the Laws (Continuance in Force) Order, 1977, suspending the right to enforce Fundamental Rights are valid for the reason that the situation prevailing in the country was obviously of such a nature as to amount to an Emergency contemplated by

clause (1) of Article 232 of the Constitution, and the right to enforce Fundamental Rights could, therefore, be legitimately suspended by an order of the kind which could have been made under clause (2) of Article 233 of the Constitution”.⁸

“As a result, the present petition fails and is hereby dismissed. However, it will be for the detenus, if so advised, to move the High Courts concerned under Article 199 of the Constitution”.

Judgement was Manipulated

The other companion judges concurred with the judgment by Anwarul Haq C.J., and endorsed his views for his lucid and able exposition of various complicated and difficult constitutional issues involved in the case. I have had the privilege of talking to many judges of the Supreme Court including Justice Dorab Patel and Justice G. Safdar Shah. It may be recalled that Justice Dorab Patel and Justice G. Safdar Shah were on the bench as companion judges of Anwarul Haq C.J., in the case of Begum Nusrat Bhutto. Justice Safdar Shah was my class-fellow. He and I had our Chambers on the same floor and in the same building. Justice Dorab Patel was my senior colleague. The two judges, on their own initiative told me that when the proposed judgement written by Chief Justice Anwarul Haq was circulated amongst the judges for their signatures, the power to amend the Constitution of 1973 had not been

⁸ PLD Supreme Court 1977, pp. 721-22

assigned to General Zia. I enquired into the matter as President of Sindh High Court Bar Association and found unanimity on the point of manipulation in the Judgement whereby the authority was given to the Chief Martial Law Administrator to amend the Constitution. The minute appraisal of the judgement delivered by Chief Justice Anwarul Haq goes in support of this important addition which was made on the back of other judges. The disputed page bears only one signature of Chief Justice Anwarul Haq.

Manipulation Apparent on the Face of Record

The power to amend the Constitution, conferred on the Chief Martial Law Administrator, does not find place any where in the judgement except at one place at page 716. It does not find place even in the concluding para of the judgement of Chief Justice Anwarul Haq. A concluding para of the judgement is the crux of finding. This para of the Court of ultimate jurisdiction becomes the law of the land. The observations at other pages come in aid of the final conclusion of the case. How the power to amend the constitution to General Zia could be given to him when Chief Justice Anwarul Haq had held in clear words that the Constitution of 1973 shall remain the supreme law and superior courts shall continue to have the power of judicial review to judge the validity of any act or action of the Martial Law Authorities if challenged in the light of the principles underlying the law of necessity, as set out in this judgement. It is indeed very surprising and does not stand to reason. Did he not provide the Chief Martial Law

Administrator to take away all from him including the power of judicial review? In order to establish manipulation, it is necessary that the wordings of power of amendment, as appearing at p. 716 be underlined and quoted, as appearing in the judgement of Chief Justice Anwarul Haq. It will be noticed that a similar para in the same language appears in the concluding para of his judgement but the power to amend the constitution is not there.

Let us have a comparative study in between the lines of clause (iii) (a) at page 716, relating to the power to amend the Constitution and a similar language appearing subsequently in terms of clause (iv) at page 722, giving all powers to the Chief Martial Law Administrator to promulgate all legislative powers minus the power to amend the Constitution. This paragraph is a part of the judgement where various questions arising in this case have been summed up, but the expression 'power to amend the Constitution' is conspicuously absent therein. The relevant paragraphs appearing at pages 716 & 722 are quoted verbatim to see whether or not the power to amend the constitution was added later on. He refers to the Chief Martial Law Administrator and says that he shall have the power to enact: -

“(iii) (a) All acts or legislative measures which are in accordance with, or could have been made under the 1973 Constitution, including the power to amend it”.⁹

⁹ PLD Supreme Court 1977, p. 716

(iv) That the imposition of Martial Law, therefore, stands validated on the doctrine of necessity, and the Chief Martial Law Administrator is entitled to perform all such acts and promulgate all legislative measures which have been consistently recognised by judicial authorities as falling within the scope of the law of necessity".¹⁰

Here, I leave the point of manipulation for the reader to judge and decide as to what is the whole truth.

Zia Hits Back

In order to nullify the power of judicial review, as envisaged in the judgement of Justice Anwarul Haq, Zia amended the Constitution of Pakistan and came out with Article 212-A wherein it was clearly laid down that no court including the Supreme Court shall have jurisdiction to make any order or entertain any proceedings in respect of any matter to which the jurisdiction of Military Court or tribunal extends and of which cognizance has been taken by or which has been transferred to the Military Court. This amendment came into effect by virtue of Constitution (Second Amendment) Order, 1979. The whole world will be shocked to know that a person no less than Chief Justice Anwarul Haq was the author of this piece of legislation who had retained the power of judicial review in respect of all matters decided or dealt with by the Martial Law Authorities.

¹⁰ PLD Supreme Court 1977, p. 722

ZIA'S CONSTITUTIONAL MECHANISM

Mr. Justice (Retd.) Dorab F. Patel, distinguished Speakers and learned Members of the Bar,

I consider it a great privilege to extend a very warm welcome to you all on this historic occasion. The occasion has become historic because of the participation of a renowned jurist like Mr. Dorab F. Patel, the former Acting Chief Justice of Pakistan, and eminent lawyers like Mr. Khalid M. Ishaque, Mr. Mohammed Ali Sayeed and Mr. Naseem A. Farooqi, former Presidents of this Association. The exemplary contributions of Mr. Justice Dorab F. Patel for the survival of our Institution shall go down in the annals of our history and serve as a torch – bearer for our succeeding generations.

A seminar was held on 11th April, 1985, under the auspices of the High Court Bar Association, Karachi, to discuss the Revival of the Constitution of 1973 Order, 1985. Presidential address was presented on the occasion by Mr. Syed Sami Ahmad in his capacity as President of Sindh High Court Bar Association, Karachi. Mr. Justice (Retd.) Dorab F. Patel was the Guest of Honour. It was pointed out that the Constitutional Amendments brought about by General Mohammed Ziaul Haq aimed at defacing the Constitution of 1973 and fortifying his hands as a dictator. Later, this address was published in the shape of a booklet. I had sent a copy of this address to General Mohammed Ziaul Haq, but received no reply.

His supreme sacrifice for the cause of judiciary and its noble objectives has made him immortal in the history of our judiciary. This fact is undenied and undeniable that, by virtue of his extra-ordinary courage and sacrifice of unprecedented nature for the cause of human dignity, he has established his sovereignty over our hearts as well as over the hearts of our posterity. He is already enshrined in our hearts and shall remain so for all times to come. We consider ourselves very fortunate that this gem of humanity who has become the pride of the nation is the product of our Association. His name on the Roll of Honour of this Association shall go on reminding the coming generations of lawyers that he was the person who preferred to break than to bend.

Ladies and Gentlemen, the subject chosen for today's discussion is the Revival of the Constitution of 1973 Order, 1985. We have assembled here this evening to analyse this piece of Constitutional Instrument and see as to how far and to what extent, the Constitution of 1973 has been restored. Before we give our verdict on the subject, it is necessary that we should examine some of its salient features. The salient features are: -

1. That, in terms of Article 2A, the principles and provisions set out in the Objectives Resolution reproduced in the Annex have been made substantive part of the Constitution and shall have effect accordingly.

Taking the face value of Article 2A of the Constitution, some very pertinent questions do arise: - whether the principles and provisions, as set out in the

Objectives Resolution, are justiciable? Will a petition, challenging the continuation of Martial Law, being contrary and derogatory to the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, be competent? Will a petition, challenging the promulgation of the Revival of the Constitution of 1973 Order, 1985, by Gen. Mohammed Ziaul Haq, be competent and maintainable on the ground that his Constitutional Instrument of March 2, 1985 is a flagrant violation of the principles and provisions, set out in the Objectives Resolution? Whether or not our Superior Courts, if approached, will hold and declare that, reliefs, as sought, cannot be granted in view of the provisions of the Provisional Constitution Order, 1981 and Article 270-A of the Constitution of 1973?

