

CONSTITUTIONAL HISTORY

(Application of laws framed by British Parliament to Pakistan)

LECTURE DELIVERED ON 08.04.2013 BY SYED JAMSHED ALI, FORMER JUDGE SUPREME COURT OF PAKISTAN, DIRECTOR GENERAL OF THE PUNJAB JUDICIAL ACADEMY, TO DIRECTLY RECRUITED ADDITIONAL DISTRICT & SESSION JUDGES.

About forty nine years from today I joined the Chamber of my father Syed Mushtaq Ali, Advocate, at Multan after having been enrolled as a pleader of the subordinate courts, on 28.8.1964 as the practice then was in vogue. One question which immediately caught my attention was as to the authority under which the country was being governed also by the laws framed by the British Parliament and his reply brought out interesting events of history which I would like to share with you. Although, as a student of history, I had some idea of the Englishmen and other European companies growing their settlements in various parts of the world, Asia and Africa being of particular interest to the Europeans, yet I had no idea of the basis of application of the laws made by British Parliament to Pakistan.

2. It was under the Charter of 1600 that the East India Company was granted the monopoly for trading to and from India. Mughal Emperor Jahangir was then ruling the Sub-Continent. From 1600 to 1669 the Charters issued primarily related to the internal management of the Company and by way of Charter of 1669, the port and Island of Bombay were granted to East India Company with powers of Civil and Military Government. By another Charter of 1677 the East India Company was authorized to coin money at Bombay. By the Charter of 1683 the East India Company was allowed to raise Military Forces and by the Charter of 1686 the Company was allowed to raise Naval Forces. In 1694 House of Common passed a resolution that all subjects have equal right to do business. This had the effect of cutting down the monopoly of the East India Company with the result that British Parliament passed an Act in 1698, according to which monopoly could only be created by an Act of Parliament. In 1726 the Municipal and Judicial Institutions (which were initially created by the company for their own officers and servants of Madras, Bombay and Calcutta) were reorganized.

3. In 1707 Emperor Aurangzeb died and once a majestic Mughal Empire started showing visible cracks. The major events which happened were that Punjab was occupied by Sikhs, Marhattas rose in Peninsula, Bangal, Daccan, Oudh threw away their allegiance. Many Rajput States declared independence. Afghan and Marhattas occupied Malwa and Rohail Khand,

many small local rulers emerged and situation for the East India Company was extremely conducive and that the traders were able to develop their political and judicial authority in India out of this chaos.

4. Meanwhile following the footsteps of the Englishmen, the French had also established certain settlements in India for the purposes of carrying on trade to and from India. In 1752 the French were defeated in the battle of *P/assy* and the East India Company then enjoyed exclusive trading rights to and from India.

5. The first major intervention of the East India Company in the local affairs occurred in 1765 when Shah Alam, a Mughal King sold fiscal rights i.e. collection of revenue in Bangal, Behar and Orissa to the East India Company for Rs.26,00,000/- per annum. By the Charter Act of 1813 the British Parliament granted to the East India Company Indian possession and authority to collect revenue for a term of 20 years. The first Government of India Act was passed in 1854 whereby the responsibility to govern and Indian possessions of the Company were transferred from the East India Company to the Secretary of the State.

6. 1857 War of Independence was the sunset for the Mughal Umpire. On 1st January 1874, the East India Company was dissolved. The British Parliament took a number of legislative measures to strengthen the British Rule over India and the first constitutional document introduced for the governance of India by the British Parliament was the Government of India Act, 1935. Under the said Act India was declared as Federation, ruled by the Governor General as nominee of the Queen.

The provinces were ruled by the Governors while there were other provinces known as Chief Commissioners' Provinces to be directly ruled by the Governor General. There were legislative lists demarcating the line of responsibility of the Federation and the Provinces, Legislative Assemblies, Financial Procedures, the High Courts and the Federal Court.

7. The War of Independence in any case, accelerated the struggle for liberating India from the Britishers. In July 1946 Lord Mountbatten constituted the first Constituent Assembly for a Constitution to govern both India and Pakistan. This was not acceptable to Quaid-e-Azam Muhammad Ali Jinnah and then on 3rd of June, 1947, the first Constituent Assembly for Pakistan was constituted by Lord Mountbatten. Quaid-e-Azam Muhammad Ali Jinnah was its

first President. Meanwhile, the political struggle intensified which pressurized the Britishers and they ultimately decided to leave the Country. On 18th of July 1947, the Indian Independence Act of 1947 was passed by the British Parliament which brought into existence two independent dominions, i.e, India and Pakistan w.e.f. 15th of August, 1947. The Government of India Act, 1935 became the working Constitution of Pakistan. These two dominions were to be headed by the Governor Generals to be appointed by the Crown. It was further provided that till the two dominions were able to make provisions for their governance, the Government of India Act, 1935, shall apply as far as possible and all provisions of the Acts, Orders in Council, rules and other instruments were to continue.

