

## **Military and Democracy: Conflict Resolution in Reference with Constitutional and Political Development of Pakistan**

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### **ABSTRACT**

A strong army plays an important role for the defense and security of any country. Without a strong army, no country can survive smoothly. Unfortunately, in Pakistan, army remained dominant in the political and constitutional development since independence because of some loopholes in the political and constitutional system. Consequently, Pakistan had to face various military coups. In British India, Army neither tried to overrule the Constitutional and political decisions taken by the Government, nor took over the country and the same rule was followed by the Indian army after independence which ultimately strengthens their political institutions. Whereas Pakistan has to face various successful as well as unsuccessful coups which not only derail the political institutions but also destabilizes the social, economic and legal systems of the country. The purpose of this article is to critically analyze the role of army in the political and Constitutional development of Pakistan especially the role of courts in validation of the different coups imposed by military dictators. This article deals with the recent constitutional amendments and judgments delivered by superior courts and to look how far the judiciary can go to stop further military intervention in the political affairs of Pakistan?

**Key words:** Army, Authority, Constitution, Democratization, Coups, Chief Martial Law Administrator, Pakistan.

### **Introduction**

Pakistan is located in a very complicated area of Asia, if viewed geographically. Afghanistan and Iran are situated on the Western sides on Pakistan, India on the East, and the Arabian Sea on the South (Nawaz, 2008, P. 28). The role of a strong army cannot be denied for the protection of Pakistan from external aggression especially the India who is sharing long bordering areas with it. However, a series of military intrusions in the political and constitutional developments left bad impact on solidarity and integrity of Pakistan. Article 2A of 1973 Constitution which is based the objectives Resolution of 1949, says that “The State shall exercise its powers and authority through the chosen representatives of the people”. Unfortunately, various military coup d'états not only snatched the rights of the people to choose their representatives according to their own choice but also used different unlawful means to expand their regimes. They even did not hesitate to make drastic amendments in the constitution.

The courts have also played an important role to validate the unconstitutional acts of military dictators. In Dosso case (1958), Justice Munir validated martial

law on the basis of doctrine of necessity. When General Zia imposed Martial law in 1977, Court once again legalized martial law (*Nusrat Bhutto v Chief of Army Staff, 1977*), and followed the precedent of *Dosso Case (1958)*. In 1999, when general Musharraf imposed martial law in the country, judiciary once again gave legal cover to the unconstitutional act of military dictator (*Syed Zafar Ali Shah v. Pervez Musharraf Chief Executive, 2000*). In recent, some modifications have been made in Article 6 of the Constitution in 18<sup>th</sup> amendment, which prohibits the courts to provide legal cover to unconstitutional acts.

## **Research Questions**

The present research will focus on the following questions:-

1. What is the significance of Pakistan Army?
2. What is the role of army in Constitutional development of Pakistan?
3. What is the role of Judiciary in Constitutional Development?
4. How politics and military affairs can play their vital role in their own specified parameters for the development of Pakistan?

The article is divided into five parts. Part 2 deals with the role of army in the Subcontinent and the significance of strong Army in Pakistan. Part 3 highlights the role of military in politics from 1947 to 2013 and its impact on the Constitutional development of Pakistan. Part 4 discusses the role of courts in validating coup d'états imposed by various martial law regimes. The last part concludes the arguments and provides a number of suggestions to stop further interference of Army in the political and constitutional affairs of Pakistan.

## **The Role of Military in the Constitutional Development of Pakistan**

On 14<sup>th</sup> August 1947, Quid-e-Azam gave message to Armed forces that “Do not forget that the armed forces are the servants of the people and you do not make national policy; it is we, the civilian, who decide these issues and it is your duty to carry out these tasks with which you are entrusted”. But unfortunately, Pakistan had to face different political conspiracies by the military since her independence. In 1951, Rawalpindi conspiracy was formulated by Major General Akbar Khan to overthrow the government of Liaquat Ali Khan; second conspiracy was made between General Ayub Khan and President Sikandar Mirza to take over the country in 1958. In 1969, third conspiracy was prepared by General Yahyah and his commanders to uphold the political control in the country; fourth conspiracy was arranged by General Zia and his associates to remove the government of Zulfikar Ali Bhutto in 1977 and currently, General Musharraf took the same step and eradicated the government of Nawaz Sharif in 1999 (*Sayed, Dawn, 2008*). Hence, such numerous stages of military interventions left their profound impact on constitutional development in Pakistan (*Newberg, 1995; Ahmed, 2014 and Ahmed & safdar, 2014*). Hence, the constitutional and political growth of Pakistan can be categorized into subsequent eras:

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### **Military Endeavor to Undermine Democracy (1947-1951)**

The constitutional and political development of Pakistan is not definite causing thereby the state a substantial loss to build strong political institutions. For example, General Akbar Khan was the author of Rawalpindi conspiracy of 1951, and he was the first army officer, who tried to overthrow the Government and to interfere in the politics of the country (Sayed, 2008, P. 1). On 9<sup>th</sup> March 1951, Prime Minister, Liaqat Ali Khan, announced the arrest of Major General Akbar Khan, Brigadier Latif, Mrs. Nasim Akbar and the editor of the Pakistan Times, Mr. Faiz Ahmed Faiz who were involved in that conspiracy (Zafar, 1996, P.194). On 21<sup>st</sup> March 1951, the Rawalpindi Conspiracy (special Tribunal) Act was passed by the Constituent Assembly consists of three senior Judges of the High Court which held that Major General Akbar Khan was the architect of conspiracy that was totally against the interest of the country with the objective to overthrow government and replace it with army rule (Zafar, 1996, P.194). The court sentenced general Akbar Khan for 12 years life imprisonment as well as to the co-accused.

### **Military Strategy in Overwhelming Democracy (1952 – 1953)**

In 1953, Martial law was imposed first time in the province of Punjab in the guise to stop the agitation of religious parties against ‘Ahmadis’ but, after restoring the law and order situation, instead of going back to barracks, the army started a ‘Cleaner Lahore Campaign’ and improved the streets, health and sanitation services in order to prolong its duration (Javed, 2014, p.1). Mian Iftikharud Din who was a member of constituent assembly warned that if the politicians did not change their attitude, Martial Law in future would also be resorted (Askari, 2003, P. 65).

### **Involvement of Army In The Politics Of Pakistan (1954 – 1957)**

After the assassination of Prime Minister Liaqat Ali Khan, Khwaja Nazimud Din became the Prime Minister whereas Ghulam Muhammad was appointed as Governor General of Pakistan. On 24<sup>th</sup> March, 1954 the Governor General Ghulam Muhammad dissolve the constituent assembly and reconstitute a new cabinet including Major General Skindar Mirza and General Ayub Khan who was the Commander-in-Chief (Choudhury, 1959, P. 146). They were not responsible to anybody except Ghulam Muhammad and the inclusion of those two Generals created an impression that the cabinet was controlled by the army. Major General Sikandar Mirza was a great supporter of ‘controlled Democracy’ “an expression which caused bewilderment and perturbation in Pakistan as well as in foreign countries” (Choudhury, 1959, P. 146). On 30<sup>th</sup> October, 1954, Skander Mirza

expresses his views in a press conference held in Karachi that the people of Pakistan are not familiar with democracy and democratic government could work efficiently only in a very advanced society such as England (Dawn, 31<sup>st</sup> October 1954). On 4<sup>th</sup> October 1954, four years before taking over the country, General Ayub articulates his political views on paper titled: “A Short Appreciation of Present and Future Problems of Pakistan” in a Hotel at London (Khan,1967, P.186).

### **Indulging the Democratic Organization (1958 – 1968)**

On 23<sup>rd</sup> March 1956, the first Constitution of Pakistan was promulgated and Major General Sikandar Mirza assumed the office of President (Mahmood, 2010, P.360). The Republican Party came out suddenly as a rival to the Muslim League in the whole country with presidential support. The National assembly was consisted of 80 members belongs to almost nine political parties but none of them had a clear majority (Mahmood, 2010, P.361). He expanded his cabinet to 26 members in the house of 80 members to secure his position but it is quite surprising that his party never participate in the elections (Mahmood, 2010, P.361). The Constitution of Pakistan 1973 (under Articles 232-237) states that the President could proclaim an emergency if the security or economy of Pakistan is in danger but the President imposed martial law when no such kind of situation was existing in the country (Khan, 2014). The Constitution of 1956 was not responsible for the instability in the country. However, some other reasons were responsible for instability in the country such as the lack of characterful politicians, the unreliable nature of political parties, dominance of bureaucracy & army, and long gap in elections (Mahmood, 2010, P.362). On 27<sup>th</sup> October 1958, General Ayub decided to get rid of Mirza and took over the country. Mirza was arrested and sent to exile to Great Britain where he later died (Khan, 2005, P.127). General Ayub being head of the state disqualified the old politicians and prevented them from supporting the activities of any political party up to 31<sup>st</sup> December 1966 under Elective Bodies Disqualification Order 1959. He imposed the Constitution of 1962 which was based on presidential form of government and introduced the idea of democracy in the form of ‘basic democracy’ which was more basic than democratic (Mahmood, 2010, P.363). Through the system of basic democracy, the president became secure and stable. He established an autocratic structure in the country with the help of military and bureaucracy. The Presidential election of 1965 proved that the whole administrative machinery assisted him against Fatima Jinnah and through threats and intimidation, the bureaucracy captured vote for Ayub Khan and his followers. All powers were in the hands of President and all other institutions were deprived of their authorities and decision making (Khan, 2008, P. 275). He totally ignored the people of East Pakistan as they felt alienated and protested against their exploitation. General Ayub and the members of his cabinet were in favor of secession of East Pakistan even from 1962, so that they could do politics in West Pakistan smoothly. But, in 1968, the public anger against the dictatorship of Ayub