2. That, after Article 41, Clause (6), the following new clause has been inserted which reads as follows: -

“Notwithstanding anything contained in this Article or Article 43 or any other Article of the Constitution, or any other law, Gen. Mohammed Ziaul Haq, in consequence of the result of the referendum, held on the 19th day of December, 1984, shall become the President of Pakistan on the day of the first meeting of Majilis-e-Shoora (Parliament) in joint sitting summoned after the elections to the Houses of Majilis-e-Shoora (Parliament) and shall hold office for a term of five years from that day; and Article 44 and other provisions of the Constitution shall apply accordingly”.

By virtue of this clause, Gen. Mohammed Ziaul Haq has imposed himself on the nation as President of Pakistan. It is important to observe that in spite of self-imposition, Gen. Mohammed Ziaul Haq did not consider it necessary to take the mandate from the Parliament regarding his assumption of office as President of Pakistan.

3. That, the original Article 48 of the Constitution of 1973 has been substituted in totality by the present Article 48 of the Constitution. This Article i.e. the Article 48 of the Constitution, as it stands today, duly fortified by the provisions of the Provisional Constitution Order, 1981, makes Gen. Mohammed Ziaul Haq all powerful and the absolute dictator of this country. In terms of Article 48, the President i.e. Gen. Mohammed Ziaul Haq shall always be free to use his veto power in the guise of his so-called discretion in respect of any matter which is placed before him by the Prime Minister or his Cabinet. While exercising his veto power, he can always take the plea that he is empowered to do so under the Constitution. In case, a dispute arises as to whether any matter is or is not a matter where he can exercise his prerogative or veto power, as explained above, it shall be he i.e. the President who shall decide and his decision shall be final, and the validity of anything done by the President shall not be called in question on the ground that he ought or ought not to have acted in his discretion.

4. That, at the time when the Revival of the Constitution of 1973 Order, 1985, was promulgated, constitutional amendments etc., brought about by Gen.

Mohammed Ziaul Haq, defacing the Constitution of 1973, could be changed and modified in terms of Article 239 thereof to suit the genius of the nation although it was an up-hill task. Our General, however, apprehending that our chosen representatives might unite and yield before the nation and effect suitable amendments in the Constitution to accord full sovereignty to our Parliament, came out with another constitutional amendment, imposing a complete embargo on the Parliament and, thereby, preventing it from amending, invalidating or modifying any of the provisions of the Revival of the Constitution of 1973 Order, 1985 or laws, enactments, notifications, rules, orders etc., made between the 5th day of July, 1977 and 23rd day of March, 1985. Whatever he has done between the 5th day of July, 1977 and the 23rd day of March, 1985, has to be treated as sacrosanct by the Parliament unless he consents to amend, repeal or alter it. Gen. Mohammed Ziaul Haq's latest amendment in terms of Article 239 of the Constitution clearly lays down that no bill, seeking amendments to any of his actions taken, acts done, laws made and the changes brought about in the Constitution between the aforesaid period, shall be initiated in the Parliament unless his consent in respect thereof has been obtained.

5. That, provisions, relating to our Superior Courts, as embodied in this Constitutional Instrument, prima facie aim at crippling their judicial authority and making them subservient to the forces opposed to the rule of law. The Provisional Constitution Order, 1981, has been kept very much intact. This piece of legislation which is wholly monstrous in nature hangs over the heads of our judiciary in the same manner as it used to hang before.

There is no doubt that political battles in our country were fought in courts. Who will deny - none will deny – that our Judiciary was used for political aggrandisement. The battles that we fought in courts for political aggrandisement make you travel from Munir to Anwarul Haq. The history of our country has already recorded its verdict in respect of both. In terms of this verdict, Justice Munir destroyed our Constitution whereas Justice Anwarul Haq destroyed our Judiciary. It is an open secret- a secret virtually known to everyone that it is Anwarul Haq who is the author of Article 212-A of the Constitution of 1973, and it is this Article which, ipso facto, nullified in totality his own decision given in the case of Begum Nusrat Bhutto. Mr. Justice Anwarul Haq held in the case of Begum Nusrat Bhutto, and I quote: -

“That, accordingly, Superior Courts continue to have the power of judicial review to judge the validity of any act or action of Martial Law Authorities, if challenged in the light of the principles underlying the law of necessity, as set out in this judgement. Their powers of Article 199 of the Constitution thus remain available to their full extent and may be exercised as heretofore, notwithstanding anything to the contrary contained in any Martial Law Regulation or Order, Presidential Order or Ordinance”.

It was again he who drafted Article 212-A of the Constitution wherein it is clearly laid down that no Court including a High Court shall grant an injunction, make any order or entertain any proceeding in respect of any matter

to which the jurisdiction of the Military Court or Tribunal extends and of which cognizance has been taken or which has been transferred to the Military Court. This piece of legislation was a challenge – a clear and open challenge to the very existence of our Supreme Court yet we all remained silent spectators. In view of the incorporation of Article 212-A in the Constitution, there was a duty cast upon our Supreme Court to hold and declare that it was ultra vires of their decision in the case of Begum Nusrat Bhutto, that being the law of the land. That was not done. The result was that finally came the Provisional Constitution Order, 1981, and all was over!

It is our well considered view that as long as the Provisional Constitution Order, 1981, remains in force, our Judiciary shall neither be independent nor dignified. In a democratic system, there are three organs in a State which virtually control the destiny of the people and operate as checks and balances: -

1. The Legislature.
2. The Executive.
3. The Judiciary.

The Legislature legislates the law, the Executive executes the law, and the Judiciary interprets the law. In every civilised society, the Legislature is always sovereign—always supreme as a law-making body. No embargo, whatsoever, can be imposed on its sovereignty. It is always

free to legislate laws within the frame – work of the Constitution to which it owes its existence. The function of the Executive is to execute the laws made by the Legislature. The Judiciary is the custodian as well as the protector of the Constitution.

In a country where democracy prevails, Judiciary keeps an eye on both the Executive and the Legislature. The Judiciary, on the one hand, keeps an eye on the Executive to see that the laws made by the Legislature are properly and faithfully executed and, on the other, it is there to guarantee that the Legislature is making laws strictly within the frame-work of the Constitution and in accordance with the limitations, as set out therein. A Parliament which is sovereign is always free to remove difficulties, if any, in making laws, by making amendments in the Constitution, if and when required, in the larger interest of the country. Any law made contrary to the provisions of the Constitution is always liable to be declared void and ultra vires and of no legal effect by the Judiciary in a democratic set-up. In short and, in fact, it is the Judiciary which controls the destiny of a nation. Judiciary is our life-line. It is in this that our salvation lies. Any departure whether intentional or unintentional from this Life-line shall be disastrous and is bound to culminate in our complete disappearance as a nation from the map of the world.

In the end, I thank you all for participating in this function and making it a success.

CALL TO GENERAL ZIA TO LIFT MARTIAL LAW

The Hon'ble Chief Justice, the Hon'ble Judges of the high Court, Members of the Bar and distinguished Guests:

At the very outset, I consider it my duty first and foremost to thank the Hon'ble Chief Justice Mr. Justice Abdul Hayee Kureshi, the Hon'ble Judges of the High Court and the Members of the Bar for accepting my invitation and gracing the occasion with their presence. I express my profound sense of gratitude to all of you for your presence on this occasion and, I do so with all humility and sincerity at my command. It is indeed a great honour that you have done me. Your sincere and spontaneous response to my invitation shall always remain enthroned in my heart. I am particularly grateful to the Hon'ble Chief Justice for his kind cooperation in organising this function. The objects of holding a function

Inaugural Speech on 24.09.1984. Immediately after assuming office as President, Sindh High Court Bar Association, Karachi, I had hosted a reception in honour of the Chief Justice, Judges of the High Court and the members of the Association. It was on that occasion that I had delivered the present speech.

of this kind are manifold and, one of the objects, as I would like to emphasise is to create greater harmony and seek greater cooperation between the Bench and the Bar. It is our considered view that this harmony is very important, very essential and is greatly needed for the ultimate and complete victory over the forces opposed to the rule of law. Never before in the history of Pakistan was so much expected from us as is expected now for fortifying the hands of judiciary and seeking the complete elimination of those who are instrumental either directly or indirectly in sabotaging our institution and disgracing the whole nation within and without.