8. On 14th of August, 1947, the Pakistan (Provisional Constitution Order, 1947) AND (Adaptation of Existing Pakistan Laws) Order, 1947 were promulgated. It, *inter a/ia*, defined existing Pakistani Law as an Act, Ordinances, Regulations, Rules and Orders, Bye-Laws and by virtue of section 3 thereof, all existing laws were adopted, subject to specified amendments made by the above Order. The Adaptation Order of 1947 was supplemented by the Adaptation of Central Acts and Ordinances Order 1949 (**Governor General Order No.4 - PLD 1949 Central Statute page 1**).

This is how the laws framed by the British Parliament became part of our *corpus juris*.

9. Unfortunately the first Constituent Assembly was not able to draft the Constitution and was dissolved by the Governor General on 24th October, 1954. This was challenged by Moulvi Tamizuddin as President of that Assembly in a constitution petition before the Sind High Court which was allowed in **Moulvi Tamizuddin Khan Vs. Federation of Pakistan (PLD 1955 Sindh 96)**. The Judgment of the Chief Court of Sindh declaring promulgation of the Governor General Order of 24th March, 1954, as *ultra vires*, was set aside by the Federal Court on appeal of the **Federation of Pakistan Vs. Moulvi Tamizuddin Khan (PLD 1955 F.C.240)**. The effect, *inter a/ia*, of the Judgment of the Federal Court was that as many as forty-six Acts stood invalidated. In this situation the Governor General promulgated Emergency Powers Ordinance (IX of 1955), *inter a/ia*, to make provisions for framing of the Constitution of Pakistan. This Ordinance was struck down by the Federal Court in **Usif Patel Vs. The Crown (PLD 1955 F.C.**

387). Consequently the Federal Government was compelled to make a Reference to the Federal Court under section 213 of the Government of India Act, 1935 (answered on 16.5.1955). Meanwhile, the Constitution Convention Order, 1955, was promulgated on 15th April, 1955 by the Governor General providing for election of a new Constituent Assembly. Initially the total number of the members of the Constituent Assembly was 60 and by virtue of Governor General Order (No.X of 1955) promulgated on 27th April, 1955, the strength of the Constituent Assembly was fixed at 80 out of which 40 were from the then East Pakistan while remaining 40 were from Punjab, NWFP, Sind, Baluchistan, Frontier States, Tribal Areas, Khairpur, Bahawalpur States and Karachi. While answering the Reference (**PLD 1955 F.C.435**), the Federal Court observed that the Assembly constituted under the Constitution Convention Order would act as the Constituent Assembly. Thus, the second Constituent Assembly came into existence who drafted the Constitution on 8th January 1956, which was adopted by the said Assembly on 29th of February, 1956, and was enforced on 23rd March, 1956 as the first Constitution of Pakistan.

10. Respite from Constitutional crisis was only transitory as on 7th October 1958, the President annulled the Constitution of 1956, proclaimed Martial Law and General Ayub Khan was appointed as the Chief Martial Law Administrator (**PLD 1958 S.C.577**). Imposition of Martial Law was questioned in a number of petitions before the Supreme Court of Pakistan which were dismissed on the basis of Law of Necessity ***State Vs. Dosso*** (**PLD 1958 S.C.533**). Thus, the infant Constitution was buried in its infancy. A Constitution Commission was, then, constituted by General Ayub Khan to frame a new Constitution. The Report of the Commission was presented to the President and Chief Martial Administrator on 6th May 1961 and, after it had been discussed in the Governors' Conference held in Rawalpindi on 24th October 1961, it was announced in March 1962 and was enforced on 8th June, 1962, on which date the proclamation of Martial Law was withdrawn.

11. On 25th March 1969 General Agha Muhammad Yahya Khan abrogated the Constitution and imposed Martial Law in the Country. On 4th of April 1969, a Provisional Constitution Order was promulgated by the Chief Martial Law Administrator, according to which the State of Pakistan was to be governed as nearly as possible in accordance with the defunct Constitution.