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Khan ignited which destabilize the law and order situation. Although, the economic condition was improved in Ayub's era, but people did not want to see a dictator any more. On 25<sup>th</sup> March 1969, he decided to resign on being failed to calm down the fuming people, but handed over power to the Army Chief, General Yahyah Khan.

### **Annihilation of State Security (1969 – 1971)**

The shift of authority from Ayub to Yahyah Khan indicated that military was not ready to rely on civilian institutions in spite the fact that those institutions had been built under the direction and supervision of military during Ayub's era. The transfer of power from Ayub to Yahya "brought back Pakistan, once again, on the starting point". Yahyah Khan ruled the country for more than two years, who alleged that Pakistan must follow a 'Turkish-type' Constitution and the Commander-in-Chief of the military would be President (Haqani, 2005, P.78). He abrogated the constitution and dissolved the national assembly as well as the two Provincial assemblies. In addition, he took over the office of Chief Martial Law Administrator (CMLA) and almost twenty-five martial law regulations were issued regarding offences, penalties and trial procedure on the same day (Khan, 2005 P. 209). The courts were not allowed to question the validity of any martial law regulation or any decision of a military court and no order or any kind of writ could be issued against the CMLA. He assumed the office of President on 25<sup>th</sup> March 1969. On 28<sup>th</sup> March 1970, he proclaimed that the system of one unit would be abolished in July. He further announced that there would be 313 members in National Assembly and the general elections were held on 7<sup>th</sup> December 1970 whereas the Provincial elections would be held on 22 October 1970. The Awami League of Mujib ur Rehman won in East Pakistan while Zulfikar Ali Bhutto's PPP remained dominant in West Pakistan (Askari, 2000, P.198). After the elections some disagreement has been created among the leaders of two parties on six point's agenda of Sheikh Mujeeb ur Rehman from East Pakistan. The contents of six points formula is as under:

- 1- A federal system of government, parliamentary in nature and based on adult franchise.
- 2- Federal Government to deal only with defense and foreign affairs. All other subjects to be dealt with by the federating states.
- 3- Either two separate, but freely convertible currencies for the two parts of the country or one currency for the whole country. In this case effective constitutional measures to be taken to prevent flight of capital from East to West Pakistan.
- 4- The power of taxation and revenue collection to be vested in the federating units and not at the center.

- 5- Separate accounts for foreign-exchange earnings of the two parts of the country under control of the respective governments.
- 6- The setting up of a militia or a paramilitary force for East Pakistan (Ali, 2008, p.1975).

At that stage, Bhutto's reservations on six point formula helped Yahyah to apply pressure on Mujeeb. He announced to delay the session of National Assembly on account that the major political party had refused to attend the session. Such decision of postponement created grave political turmoil in East Pakistan. As a result, the civil war started in East Pakistan between Pakistan military supported by minority in East Pakistan and the members of Awami League who were in favour of the creation of Bangladesh. Mrs. Indra Gandhi Prime Minister of India complained that millions of refugees from East Pakistan were migrating in India and damaging the financial and political stability and she stressed the return of refugees to their country. India began to support rebellious movement of Mukti Bahini to dislodge the Pakistani army and on 21<sup>st</sup> November 1971, the Indian army attacked on East Pakistan. It weakened the position of Pakistani army and resultantly, Pakistan had to lose East Pakistan.