This fact is undeniable that our preservation as well as the preservation of our posterity depends on the rule of law. Can we preserve our society – the society that we constitute without the rule of law? Can we prosper as a civilised nation without the rule of law? Can we save this country from being disintegrated or destroyed in the absence of the rule of law? These are the questions – very vital and very pertinent – awaiting the answer from the persons in authority. The answer is in the negative. Those who are denying us the rule of law know in the heart of their heart that, by doing so, they are serving their own cause and not the cause of the nation. Nevertheless, the process of denial in this direction continues and is likely to continue till comes the doomsday of those who have eyes but without vision, who have ears but without drums, who have hearts but without conscience. This act of theirs manifestly shows that they are under divine punishment. History is our guide. History wants us not to ignore the writing on the wall. Those who ignore the writing on the wall – those who ignore the footprints of time do not go unpunished. The time has come that we should open our

eyes and seriously and sincerely realise as to where we are landing.

Our stand on the rule of law is known to the whole world. It is equally known to the whole world that we shall have no compromise – no bargain on this issue. We want our judiciary to be dignified and independent. We want the Judges of our Superior Courts to function, as Islam commands them to function. There is no Martial Law in Islam. There is no provision for the establishment of Martial Law Courts in Islam. Islam does not recognise the existence of such Courts. In terms of Islam and its tenets, all Courts, all Tribunals and all Tributaries from which justice flows have to be subservient to our Superior Courts. All the State Functionaries including the Head of the State have to submit themselves to the jurisdiction of such courts and are not permitted to enjoy any kind of immunity or protection behind any piece of legislation such as the Provisional Constitution Order, 1981. Islam believes in the dispensation of justice without any discrimination between the strong and the weak, the rich and the poor. It is on this virtue that the foundation of an Islamic Society is laid. Martial law destroys this virtue and nullifies in totality the dispensation of justice under the Islamic Order.

Islam casts equally a very heavy duty, a very heavy responsibility on our judges. God speaks to them directly on matters, relating to the dispensation of justice and commands them to hold the scale of justice firmly and balance it without any fear or favour. God says in the Holy Quran that those who have been assigned the task of administering justice shall perform their duties strictly in accordance with their conscience and without any fear or favour. It is quite evident from the Holy Quran and the

Sunnah that, any person, holding the scale of justice, if he compromises with the situation and fails in any manner whatsoever in the performance of his duty, awaits a very severe punishment on the Day of Judgement.

Our struggle for the rule of law is not hidden from anyone. We have a history – a long history behind this struggle of ours. Our struggle for the supremacy of law – our struggle for a dignified and independent judiciary is a landmark in the history of Pakistan. Ours is a constant battle – the battle that we have been fighting right from 1958 till this day. We have been warning our rulers right from the very beginning that Martial Law is no solution to our problems. It is disastrous. It is nothing short of a calamity. A country, which is a victim of Martial Law, is just like a boat without an oar. Despite our best endeavors, we were ignored. Our warnings were ignored. The forces, opposed to the rule of law, the forces, opposed to the restoration of human dignity, remained supreme and such forces are supreme even now. They have done their best to subdue us, to subjugate us, but have failed and failed miserably in their designs. We have refused to be conquered by such forces. We are confident of our victory. Even if the heavens fall and the earth splits, but our victory is a must. Our victory is inevitable.

We have already lost half of the country and even the present half is at stake because of Martial Law. Our country is very dear to us. Our country is one of the finest in the world. God has given us everything. The country, much dearer than our lives, has to be saved. We are already surrounded on all sides by our enemies. The time has come that we should open our eyes and rise to the occasion. The

time has come that our rulers should open their eyes and see the writing on the wall.

It is our well considered view that our salvation, our survival lies in the immediate abrogation of the Provisional Constitution Order, 1981. Our salvation lies in the immediate restoration of the Constitution of 1973. We call upon our rulers in the larger interest of the country to come out of the world of illusion and see as to where and in which direction we are moving. The nation must be taken into confidence immediately. Oh! Our rulers, if you want the nation of 85 million to stand like a rock and fight shoulder to shoulder against the enemy; if you want the nation to fight in defence of the country to the last gun and till the last ditch; then do the following forthwith:

1. Lift Martial Law.
2. Abrogate the Provisional Constitution Order, 1981.
3. Restore the Constitution of 1973, as it was when it was signed and authenticated.
4. Separate the Judiciary from the Executive forthwith.
5. Hold general elections on the basis of adult franchise.
6. Hand over the power to the duly elected representatives of the people.

These are the demands of the whole nation and particularly of our legal fraternity throughout Pakistan. We appeal to our rulers to do it today, who knows, tomorrow may be too late.

**SINDH HIGH COURT BAR FOR
RESTORATION OF HUMAN DIGNITY**

The Hon'ble Prime Minister of Pakistan,
The Hon'ble Chief Justice of Pakistan,
The Excellency the Governor of Sindh,
The Hon'ble Chief Minister of Sindh,
The Hon'ble Judges of the Supreme Court,
The Hon'ble Judges of the High Court,

Distinguished guests,

Members of the Bar, Ladies & Gentlemen,

I consider it a great privilege and honour to extend to you, Sir, a very warm welcome on behalf of the High Court Bar Association, Karachi. We express our profound sense of gratitude to you for gracing the occasion of our Annual Dinner with your presence as Chief Guest. We are fully conscious of the fact that you have been kind enough

Presidential Address of welcome was presented by me to Mr. Mohammed Khan Junejo, the then Prime Minister of Pakistan at the Annual Dinner of the Sindh High Court Bar Association, Karachi, held on 31st August, 1985. His attention was invited to the effect that our Parliament was not sovereign and further that its sovereignty would not be achieved unless the Constitution of 1973 was restored, as it was when it was signed and authenticated.

to accept our invitation in spite of your multifarious activities and important and heavy engagements as our duly elected Prime Minister. Since you represent our duly elected Government and the Parliament, consisting of the members chosen by the people, we feel proud to have you in our midst this evening on this auspicious occasion. We congratulate you with all sincerity on your assumption of office as the Prime Minister of Pakistan and assure you of our full co-operation in your pursuit for the establishment of a Government of the people, for the people and by the people. Mr. Prime Minister, we wish you Godspeed in your mission and assure you that, in case you remain firm, the goddess of victory shall touch your feet and forces opposed to the rule of law and democracy shall collapse before you like a house of cards.

Mr. Prime Minister, Sir, who will deny – none will deny that you have assumed office of the Prime Minister of this country at a very critical juncture. Your assumption of office as the Prime Minister of our beloved country has given the whole nation a new ray of hope. We are very much hopeful that you and your colleagues chosen by the people as their representatives shall not yield before any pressure. Since you and your colleagues in the Parliament have been elected directly by the people, we recognise you and your colleagues alone as the persons competent to govern our country and control our destiny. It is our considered and formidable view that, since you all are the representatives chosen by the people directly on the basis of adult franchise, the real power and the real strength to rule and reign this country for and on behalf of the people lies with you. We make no secret of the fact that any

weakness or any temptation whether express or implied on the part of our chosen representatives, shall amount to betrayal – betrayal of trust reposed in them by the people.