It will not be out of place to refer to an important decision of the Lahore High Court Lahore. A number of cases pending before the Special Judge Central, Rawalpindi were transferred by the Martial Law Authorities to the Special Military Court. This action was challenged which was sustained by the Lahore High Court in **Mir Hassan and another vs. The State (PLD 1969 Lahore 786)**. On 28th March 1970 General Agha Muhammad Yahya Khan announced the Legal Framework Order, 1970 which, *inter a/ia*, laid down the basic principles for the future Constitution of Pakistan. Holding of the general elections was also contemplated. Under the said regime elections were held in 1970, but unfortunately there was a constitutional breakdown, war with India and separation of East Pakistan in 1971, now Bangladesh.

12. On 22nd December 1971, a political leader, namely, Mr. Ghulam Jilani Malik was detained under the Defence of Pakistan Rules, but the said order was substituted by an order of Martial Law Administrator, Zone 'C'. It was challenged before the learned High Court by Ms. Asma Jilani, a daughter of the detenu. The writ petition was dismissed. The matter was taken to the Supreme Court, where the appeal was allowed. **State Vs. Dosso supra** was reconsidered and dissented from, Yahya Khan was declared as a usurper **(PLD 1972 S.C.139)**. Meanwhile on 20th December 1971, the Pakistan People's Party had come into power as Constitutionally elected Government as result of the 1970 Election. In 1972, an Interim Constitution was promulgated and enforced.

13. On 14th August 1973, the Constitution of Islamic Republic of Pakistan, 1973, which was unanimously agreed to by all the political parties, was enforced but again, unfortunately, its life was short when this time General Muhammad Zia ul Haq imposed Martial Law in the Country on 5th July 1977. A number of political leaders, including Mr. Zulfikar Ali Bhutto, were detained under a Martial Law Order against which a constitution petition was filed before the Honourable Supreme Court of Pakistan. **[Begum Nusrat Bhutto Vs. Chief of Army Staff and Federation of Pakistan (PLD 1977 S C 657)** decided on 10.11.1977]. Unfortunately the *Ke/sen* Theory, which had been the basis of the Judgment in *Dosso's case supra* was resurrected. General Muhammad Zia ul Haq had promised general elections within 90 days, but the commitment made with the nation was not redeemed.

14. On 2nd of March 1985 Revival of Constitution Order (President's Order No.XIV of 1985) was promulgated whereby the Constitution was restored. And, non-party election was held the

same year in which Mr. Muhammad Khan Junejo was elected as the Prime Minister of the Country on 25th March 1985. His

Government was, however, dismissed on 29th May 1988. On the death of General Muhammad Zia ul Haq in the air crash on 17th August 1988 Mr. Muhammad Ishaq Khan, who was the then Chairman Senate, assumed Office of the President and general elections were held in 1988 in which Pakistan People's Party led by Mohterma Benazir Bhutto assumed the Office of the Prime Minister on 2nd December 1988 to form the Government at the Center. She remained in the Office till 6th August 1990 when her Government was dismissed by the President of Pakistan, Mr. Ghulam Ishaq Khan. From 1988 to 12th October 1999, constitutionally elected Governments have been in office but none could complete its tenure.

15. Unfortunately on 12th October 1999 General Pervez Musharraf brought about a successful coup, held the Constitution in abeyance, declared himself as the Chief Executive of the Country, also continued to hold the post of the Chief of the Army Staff and later assumed the Office of the President also. This action of General Musharraf was unsuccessfully assailed before the Honourable Supreme Court by Syed Zafar Ali Shah in a constitution petition but the actions of the General were validated by the Honourable Supreme Court and the Chief Executive was conferred power even to amend the Constitution **(Zafar Ali Shah Vs. Federation of Pakistan)** [PLD 2002 S.C.869].

16. In 2002 two important events happened, one was promulgation of the Election Order 2002 and the other was Referendum, as a result of which General Musharraf's position as President was affirmed. On 10th October, 2002, general elections were held as a result of which Mr. Zafar Ullah Khan Jamali of Pakistan Mulim League (Quaid-e-Azam) was elected as the Prime Minister of Pakistan who assumed Office on 21st November 2002 but resigned on 26th June, 2004. Meanwhile, to perpetuate his rule as President, General Musharraf got a vote of confidence from the Parliament and four Provincial Assemblies on 1st of January, 2004 and continued in the Office as President and Chief of the Army Staff.