### **Abolishing The Civilian Government by Coup D'état (1972 – 1977)**

After the separation of East Pakistan, Yahyah handed over the Government to the Pakistan People Party which emerged as the major party in West Pakistan. On 21<sup>st</sup> April, 1972 National Assembly approved the interim Constitution. After one year, the National Assembly adopted the New Constitution which became effective from 14 August 1973 which "acquainted with the Parliamentary form of government, fundamental rights, and Independence of Judiciary. However, Bhutto introduced various amendments to restrict the political and judicial freedom and strengthen his position. Third amendment was introduced to curtail the rights of a *detenu* who was detained under article 10 of the Constitution in 1975 and the duration of detention was enlarged from one month to three months. Fourth amendment stopped the courts to grant bail to anyone so detained and under Fifth Amendment, "the Chief Justice of the Supreme Court would hold office for a period of five years unless he retired earlier on attaining the age of sixty five years" and in the same way, "the Chief Justice of a High Court would hold office for a period of four years unless he retired earlier on attaining the age of sixty two years" (Khan, 2005, P. 307). On 1<sup>st</sup> March 1976, Bhutto selected General Zia ul Haq as new Chief of Army Staff whose number was sixth in seniority among other generals. In March 1977, general elections were conducted and opposition parties complained about Pakistan People's Party of election rigging and the demands of holding fresh elections transformed into a demand for resignation of Zulfikar Ali Bhutto. The Government tried to resolve the political agitation through negotiation with the opposition but all the efforts of Government ended without any result (Mahmood, 2010, P.368). The military took benefit of that situation and General Zia overthrew the government of Bhutto.

## **Destruction of Constitutional Structure (1978 – 1988)**

General Zia assumed the office of Chief Martial Law Administrator contrasting the earlier two declarations of martial law; the constitution was not abrogated but was held in abeyance (Nusrat Bhutto v. The Chief of the Army Staff, 1977). The powers of the Supreme Court and High courts were suspended but after two days, CMLA order 2 of 1977 allowed the Supreme Court and High Courts to use their power of Writ Jurisdiction except against the CMLA or MLA (Laws continuance in Force Amendment Order, 1977). The Chief Martial Law Administrator (CMLA) gave order for the withdrawal of fifth and sixth amendment. At that time, the case of Bhutto was in the court of Chief Justice Yakub Ali but after the withdrawal of fifth and sixth amendments, Justice Yakub ceased to hold office and he was succeeded by Anwar ulHaq who afterwards gave decision of Nusrat Bhutto case (Haqqani, 2005, P.123). After the assassination of Bhutto, the alliance between Zia and Pakistan National Alliance (PNA) came to an end as their partnership was based on mutual need whereas Zia desired to have PNA's political backing to oust Bhutto's party from politics. The PNA wanted Zia to execute Bhutto so that only non PPP politicians could take part in the general elections to be held on 17 November 1979 (Khan, 2005, P. 350). Z.A Bhutto was executed by General Zia in 1979 and he did not hold general elections till 1985. General Zia used the name of Islam for his political survival with the support of Jamaat-e-Islami and in reward Zia included its members in his Cabinet (Shafqat, 1997, P.198). In 1978, Sharia Benches were formulated to enforce law according to the injunctions of Islam whereas Hadood&Zina Ordinances were promulgated in 1979. Moreover, 'local bodies' elections were held on non-party basis in the same year but the results were not as per the expectations of Zia as majority members of Pakistan People's Party came out as successful rivals. In 1981, CMLA issued the Provisional Constitutional Order (PCO) and the Judges of the High Court and Supreme Court were asked to sworn of office under PCO (Shafqat, 1997, P.194). The National Assembly could be dissolved only on the advice of Prime Minister as per the Constitution of Pakistan 1973. General Zia introduced 8<sup>th</sup> amendment which leads major changes in the constitution that ceased the parliamentary system of government and gave wide discretionary powers to the President. Eighth amendment gave extensive discretionary powers to the president under Article 58 (2) (b) for which he was not bound to take any advice of the Prime Minister or the Cabinet and even if such an advice was required, it was not binding on him (Empror v. Sibnath Banerjee, 1943). The most tremendous of those authorities was the power of the president to, in his discretion, dissolve the National Assembly under Article 58 clause (2)(b) and the conforming authority of the Governors to dissolve the Provincial Assemblies, which authority, if used, had the consequence of dismissing the Prime Minister, and his Cabinet ( Karim, 2006, P. 27). In December 1985, General Zia lifted Martial Law and exercised his power and

dissolved the National Assembly (Khan, 2008, P. 329). On 17<sup>th</sup> August 1988, after the death of General Zia, this action was first challenged before the Lahore High Court in (*Muhammad Sharif v. Federation of Pakistan* 1988), and then before the Supreme Court in (*Federation of Pakistan v. Haji Muhammad Saif Ullah Khan*, 1989). The Court held the dissolution of the National Assembly as well as provincial assemblies against the law but it deprived of the right to restore the said Assemblies.