When we achieved Pakistan, it was the fifth largest and the biggest Islamic State in the world. When Pakistan came into being, our Quaid-e-Azam, the leader of the Pakistan Movement and the Father of the newly born nation, assured his people and the whole world that Pakistan would be a democratic state. When his attention was invited as to what would be the constitutional set-up of Pakistan, he categorically stated that democracy and democracy alone shall be the destiny of Pakistan. Our Quaid made it quite clear to the world that the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, would be fully observed in Pakistan. He further declared that Pakistan would be governed through the chosen representatives of the people and further that the fundamental human rights including the rights of equality before law, of freedom of thought, expression, belief, faith and association and of social, economic and political justice would be fully observed. We have no hesitation in making this statement before you that today's Pakistan is totally different from Quaid's Pakistan. There cannot be two opinions on the point that the present constitutional set-up of this country, in view of the amendments made in the Constitution of 1973 by virtue of the Revival of the Constitution of 1973 Order, 1985, is a flagrant betrayal of Pakistan, as conceived by our Quaid-e-Azam.

Mr. Prime Minister, your first speech in the Parliament that Martial Law and Democracy cannot go together is quite fresh in our minds. Your second speech is also of great significance when you testified before your people that an independent and dignified judiciary was a condition precedent to the set-up of a democratic institution. We congratulate you on your historic utterances and assure you that your such utterances still reign supreme in our minds. When you say so, you become the voice of the nation. In view of what you have said in your historic speeches, I am reminded of an occasion when the late Winston Churchill, while addressing his nation on the day when Germany capitulated and laid down its arms before the Allied forces, said, and I quote as nearly as possible his own words: -

‘I would like to salute our valiant forces who fought fierce battles against the enemy on the land, at sea and in the air but before I salute them, I would like to salute the members of our judiciary who, by doing justice in all walks of life, infused such a spirit of patriotism which enabled them to fight against the enemy to the last gun and till the last ditch’.

Mr. Prime Minister, our stand on the rule of law is very clear. We have been reminding the persons in authority that our society cannot be preserved unless our judiciary is independent and dignified. Mr. Prime Minister, Sir, before you assumed office, the valiant and fearless members of this Association afforded me, as their President, an opportunity to speak their minds and convey their feelings to our rulers on the necessity of the rule of

law and of an independent and dignified judiciary. I conveyed their feelings on the subject on 24th September 1984 through my inaugural speech. My speech on such an important subject, however, fell prey to the censorship and could not appear in the press. Mr. Prime Minister, since you are with us this evening, I will be failing in my duty in case I do not quote a part of it. I quote: -

“Our stand on the rule of law is known to the whole world. It is equally known to the whole world that we shall have no compromise – no bargain on this issue. We want our judiciary to be independent and dignified. We want the Judges of our Superior Courts to function, as Islam commands them to function. There is no Martial Law in Islam. There is no provision for the establishment of Martial Law courts in Islam. Islam does not recognise the existence of such Courts. In terms of Islam and its tenets, all Courts, all Tribunals and all Tributaries from which justice flows have to be subservient to our Superior Courts. All the State Functionaries, including the Head of the State, have to submit themselves to the jurisdiction of such courts and are not permitted to enjoy any kind of immunity or protection behind any piece of legislation such as the Provisional Constitution Order, 1981. Islam believes in the dispensation of justice without any discrimination between the strong and the weak, the rich and the poor. It is on this virtue that the foundation of an Islamic Society is laid. Martial Law destroys this virtue and nullifies in totality the dispensation of justice under the Islamic Order.”

Mr. Prime Minister, you have assured us that Martial law is going to be lifted by the end of this year. You have given us a positive assurance that Martial Law shall not witness the sunrise on January 1, 1986. In view of the fact that the people of this country have already chosen their representatives, we see no reason for Martial law to continue. Its continuance is a challenge to our duly elected representatives. We want our armed forces to go back to their barracks. The sooner they go, the better it is. We advise them in the larger interest of the country to go back to their barracks forthwith. Who knows, tomorrow may be too late!

Mr. Prime Minister, we will submit most respectfully that the lifting of Martial Law is only the first phase of your struggle for the restoration of human dignity. Your second phase of struggle shall commence when positive steps shall be taken by you and your colleagues to make our Parliament sovereign. So long as our Parliament is not sovereign, we shall not be able to see the light of democracy in our country. It is our well considered view that, as long as the amendments made in the Constitution of 1973 by virtue of the Revival of the Constitution of 1973 Order, 1985, hold the ground, our Parliament shall neither be sovereign nor dignified. In a democratic set-up, no compromise can be accepted on the status of our Parliament as a sovereign body. The latest amendments carried out in the Constitution of 1973 are a clear encroachment on the sovereign status of our Parliament. The amendments so made manifestly aim at fortifying the hands of the worst type of despotism. We have suffered an irreparable humiliation at the hands of despotism. The

people of this country are not prepared to suffer any more. We the members of the legal fraternity throughout the country are unanimous in our view that we shall not be able to attain emancipation unless amendments made therein are withdrawn and the Constitution of 1973 is restored, as it was, when it was signed and authenticated. In short and, in fact, the second phase of our struggle is equally decisive.

Sir, finally, in view of what I have already said in my speech, I may be permitted to place before you and your Government our following demands: -

1. Lift Martial Law.
2. Abrogate the Provisional Constitution Order, 1981.
3. Restore the Constitution of 1973, as it was, when it was signed and authenticated.
4. Separate the Judiciary from the Executive forthwith.
5. Withdraw all the recent amendments made in the Legal Practitioners and Bar Councils Act, 1973.
6. Provide recurring annual grant-in-aid of Rupees two lacs and fifty thousand to the High Court Bar Association, Karachi.
7. Order equitable distribution of retainerships and Government cases purely on merit amongst advocates.
8. Increase the number of Judges in Superior Courts and Subordinate Judiciary for the expeditious disposal of cases.

In the end, I once again sincerely thank you, Sir, for accepting our invitation and making our Annual Function a grand success by your presence. I also thank the Hon'ble Chief Justice of Pakistan, the Hon'ble Judges of the Supreme Court and High Court and other distinguished guests for participating in this function and making it a success.

ZIAUL HAQ'S DESPOTIC REGIME

Zia Spreads Religious extremism

Ziaul Haq killed Bhutto, the elected Prime Minister of Pakistan through a judicial verdict. He obtained the judicial verdict by exercising his influence as Chief Martial Law Administrator. The second important historical event of his tenure was that he, in order to consolidate his position as a ruler, spread religious fanaticism. He converted the mosques into Madrasas where he employed clerics of his own choice to spread extremism amongst young students. Zia, as a Military dictator, took refuge behind Islamisation, but he was the least sincere in this pursuit. The consequence was that Madrasas became an emblem of exploitation of religious thoughts and teachings. Those Madrasas produced misguided students who were kept totally ignorant of peace, tranquility and tolerance in terms of Islamic teachings. He kept Ulema and Mashiaq on the forefront to defraud the nation to show that he was all out for Nizam-i-Mustafa. He was under the illusion that by doing so he would gain public support and, would be able to enslave the people under the umbrella of Military rule for an indefinite period. I will not make further comments on the adventurism of Zia in the name of Islamisation. What ever you see today is the outcome of those misguiding and misleading teachings of Islam. I must conclude by saying that we are reaping the harvest of our misdeeds.

Afghan War

The despotic regime of Zia was highly unpopular throughout the world. He established summary Military courts for his political ends. The Military officers of his summary military courts were highly corrupt. In spite of corruption, such courts remained operative for about seven years. It is important to record here that such summary military courts had been established by Ayub Khan also. However, when he heard about corruption, prevailing in such courts, they were wound up by him immediately. Ayub's summary military courts could remain operative for six months only – whereas Zia's summary military courts remained operative till the lifting of Martial Law. In addition, the cases of violation of human rights were also rampant during his regime. While Zia was at the lowest ebb in the world as a military dictator, some thing very important and significant appeared on the political scenario, which elevated his position and enabled him to turn the tide in his favour. That was the Soviet invasion on Afghanistan.