On 6<sup>th</sup> August 1990, the same power of Article 58 (2) (b) was exercised by the President Ghulam Ishaq Khan. The Supreme Court (SC) considered the dissolution of Benazir government in a case of *Ahmed Tariq Rahim v. Federation of Pakistan* (1992) and upheld the act of the President to dissolve the assemblies and deprived of its reinstatement. Once again, Article 58 (2) (b) was exercised by President Ghulam Ishaq Khan and the National Assembly of Nawaz Sharif was dissolved on 18<sup>th</sup> April 1993. However, in *Muhammad Nawaz Sharif V President of Pakistan* (1993), the SC by a majority of ten to one declared the act of President illegal and reinstates the assemblies and the cabinet. On November 5, 1996, this power was exercised fourth time by the President Farooq Leghari who dismissed the government of Benazir Bhutto. Therefore, in a case of (*Benazir Bhutto v. President of Pakistan*, 1998), the court sustained the presidential order of dissolution. However, during the second tenure of Nawaz Sharif, 13<sup>th</sup> amendment replaced the 8<sup>th</sup> amendment which restricted the discretionary powers of the president to dissolve the National Assembly.

### **Extinction of Democracy (1989 – 2014)**

Due to resilient intervention of army in the constitutional development, Pakistan can be said “a state within the army and not an army within the state” (Burki & Buxter, 1991, P.73). In 1999, once again martial law was imposed by a military dictator General Musharraf after overthrowing the civilian government who held in abeyance the Constitution of Pakistan 1973. The military took over Pakistan and the National Assembly as well as Provincial Assemblies was suspended. He issued a Provisional Constitutional Order (PCO) in 1999 and the Judges of higher Courts were forced to take oath under the PCO. However, majority of the judges refused to take oath. On 30<sup>th</sup> April 2002, before the general elections, Musharraf held a referendum to remain in power, which he won by 97 percent votes but it was challenged in the Supreme Court through a number of constitutional petitions. Supreme Court declared that the results of referendum have to be decided by the Parliament (*Hussain Ahmed v. Pervez Musharraf*, 2002). In 2002, general elections were held and the constitution was partly restored. In 2003, 17<sup>th</sup> amendment was passed and Article 58(2) (b) and Article 112(2) (b) were reinserted again. General Musharraf became President of Pakistan.

On 14<sup>th</sup> November 2007, Article 43 remained suspended because Musharraf was holding positions of President and Chief of Army Staff simultaneously. According to Article 43, “The president shall not hold any office of profit in the



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service of Pakistan or occupy any other position carrying the right to remuneration for the rendering of services”. On 9<sup>th</sup> March 2007, CJ of Pakistan Iftikhar Muhammad Chaudhry, was removed by the President on the charges of corruption and misconduct imposed by General Musharraf. However, Chief Justice challenged the validity of Presidential Reference in the Court and the Supreme Court restored him to his office and set aside the Reference (Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through secretary and others, 2010). On 3<sup>rd</sup> November 2007, Musharraf declared emergency once again and he suspended the constitution and the parliament as Chief of the Army staff. In the same authority, PCO was proclaimed which required all judges to take oath under it but seven members bench headed by Chief Justice Iftikhar Chaudhry immediately issued an interim restraint order directing that no judge of the SC would make oath under any extra constitutional order. On the Same day, the SC “immediately declared the emergency unlawful” (Wjilud Din Ahmed v. Chief Election Commissioner Islamabad and others, 2008).

In this way, Musharraf dismissed CJ Iktikhar Chaudhry along with sixty other judges of SC who refused to take oath. Justice Hameed Dogar took oath under PCO and assumed the office of Chief Justice of Pakistan. In Tikka Muhammad Iqbal Khan case, (2008) and Watan party case through its president confronted the legitimacy of the said act of General Musharraf through constitutional petitions in the SC under Article 184(3) of the Constitution of Pakistan. Justice Hameed Dogar legalized the proclamation of emergency as well as other unlawful orders of General Musharraf (Tika Muhammad Iqbal Khan v. General Parvaiz Musharraf, 2008). The unconstitutional step of Musharraf was not accepted by the people of Pakistan and it was resisted by the lawyers, media, Human rights activists, NGOs and political parties. On 15<sup>th</sup> March 2009, those lawyers Human rights activists, and political parties started a long march from Lahore to Islamabad. Millions of people were moving to Islamabad under the leadership of Nawaz Sharif when government restored the deposed judges. On 24<sup>th</sup> March 2009, Iftikhar Chaudhry assumed his office again. The Supreme Court declared all the “action taken by General Parvez Musharraf from 3<sup>rd</sup> November 2007 to 15 December 2007 to be unconstitutional, illegal and void ab initio”.

### **Constitutional Violations and Role of Judiciary**

As per Article 244 of the Constitution of Pakistan 1973, the members of the Armed Forces will take oath in the following words “I do solemnly swear that I will bear true faith and allegiance to Pakistan and uphold the Constitution of the Islamic Republic of Pakistan which embodies the will of people, that I will not engage myself in any political activities whatever and that I will honestly and faithfully serve Pakistan in the Pakistan Army (or navy or Air Forces) as required by and under the law”. But unfortunately, two military dictators suspended the

Constitution after its formation in 1973, for three times and destabilized the democratic system of Pakistan and the role of judiciary cannot be ignored in devastation of democratic system and validation of Martial law regimes.

### **Abolishing Constitutions through Doctrine of State Necessity**

The Supreme Court of Pakistan took an active part by legalizing the extra constitutional dealings of the army. It did not hesitate to determine political questions. Justice Munir used the doctrine of state necessity or the maxim *saluspopuliestsupremalex* (welfare of the people was the Supreme law) for the first time in the history of Pakistan to legalize the extra-legal use of emergency powers by the Governor General to be constitutional under the doctrine of state necessity (Reference by His Excellency the Governor General 1955). In his judgment, Chief Justice also quoted Bracton's maxim, "that which is otherwise not lawful is made lawful by necessity". In 1958, by deciding Dosso case, Justice Munir again 'set the judiciary on an explicitly political path'. In that case, the basic difficulty faced by court was to determine a constitutional issue in the absence of an official constitution. The court could have detached itself from the political tussle by declaring that the suspension of the formal Constitution meant that the petitions themselves were no longer possible to judge (Newberg, 2002, P.73). But the court held that the petitions prior to the martial law of 1958 would be determined according to 1956 Constitution.

In Dosso's case (1858), Justice Munir validated the Martial Law of 1958 by invoking the *Kelson Theory* and articulating the doctrine of 'revolutionary legality'. He held that a victorious revolution or a successful *coup d' etat* is an internationally recognized legal method of changing a constitution and after that change, if the territory and the people remain the same, they would be under the modern juristic doctrine, no change in the corpus or international body of the State. According to international law, the revolutionary government and the new constitution would be the lawful Government and the valid Constitution of the State. "The court's judgment, however, was questionable for its logic as well as its political assumptions" (Newberg, 2002, P.73). However, after the death of Yahyah Khan, the question of Martial Law was reviewed once again in Asma Jilani Case (1972). In that case, a politician Malik Ghulam Jilani and an Editor-in-Chief Altaf Husain Gauhar were placed under preventive detention under preventive detention under the Defense of Pakistan Rules and Martial Law Regulation No. 78. But petitions filed by both parties were failed by Lahore HC and Sindh HC. In appeal, the Supreme Court retrospectively declared the martial Law to be illegal and called the Chief Martial Law Administrator as a usurper. The court overruled Dosso case (1958) and held that Doctrine of necessity could not legalize an unconstitutional coup and also held that "Kelson's theory was by no means a universally accepted one, nor was it a theory that could claim to have become a basic doctrine of the science of modern jurisprudence, nor did Kelson even attempt to formulate any theory which favour totalitarianism".