Kabul under Turmoil

Before the Soviet invasion, Sardar Daud who was the first cousin of King Zahir Shah rose in rebellion against him. King Zahir Shah was forced to go into exile. He with the members of his family took asylum in Rome. After about three years, Daud and his entire family members were gunned down by the rebels who were pro-Soviets. They came in power and, in consequence thereof,

communist regime took over the country. In the beginning, a number of pro-Moscow leaders were killed one after another. Finally, Najeebulla Khan settled down as the Head of the State.

America Intervenes Indirectly

It was at this moment of time that Americans sought the help of Zia. The Soviet invasion was a direct threat to their interests in Persian Gulf and the Middle East so far as their oil deposits were concerned. Since oil deposits in the Soviet Union were saturating, they were desperate to come close to Persian Gulf and the Middle East to capture oil deposits. Keeping in view that objective, the Soviets became a potent threat to American interests of vital importance.

American Aid to Pakistan

Pakistan had a well equipped Army. Beside this, the entire belt of N.W.F.P was with the people of Afghanistan and they were equally supporting them in their struggle for freedom against the Soviets. The history of Afghanistan is that, since the time immemorial, no foreign power has ever been able to conquer the people of Afghanistan. The Americans needed Pakistan Army to help the people of Afghanistan behind the scene. The people of Afghanistan needed American weapons on a massive scale to fight against the Soviets and drive them out. The Soviet troop

movements indicated that a possible invasion was in prospect from at least 7 October, 1979. The Soviets appeared on the soil of Afghanistan with a huge Army and the Air Force. In 1979-80, the armed forces totaled 3,658,000 persons, with the Army accounting for 1,850,000 and the Air Force 475,000. The personnel of the Army were organised into 47 tank divisions, 118 motorised rifle divisions, and 8 airborne divisions.

Zia Develops Close Ties with America

The Soviet invasion brought the Soviet armed forces directly closer to Pakistan's borders, and for Pakistan this could be seen as a clear threat to the territorial integrity of Pakistan particularly because of Moscow's support to India for the fragmentation of Pakistan barely a decade earlier. However, the Soviet invasion did not simply confront Pakistan with threats; it also provided it opportunities. Pakistan was manifestly the state from which any international opposition to the Soviet presence in Afghanistan was the need of the time. No one grasped this more swiftly than Zia: as Jalal put it, 'the Soviet invasion of Afghanistan gave him just what was needed to establish his regime's non-existent international stock without which the domestic agenda of repression seemed destined to end in tears' (Jalal, 1995: 103). The upshot was the eventual approval by the US Congress of a package of economic and military assistance to Zia's regime worth \$3.2 billion over a six-year period, assembled after Zia had scorned an initial offer of \$400 million (Weinbaum, 1994: 18). The significance was primarily symbolic: Zia had come in the

forefront of American lobby. However, he was also to exploit the Soviet presence in Afghanistan in more overtly domestic ways as well: he managed to find common cause over Afghanistan, with Pakistani religious parties such as the Jamaat-i-Islami which hitherto had been wary of what they saw as the lukewarm character of his Islamisation programme. This was initially not a very important consideration, but over time, Pakistan's religious parties increasingly built their own ties with Afghan parties and groups which they found congenial, and the long-run consequences of this were to prove disturbing.

Resistance Movement

The resistance movement in Afghanistan against the Soviet forces after the supply of arms by America became very effective. This movement was declared a crusade (Jehad) against the Soviet invasion. The Muslims of N.W.F.P and particularly the Pushto speaking Pathans living on the border of Afghanistan came in aid of Mujahidin on a massive scale. The Americans needed very badly the help of General Zia-ul-Haq and his Army to fortify the hands of resistance groups combating against the Soviet Army. In this way, the Pakistan Army became the prime channel through which outside Military assistance was directed to Afghan resistance groups, and the process was easier to manage because Pakistan was under Military Rule. Religious sentiments also played a very effective rule in favour of Mujahidin. Religious groups in Pakistan also declared the resistance movement by the Afghan people against the Soviet forces a (Jehad) and called upon the

Muslims to join hands with them. For all these reasons, as well as from calculations of interest, the Pakistan Army threw itself into the process of backing the Afghan Mujahidin. Since the Americans wanted the defeat of the Soviet Army, they supplied the most sophisticated weapons to Afghan Mujahidin. Pakistan was assigned the role as conveyor of Arms to the Afghan resistance. They sought our help as trainer and logistic support of those who were fighting against the soviet Army. During the war in Afghanistan, American ships were seen very frequently on the shore of Karachi and unloading arms for Afghan resistance groups. Those arms were transported through the land route to Afghans who were fighting very bravely for their motherland. The Soviets had a very strong Air Force to back their infantry as well as their tanks, Armored cars and other vehicles. The Afghans had no Air Force. Since Pakistan Army as well as Americans were giving them support in disguise, the air force against the Soviets could not be used. As a result, the Soviets had a free hand in space. Realising this handicap, the Americans supplied stringer missiles to Afghan resistance groups. When this new weapon came in the hands of Afghans, the Soviets were taken by surprise. The Soviet Air Force was no longer in a position to have a free hand in the space. A lot of damage was done to the Soviet Air power by the use of stringer missiles. There were other American weapons also which proved to be very effective against the advancement of the Soviet forces. The result was that the success of the Soviet forces came to a stand still. Their losses both in men and machines were enormous. In spite of sustaining heavy losses, they got themselves entangled in Afghan war for a period of more than 8 years. Their eventual defeat became inevitable. In view of such precarious conditions, they

wanted to withdraw and have a truce with America. The Americans equally estimated that the Soviet forces were no longer a threat either to Afghanistan or to their oil installations in Persian Gulf and the Middle East. A number of meetings were held in Geneva between the two super powers and finally the US Administration decided to accept the Accords. The Soviet's desire for an Accord provided a dignified cover for their retreat from Afghanistan.

This fact cannot be denied that Pakistan Army and their generals had played a very important role in the defeat of the Soviet forces. All was done under their command and leadership. It were they who had handled the mechanism of war in Afghanistan. General Zia was flying high and his objective were to have the whole of Central Asia under his influence. And, as such, he wanted to go further for exploitation of the situation. The US Administration tried to prevail upon General Zia to change his mind, but it was his misfortune that he remained adamant. This situation caused a sharp division between Zia and the US Administration. General Zia had perhaps forgotten that he was their nominee and that he was sitting on the throne because of their blessings. The result was that in spite of Zia's opposition, the Accords were finally signed at a ceremony at the Palais des Nations on 14 April 1988. Najibullah's Foreign Minister Abdul Wakil signed on Kabul's behalf. Pakistan's signature was recorded by Pakistan's Deputy Foreign Minister Zain Noorani, and George Shultz and Eduard Shevardnadze represented the USA and the USSR respectively. The only speaker was the UN Secretary-General, Perez de Cuellar, and Noorani and Wakil avoided eye contact.

Consequences of Soviet Retreat

The Soviets had to pay a very heavy price for the Afghan war. The immediate effect of their debacle in Afghanistan was that the Soviet Union ceased to be a superpower. The economy of the Soviet Union almost collapsed and the financial power was drained out. Almost all the States, which had been annexed by Russia before and after the Second World War, broke away from the Union and became totally independent. As a result, the Soviet empire disappeared from the face of the earth and there remained only Russia on the Map of the world. The Americans achieved what ever they wanted to achieve after the defeat of Soviet Union. This important historic event made America the most powerful nation in the world and it emerged as the sole super power in the world. In short and in fact, the emergence of America as the only superpower changed the map of the world.

Zia Reacts

When Geneva Accords were signed, Zia was the self-proclaimed President of Pakistan as well as the Chief of the Army Staff. He was all powerful. He never anticipated that Geneva Accords could be signed against his will. He was pulling his muscles, because of the success in Afghan war. He was proud of his generals and other high ranking officers of his Army for playing a significant role in the mechanism of war against the Soviets. At that moment of time, when he was suffering from this illusion,

he had completely forgotten his master. The fact of the matter is that there would have been no victory in Afghan war without getting American weapons on a massive scale. He was in a fool's paradise if he was ever seized with the notion that his refusal would come in the way of the signing of Geneva Accords, as desired by Washington.