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### **Disregarding Article 6 by the Courts**

- (a) The framers of 1973 Constitution inserted Article 6 in the constitution which deals with high treason. According to this Article, “any person who abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subverts the constitution by use of force or show of force or by other constitutional means shall be guilty of high treason” and “the person aiding or abetting such act shall likewise be guilty of high treason and the Parliament shall provide law for the punishment of persons found guilty of high treason”. The object of Article 6 was that the Constitution must remain a supreme and basic law of the land (Rizvi, 2005, p.57). To fulfill the requirement of Article 6, High Treason (Punishment) Act, 1973 was enforced. Section 2 of the act says, “a person who is found guilty:
  - (b) Of having committed an act of abrogation or subversion of Constitution in force in Pakistan at any time since the 23<sup>rd</sup> day of March 1956, or
  - (c) Of high treason as defined in article 6 of Constitution, shall be punishable with death or imprisonment for life” (The High treason punishment act, 1973 LXVIII of 1973).

It is important to note that not only the subversion or abrogation of 1973 Constitution would be as offence punishable with death or imprisonment for life but also the subversion and abrogation of previous Constitutions. According to Section 3 of the act, “No court shall take cognizance of an offence punishable under this Act except on complaint in writing made by person authorized by the Federal Government in this behalf” (Section 3, The High treason punishment act, 1973 LXVIII of 1973).

Clause (2) of Article 12 of Constitution of 1973 is the supplement of Article 6. Clause (1) of Article 12 gives protection against retrospective punishment but Clause (2) is the exception to the general rule, according to which, any person who may have abrogated or subverted the Constitution from 1956 can by virtue of a law made by the parliament can be not only prosecuted but also suitably punished (Report of the constitution committee along with a Draft of the constitution, p. 60). “Clause 2 of Article 12 also mentions Article 270 to ensure that those persons who committed offence of abrogation etc. of the constitution in the past may also be prosecuted under Article 6 of the Constitution” (Rizvi, 2005, P. 63).

In 1977, martial law was imposed again by General Zia by ousting the government of Bhutto. He detained Bhutto under martial law regulations. Nusrat Bhutto moved the SC against the detention of Bhutto in its original jurisdiction for enforcement of fundamental rights under the Constitution. In Nusrat Bhutto case (1977), the counsel of the petitioner argued that the Chief of Army Staff of the Pakistan Army, General Zia Ul Haq, had no authority under the 1973 constitution to impose martial law in the country and his act amounted to an act of high treason. But the Supreme Court validated Martial Law of 1977 on the basis of

doctrine of necessity. The court explained that the imposition of Martial Law was short-term constitutional departure for a limited purpose rather than the revolution. The Court also held, “Kelson’s theory of revolutionary legality had no relevance to such transit and limited change in legal and constitutional continuity of a country”. In 1993, the act of Prime Minister Nawaz Sharif was challenged. One of the grounds was that the Prime Minister has challenge the Constitutional set-up of the Country and therefore his speech attracted the definition of Article 6. But the Court held that the speech made only amounted to mere allegations and does not create lawlessness or upset security (Nawaz Sharif v. President of Pakistan, 1993). In 1999, General Musharraf took over the country and “ousted Prime Minister Nawaz Sharif and assumed the office of Chief Executive” (Khan, 2008, P.335). However, his act was challenged (Zafar Ali Shah v. Pervez Musharraf Chief Executive, 2000). It was argued that the army subside the mandate of the public and General Musharraf disregarded his oath under Article 244 of the Constitution of Pakistan 1973 but it is surprising that the Supreme Court again legalized the military take over under the doctrine of state necessity. It legalized the suspension of assemblies and Senate by the Chief of Army Staff and also held that he has validly assumed powers by means of an extra constitutional step in the interest of the country for the wellbeing of the people. On 3<sup>rd</sup> November 2007, General Pervez Musharraf imposed emergency for the second time in the country. The action of General Parvaiz Musharraf was challenged and SC “upheld his unconstitutional acts on the touchstone of the law of necessity or *salus populi est suprema lex*” (Tikka Muhammad Khan v. General Parvaiz Musharraf, 2008). In Subsequent case, the SC held that “the doctrine of necessity as elucidated in the case of Begum Nusrat Bhutto absolutely have no application to an unconstitutional and illegal assumption of power by an authority not mentioned in the constitution in a manner not provided for in the Constitution” (Sindh High Court Bar Association case v Federation of Pakistan (2009).

## **High Treason and Contemporary Situation**

Some Amendments have been introduced in Article 6 through 18<sup>th</sup> Amendment. After 18<sup>th</sup> Amendment, Article 6 can be read in the following way,

- 1) Any person who abrogates or subverts or suspends or holds in abeyance, or attempts or conspires to abrogate or subvert or suspend or hold in abeyance, the Constitution by use of force or show of force or by any other unconstitutional means shall be guilty of high treason
- 2) Any person aiding or abetting or collaborating the act mentioned in clause (1) shall likewise be guilty of high treason.
- 2A) An act of high treason mentioned in clause (1) or clause (2) shall not be validated by any Court including the Supreme Court and the High Court (Constitution Eighteenth Amendment Act, 2010).

In past, courts played an active role to tolerate martial laws on the basis of Doctrine of State Necessity. But 18<sup>th</sup> Amendment has created a bar on powers of

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the Courts to validate the act of high treason. For the first time in the history of Pakistan, the trial of a military dictator has been started under Article 6. In that case, The Government has made five charges against Musharraf under Article 6 clause (1). These charges are “abrogating, subverting, suspending, holding in abeyance and attempting to conspire against the 1973 constitution by declaring emergency and overthrowing superior judiciary in November 2007” (*Dawn*, 9 december 2013). It was alleged in the complaint that General Musharraf issued a proclamation of Emergency Order on Nov. 3 2007, as Chief of armed forces to hold the constitution in abeyance (*Dawn*, 9 December 2013). It is further alleged that the Army Chief abrogated the Constitution and hence guilty of high treason as per Article 6 of the Constitution of Pakistan 1973 (Complaint No 01/2013). However, the Complainant neither blamed General Musharraf for the 1999 coup nor nominated any co-accused in the case despite the fact that Clause 2 of Article 6 also holds “any person aiding, abetting or collaborating, the acts mentioned in Clause (1) shall likewise be guilty of high treason”. At the request of the Government under the Criminal Law Amendment (Special Court) Act 1976, Chief Justice Iftikhar Muhammad Chaudhry constituted the special court and the matter is still sub judice.

### **Conclusion**

The history of Pakistan has been scuffling between the democracy and dictatorship since from independence. Pakistan Army and Pakistan Government are so interconnected that it looks as if army works as one of the government institutions (jamal,2014). Before the partition of Subcontinent, there was great harmony between civil military relationships. After the partition of Subcontinent, in India, Constitutional developments were made to halt army from indulging in the political and Constitutional affairs. On the other hand, Quid-e-Azam died just after one year of the birth of Pakistan. Pakistani Army took advantage of corrupt and incompetent political leaders and took over the Country for four times. First conspiracy of military against Government started from 1949 and continued till 1951. But Government soon came to know about that conspiracy before it became successful. The case started in a special tribunal instead of Court Martial. When Ghulam Muhammad became Governor General, he included two Generals in his Cabinet. It was the formal beginning of entering army in politics. Therefore, the extensive military intervention in the political affairs of Pakistan continued from 1953 to 1999 through successive martial law regimes.

The main causes of military interference in the political affairs of Pakistan are incompetency, immaturity, corruption, feudal mind set, floor crossing and lack of patriotism of politicians which creates a gap later filled by the Army and hence the democracy in Pakistan is still not established. Moreover, during civilian regimes, military constantly interrupts it and creates a perception among the common

people that civil government cannot run the country smoothly. Therefore, Democracy has never been given a fair chance to flourish in the country due to persistent military interference in political affairs of Pakistan.

In 1973 Constitution, some provisions were formulated to stop the interference of army in politics of the Country. Article 6 is most important provision in this regard. It is inspired by Deterrence Theory and deals with high treason as the punishment of Article 6 is harsh because its purpose is to stop further military intervention in politics. But unfortunately, even after 1973 Constitution, Judiciary did not hesitate to validate illegal acts of military by using the doctrine of State Necessity (Begum Nusrat Bhutto v. Chief of army Staff, 1977) and ignoring the significance of Article 6. However, 18<sup>th</sup> amendment has modified Article 6 and the bar is imposed in validating the illegal acts of military. It is an important step to bury the Doctrine of State Necessity but again the role of Supreme Court will be significant to decide the fate of Article 6 in future.

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9. Article 48(1) and (2) of 1973 Constitution
10. Article 58(2)(b) of 1973 Constitution
11. Article 63 A of Constitution of 1973
12. Article 112(2)(b) of 1973 Constitution
13. Article 244 of 1973 Constitution
14. Article 90 of 1973 Constitution
15. Article 270AA of 1973 Constitution
16. Article 270AAA of 1973 Constitution
17. High treason (punishment) act, 1973 (LXVIII of 1973)
18. 3<sup>rd</sup> Schedule of Pakistan Constitution 1973
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