Miserable End of Zia

He was taken by complete surprise when Prime Minister Mohammed Khan Junejo sent Zain Noorani to Geneva to sign the Accord. Zia did not realise that after all he was the second fiddle and his real master from every point of view was Washington. His own perception that he was all powerful evaporated in the air. He took the signing of the Accord at Geneva as a severe blow to his vanity. It was the next day that he dissolved the National Assembly of Pakistan by invoking Article 58(2)(b) of the Constitution and dismissed Prime Minister Junejo and his entire cabinet. He was fully aware of the consequences of taking such drastic steps particularly when he challenged the authority of Washington. Zia was not seen at any public place after the dissolution of the National Assembly. He, in fact, confined himself to his Presidential Palace for about three months. He had a strong intuition that he was in danger. What transpired during this period is still a top secret. Suddenly he and his top ranking six generals and six Senior most Brigadiers along with other members of the staff decided to visit Bahawalpur. It is important to mention here that all those generals and Brigadiers who accompanied him to Bahawalpur in C-130 plane were closely associated

with Afghan war. According to the Press release, the plane reached the destination safely. A great secrecy still prevails as to why six important generals and six senior most Brigadiers travelled together, as it was against the Military rules. However, they spent the whole afternoon, but it is not known what the mission on their agenda was.

It was more or less evening time when they finished their business and boarded the plane to reach Islamabad. While C-130 was about to take off, a few minutes earlier the American Ambassador and one senior most Military officer of the Pentagon went inside the plane for a few seconds to convey some important message to General Zia. As they were busy in conveying the message, Zia requested rather insisted to have tea with him while flying, by saying that he would drop them at Multan and further that, since their own plane (Ambassador's plane) was also ready for take off, it would follow his C-130. The Ambassador and the American Military officer who was in his company both acceded to his request. Zia's plane, that is, C-130 took off and while it had attained the height of 5000 feet, the pilot and the co-pilot both became unconscious, as they had been poisoned in their ears through their wireless caps. The plane in no time lost its height and touched the ground like a ball of fire, as its tanks were full of gasoline. All on board perished, their bodies vanished and went beyond recognition. So far as Zia was concerned, not a piece of flesh of his body was found. It is claimed that in case of Zia, his jaw-bone could be identified. It is this part of his body which has been placed in his grave at Islamabad. That is how General Zia met his miserable end.

Tragedy of C-130

The inner feelings of Zia were giving him a clear signal that he would not be able to escape from the divine punishment. That was the reason that he chose C-130, the world's safest plane. The idea of its safety may be gauged from the fact that in case of any mishap, it could float. In the present mishap, the plane burst into flames. The pilot and the co-pilot were lying dead in their cockpit. This tragedy took a heavy toll of important lives. It was the will of God Almighty to destroy Zia in such a way on August 17, 1988. There is no doubt that there were innocent people also in the plane who met a similar fate.

Report of Inquiry

This tragedy was *prima facie* the result of a conspiracy. The true facts of this tragedy were never revealed. Since Zia was the most hated man in the country, the subsequent persons in authority never bothered to discover as to who were the persons involved and how the blowing up of C-130 could be materialised in such a scientific manner. A few months later, some of the Military officers appeared on the television and submitted the report of inquiry, held into the air crash of C-130. The report did not reveal as to why General Zia and his important aides boarded C-130 and went to Bahawalpur. The Report through the media informed the public at large that when the plane had attained the height of 5000 feet, both the

pilots, as a result of poisoning through their ears, died on their seats while sitting in their cockpit. It was further revealed that since the plane was loaded with gasoline to its full capacity, it burst like a bombshell. However, it was not made known as to why and on what mission the plane had gone to Bahawalpur.

HAJI SAIFULLAH CASE**(1988)****Dissolution of National Assembly**

A petition was filed in the Lahore High Court, challenging the dissolution of National Assembly and the dismissal of Prime Minister Muhammad Khan Junejo and his Cabinet. This action had been taken by Ziaul Haq in terms of Article 58(2)(b) of the Constitution of Pakistan. I have already assigned the main cause of the dissolution of the National Assembly and dismissal of Muhammad Khan Junejo in my previous chapter.

Haji Muhammad Saifullah and also a few others filed a writ petition in the Lahore High Court, wherein it was pleaded that there were no grounds on the basis of which the discretionary power could be exercised by the President. It was further pleaded that the dissolution of the Assembly was illegal, unconstitutional and ultra vires. The petitioners partially succeeded in the sense that the orders of dissolution and dismissal of the Federal and Provincial cabinets were found to be unsustainable in law but relief, in the shape of restoration, as sought, was not granted. The reasons for declining to pass an order for restoration were obvious.

Mr. Moin Qureshi who was Pakistan-born American had already been imported from Washington to act as care-taker Prime Minister of Pakistan. The dates for holding general elections in respect of Assemblies both Federal and Provincial had already been fixed and Benazir Bhutto and Nawaz Sharif were already in the run. The nation was ready to go to the polls. In view of such a situation, the matter came finally before the Supreme Court. It was heard by a Full Court consisting of Muhammad Haleem, C.J; Aslam Riaz Hussain, J; Muhammad Afzal Zullah, J; Dr. Nasim Hasan Shah, J; Abdul Kadir Shaikh, J; Shafiur Rahman, J; Javid Iqbal, J; Ghulam Mujaddid, J; Saad Saood Jan, J; S. Usman Ali Shah, J; Ali Hussain Qazalbash, J; and Naimuddin, J.

The petition of Haji Muhammad Saifullah and of others was a belated one. Reliefs were sought when Ziaul Haq had already disappeared from the political scenario under the divine law. The case of Haji Muhammad Saifullah and of a few others, challenging the discretionary power of the President in terms of Article 58(2)(b) drew the attention of the entire nation, as many jurists and the intelligentsia were of the opinion that such discretionary power conferred upon the President was absolute and could not be questioned. Before I proceed, I would like to point out that the real background of the dissolution of the National Assembly and, in consequence thereof, the dismissal of the entire cabinet does not figure in the judgement either of the Lahore High Court or of the Supreme Court. Since Ziaul Haq had taken the action abruptly, he called a press conference where a group of

journalists came to the President House to attend. Ziaul Haq walked into the Conference Hall and made a breath – taking announcement that he had dissolved the National Assembly and dismissed the Federal Cabinet with immediate effect. He then read out the order that he had passed in that behalf.

The order passed by Zia was issued in terms of Article 58(2)(b) of the Constitution and it is being quoted verbatim as under: -

“Whereas the objects and purposes for which the National Assembly was elected have not been fulfilled;

And whereas the law and order in the country have broken down to an alarming extent resulting in tragic loss of innumerable valuable lives as well as loss of property;

And whereas the life, property, honour and security of the citizens of Pakistan have been rendered totally unsafe and the integrity and ideology of Pakistan have been seriously endangered;

And whereas in my opinion a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.

Now, therefore, I, General Muhammad Zia-ul-Haq, President, in exercise of the powers conferred on me by Clause (2)(b) of Article 58 of the Constitution of the Islamic Republic of Pakistan hereby dissolve the National Assembly with immediate effect and in consequence thereof the Cabinet also stands dissolved forthwith.”

The leading judgement in this case is of the Lahore High Court. The Supreme Court has simply concurred with the findings arrived at that by the Lahore High Court on the issues involved in the case of Muhammad Saifullah Khan and others. My appraisal of both the judgements clearly shows that the whole case of Muhammad Saifullah Khan and others revolves around the provisions of Article 58(2)(b) and Clause (2) of the Article 48 of the Constitution. The provisions of these two Articles of the Constitution are of paramount importance. This is the reason that both the courts have taken pains to define and interpret these Constitutional provisions in the larger interest of the society. It is, therefore, necessary to reproduce and re-examine the relevant provisions of Article 58(2)(b) and 48(5)(a) and (b) of the Constitution and they are: -

“58(2) Notwithstanding anything contained in Clause (2) of Article 48, the President may also dissolve the National Assembly in his discretion where, in his opinion,--

- (b) a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.”

“48(5) Where the President dissolves the National Assembly, he shall, in his discretion--

- (a) appoint a date, not later than ninety days from the date of the dissolution, for the holding of a general election to the Assembly; and

- (b) appoint a care-taker Cabinet.”

The order of dissolution is *prima facie* illegal and unconstitutional. It is indeed very surprising that who ever drafted the Notification of dissolution in terms of Article 58(2)(b) of the Constitution completely ignored the mandatory provisions of Article 48(5) of the Constitution. There cannot be two opinions on the point that the provisions of Article 58(2)(b) and of Article 48(5)(a) and (b) go together. Irrespective of the fact that the action of dissolution by it self was *per se mala fide*, the absence to appoint a date to hold a general election within ninety days and failure on the part of the President to appoint a care – taker Cabinet made the Notification of dissolution of Assembly a laughing stock, manifestly showing that the action was taken in haste. This incurable constitutional defect further demonstrates that neither Zia nor his Law Minister were in their proper frame of mind at that moment of time. In support of my contention, I am quoting Dr. Nasim Hasan J; to see as to what he says on this point. In this context, referring to the first point in terms of Article 48(5)(a) Dr. Nasim Hasan Shah, J; says: -

“Taking first the matter of appointment of the date of elections it will be seen that whereas the National Assembly was dissolved on 29-5-1988, the President did not simultaneously appoint a date for the holding of the general elections with the order of dissolution but took nearly two months thereafter, to

do so. It was only on the 20th July, 1988 that he announced that the general elections will be held on the 16th of November, 1988. Thus a date, long after the expiry of 90 days from the date of the dissolution of the National Assembly was appointed. Could this be done?"¹

Findings of Lahore High Court

The Lahore High Court repelled the contention of Attorney General of Pakistan that the President was fully empowered to dissolve the National Assembly in his discretion and the validity of the action taken by him in exercise of his discretionary power could not be questioned on any ground whatsoever, as provided for under Article 48(2). This contention was rejected outright by the Lahore High Court on the ground that such a contention could nullify the provisions of Clause (2) of Article 58 which take effect "notwithstanding anything contained in Clause (2) of Article 48".

The observations of the Hon'ble High Court of Lahore in this context are very relevant and I will be failing in my duty as a defender of the rule of law, if I do not quote the beautiful passage therefrom. It is quoted verbatim as under: -

"It, therefore, found that it was not possible to hold that the action of the President under Article 58(2)(b) was not open to question by the Courts and was beyond their jurisdiction. It

¹ PLD 1989 Supreme Court p.191

was of the opinion that the Court could question the action of the President in dissolving the National Assembly if, for example, it was based on no facts at all. The Courts, it was observed, could not, in such circumstances, “stand aside and let the Constitution be flouted”. It was added that “the ‘discretion’ or the formation of the ‘opinion’ had to be based on facts and reasons which are objective realities. The ‘discretion’ or formation of ‘opinion’ cannot be based on illusions, fancy or whim. The authority, power or discretion were not absolute”. The High Court went on to observe that “if the authority, power or discretion were to be free from reason and absolute, it will partake of the Omnipotent which is impermissible to a mortal, however high he may be. If it were otherwise, the life of the representatives of the people in the National Assembly and liberty of their constituents the nation will be at the mercy, fancy or whim of the individual holding the authority for the time being”.²

Our Apex Court appears to have greatly appreciated the approach of the learned Chief Justice of the Lahore High Court on the factual aspect of the case. His comments on the fallacies of the first point of dissolution of National Assembly are worth reading. In this context, the learned Chief Justice observed as under: -

“Who does not know was the object and purpose for which Pakistan was created? That it will be independent, free democratic country in which the majority will be of Muslims and they will be enabled to lead their lives in the best traditions of Islam. Have these objects and purposes been fulfilled? Has not the country been subjugated by Martial Law or remained under its threat for a large part of its life? Have we not got more astray from Islam than before? Can anybody in his right senses say that since object and purpose of

² PLD 1989 Supreme Court pp.180-181

Pakistan have not been fulfilled, let it be dissolved? It would be the perversity of the highest order.”

It was, accordingly, held that the first ground did not hold water”.³

Restoration was Refused

The Lahore High Court came to a positive conclusion that the President of Pakistan in terms of Article 58(2)(b) of the Constitution did not enjoy absolute power like a dictator to dissolve the National Assembly. The superior Judiciary cannot be deprived of the power of judicial review in respect of any matter or action taken by any authority however high that authority may be. They further held that it would amount to abuse of the Constitution of Pakistan if the President of Pakistan is empowered to dissolve the National Assembly on flimsy or whimsical grounds. In spite of this clear view and vision on the point of dissolution, reliefs to restore the National Assembly and reinstate the dissolved Federal Cabinet were refused and the reason in support of this refusal by the learned judges was the interest of the Nation, as the general elections scheduled for the 16th and the 19th November were going to be held on the said dates.

It is, however, necessary to reproduce the short order of the Lahore High Court on this point. The Appex court fully concurred with the short order of the Lahore High Court and held the same view in its own judgement, relating to the refusal of restoration of the dissolved

³ PLD 1989 Supreme Court p. 181

Assemblies. The short order of the Lahore High Court is reproduced as under: -

“In the short order passed by this Court while disposing of these matters on 5th October, 1988, it was observed that we agreed with the view expressed by the Lahore High Court that the grounds contained in the President’s Order dated 29th May, 1988, dissolving the National Assembly and dismissing the Federal Cabinet had no nexus with the preconditions prescribed by Article 58(2)(b) of the Constitution empowering him to dissolve the National Assembly in his discretion; but were not inclined to grant the reliefs to restore the National Assembly and reinstate the dissolved Federal Cabinet despite this finding”.⁴

The leading judgement in this case was written by Shafiur Rehman, J. Mr. Justice Shafiur Rehman, while giving his own finding, in this context, says: -

“The third factor to be noted is that all the Writ Petitioners were directly and immediately affected by the dissolution of the Assemblies, by the failure to hold the General Elections within ninety days of the dissolution, by the omission to appoint a Prime Minister for the caretaker Cabinet, but none of them came forward to challenge any of these acts of omission and commission. It was only when the late General Muhammad Ziaul Haq, disappeared from the scene on account of an unforeseen disaster, after the stage had been fully set and the whole nation was preparing itself for the General Elections that these writ petitions were filed seeking reversal of the state of affairs, asking for a declaration of all round pervasive nullities and illegalities and for claiming all the reliefs which have been enumerated. This conduct of the petitioners, the

⁴ PLD 1989 Supreme Court p. 194

stage at which these petitions were filed and the death of General Muhammad Ziaul Haq whose acts had in essence occasioned all the grievances of the petitioners, disentitled them of any discretionary relief in the matter. The mere transitory continuance of such a pre-existing state of affairs, with an eye on the immediate and prime objective of holding a timely and fair General Election prompts us not to interfere in these proceedings with those matters, and the prevailing state of affairs. For reasons already given the findings recorded by the High Court are upheld, the denial of relief to the writ petitioners is affirmed, and all the appeals are dismissed with no order as to costs".⁵

General Elections

The General Elections as scheduled were held. Benazir had the full support of Washington. It was on account of the support of Washington that she won the elections and became the leader of the majority party in the National Assembly. It was a great victory for her. That is how she emerged on the political scenario as the first Muslim woman as Prime Minister in the Muslim world. The rule of Benazir as Prime Minister of Pakistan will be recorded and commented upon in Part Two of this book.

⁵ PLD 1989 Supreme Court p. 222

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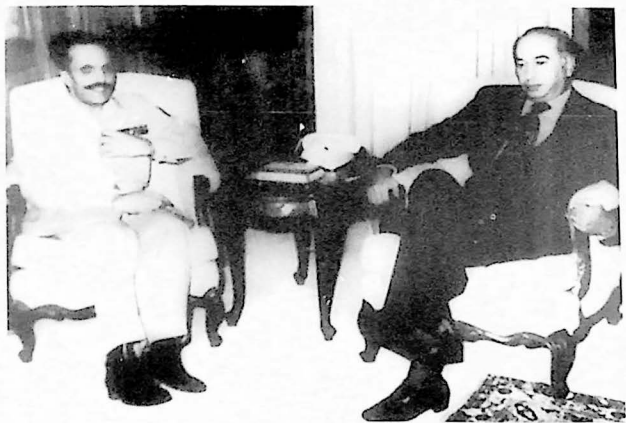
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*Zulfikar Ali Bhutto,
elected Prime Minister of Pakistan,
was executed in Rawalpindi central jail, on April 4, 1979*

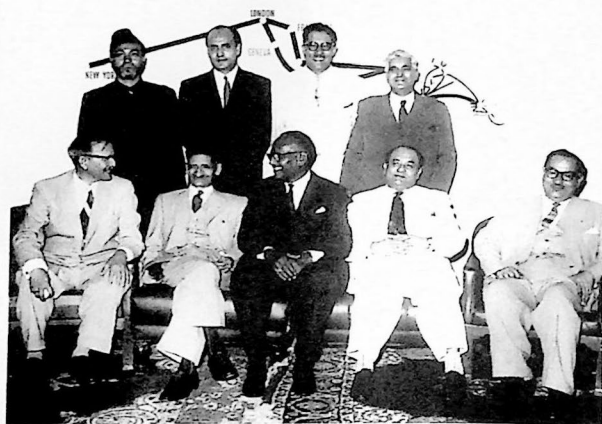


General Zia-ul-Haq,
*the usurper, ruled over Pakistan from 1977- 1988
and was killed in the air crash on August 17, 1988*



L to R: General Zia-ul-Haq after seizing power and Zulfikar Ali Bhutto in his protective custody in Governor House, Murree.

It was for the first time that the High Court Bar Association, Karachi and the Karachi Bar Association hosted a joint Reception in honour of Justice M. R. Kayani after he laid the robes. The Reception was hosted on November 7, 1962 at Hotel Metropole, Karachi. The photograph below was taken on the occasion. Mr. Justice M. R. Kayani exactly 8 days later unexpectedly passed away at Chittagong where he had gone to address a meeting.



Sitting L to R: Mr. Justice Inamullah Khan, Mr. Justice M. R. Kayani, Mr. M. A. Rahim (the then President, Karachi Bar Association), Mr. Justice Wahiduddin Ahmed and Mr. Justice Qadeeruddin Ahmed.

Standing L to R: Mr. Abdullah Sanghai, Mr. Syed Sami Ahmad (the then Secretary, Karachi Bar Association), Mr. Muhammad Zahoorul Haq and Mr. Syed Moinullah.

*The photograph below was also taken on the same occasion,
i.e., on November 7, 1962*

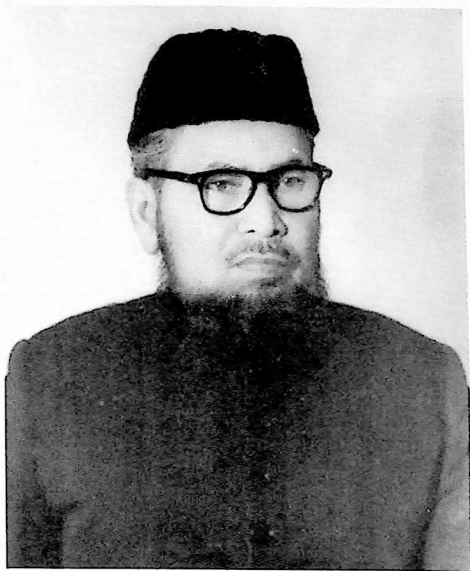


*Right to Left: Mr. Justice M. R. Kayani is being escorted to the dais by
Mr. Syed Sami Ahmad (the then Secretary), Karachi Bar Association),
Mr. Hayat Ahmad Khan (the then Vice President, Karachi Bar
Association) is seen in the Centre*

The 12th Death Anniversary of Justice Dorab F. Patel was observed under the auspices of the Justice Kayani Memorial Law Society on November 15, 1974 at the Sindh High Court Lawn, Karachi. Justice Dorab F. Patel was the Chief Guest. The photograph was taken on the occasion.



From Left to Right: Mr. Akhtar Mahmood Khan, a Member of the Justice Kayani Memorial Law Society, Mr. Syed Sami Ahmad (President, Justice Kayani Memorial Law Society), Mr. Justice Dorab F. Patel (Chief Guest), Mr. Asad Ali Bilgrami (Secretary, Justice Kayani Memorial Law Society), Mr. Shah Yaqoob, Advocate all are seen coming to attend the Anniversary.



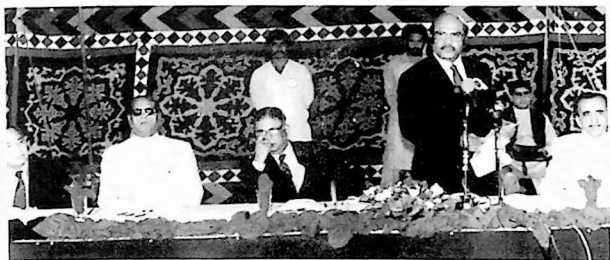
*Maulvi Tamizuddin Khan,
the valiant, who challenged the usurpers and preferred
to break than to bend.*

The photograph was taken on August 31, 1985, at the annual dinner of the Sindh High Court Bar Association, Karachi



Mr. Syed Sami Ahmad, President, Sindh High Court Bar Association, Karachi, is introducing the Chief Guest Mr. Muhammad Khan Junejo, the then Prime Minister of Pakistan, to the Members of the Bar, Judges & other Dignitaries on August 31, 1985, at the annual dinner of the Sindh High Court Bar Association, Karachi

The annual dinner of the Sindh High Court Bar Association, Karachi, was held on August 31, 1985. Mr Muhammad Khan Junejo, the then Prime Minister of Pakistan was invited as the Chief Guest. The photograph below was taken on the occasion.



Left to Right: Mr. Sharifuddin Pirzada, the then Seceretary-General, OIC, Mr. Syed Nasiruddin (President-elect), Mr. Justice Muhammad Haleem, the Chief Justice of Pakistan, Mr. Syed Sami Ahmad (President, Sindh High Court Bar Association, Karachi), is seen presenting an address of welcome and Mr. Muhammad Khan Junejo (Chief Guest), the then Prime Minister of Pakistan is seen sitting next to him.

*A dinner was held in honour of Justice Saeeduzzaman Siddqui,
Chief Justice of Pakistan on August 21, 1999 at the residence of
the Author.*



*From Left to Right: Khawaja Adeel Ahmed, Senior Advocate;
Justice Nazim Hussain Siddiqui, Chief Justice, High Court of Sindh;
Justice Nasir Aslam Zahid; Syed Sami Ahmad, the host; Justice
Saeeduzzaman Siddiqui, the Chief Guest; Asad Ali Bilgrami, Senior
Advocate; Chaudhry Muhammad Farooq, Attorney General of Pakistan
and Justice Mamoon Kazi*

The 9th Death Anniversary of Justice M. R. Kayani was commemorated under the auspices of the Justice Kayani Memorial Law Society on October 31, 1971 at Hotel Intercontinental, Karachi. Mr. Justice Qadeeruddin Ahmed, the then Senior Judge of the High Court of West Pakistan was the Chief Guest. The photograph below was taken on the occasion.



From Left to Right: Mr. Justice Qadeeruddin Ahmed is seen coming to read a paper on the Life of Justice M. R. Kayani and Mr. Syed Sami Ahmad (President, Justice Kayani Memorial Law Society), is seen escorting him to the dais.