17. On 2nd October, 2007 Mr. Justice Wajihuddin Ahmad, an Honourable former Judge of the Supreme Court (who had refused to make oath under the Martial Law of General Musharraf) filed a constitution petition. A number of other petitions were also filed challenging

the election of Musharraf as President in Army uniform. However, these petitions were being heard when on 3rd November, 2007, General Musharraf proclaimed Emergency in his capacity as Chief of Army Staff. This proclamation particularly offloaded totally baseless allegations against the judiciary for interfering in the government policies and executive functions. And, on the same day Oath of Office of Judges Order was promulgated. However, only five Supreme Court Judges made the oath.* A number of Judges of the High Courts also refused to make the oath. Thus, out of ninety five judges of the superior courts, only thirty made the oath. On the same day i.e. 3rd November 2007, the Supreme Court passed an interim order nullifying the effect of proclamation of emergency of 3rd November, 2007.

18. On 9th March 2007, the Honourable Mr. Justice Iftikhar Muhammad Chaudhary, the Chief Justice of Pakistan, was suspended by General Musharraf and proceedings were initiated against him before the Supreme Judicial Council. This was the reaction to the stance of the Honourable Chief Justice who stood firm on his ground and had refused to resign although pressurized to do so in the Army House.

19. The Honourable Chief Justice filed a petition challenging the proceedings initiated against him before the Supreme Judicial Council. A thirteen Member Bench heard the said petition which was allowed and the Honourable Chief Justice was restored to the office. Please See **Iftikhar Muhammad Chaudhri Vs. President of Pakistan etc (PLD 2010 S.C.61).****

20. Meanwhile on 28th of November 2007 Musharraf gave up the office of Chief of the Army Staff and on 29th November, 2007 took oath as President. He also held out that the emergency shall be lifted on 5th of December 2007 when the PCO

*The author was one of the Supreme Court Judges who had refused to make oath.

**The author has been a member of 13 Judges Bench.

may also be withdrawn and election would be held on 8th of January 2008. On 15th December, 2007 Musharraf lifted the emergency, the PCO and revived the 1973 Constitution. On 11th of November 2007 Musharraf announced holding of the General Election on 9th January, 2008. Unfortunately on 27th December 2007 Mohtarama Benazir Bhutto was assassinated. The elections were held on 18th of February 2008. Pakistan People's Party Parliamentarian (PPPP) was able to form coalition Government.

21. During the suspension of the Hon'ble Chief Justice C.P.No.87 of 2007 decided on 23rd November 2007 and C P. No.73 of 2007 decided on 19.11.2007 filed respectively by Tikka Muhammad Iqbal Khan and Justice Wajihud Din Ahmad were dismissed. The effect thereof was that the extra constitutional measures of 3rd November 2007 stood validated. **(PLD 2008 S.C.178)**. Affirmed on review in (PLD 2008 S.C.615).

22. After reinstatement of the Hon'ble Chief Justice, the matter regarding the Emergency of 3rd November 2007 came before the Hon'ble Supreme Court in constitution petitions Nos. 8 & 9 of 2009. The Proclamation of Emergency of 3rd November 2007, removal of Judges and appointment of new Judges, without consulting the *de jure* Chief Justice, were declared as without lawful authority. The judgment in Tikka Iqbal Muhammad Khan was held to be *per in curium, coram non iudice*, without any legal basis and was declared as void *ab initio*. **(PLD 2009 S.C.789 and 879)**

23. During the Pakistan Peoples' Party Parliamentary Government at the Centre major amendments in the Constitution were carried out. In the Chapter of Fundamental Rights, the following additions were made:-

- i. Addition of Article 10-A (Introduction of the due process clause).
- ii. Addition in Article 19-A (introduction of the right to information).
- iii. 25-A (right to education).
- iv. Article 17 was substituted.

24. Other important amendments were aimed at the provincial autonomy by abolition of the Concurrent Legislative List. For appointment of Judges in Superior Judiciary a Judicial Commission and Parliamentary Committee were constituted to process all proposals and for that purpose Article 175-A was inserted in the Constitution providing for detailed mechanism. A number of other amendments were also made in the Constitution commonly known as Eighteenth Amendment. **(Please see PLD 2010 Federal Statute Page 1)**. Thereafter 19th and 20th Amendments were also made and for their full text please see **(PLD 2011 Federal Statute 19)** and **[PLD 2012 Federal Statute (Supplement-I)] 355**].

25. A chart showing the Governments at the Centre from 2nd December, 1988 to 25th March, 2013, is given hereunder:-

Name	Party	Period
Mohterma Benazir Bhutto (Headed the Office of the Prime Minister)	Pakistan People's Party	2 nd Dec. 1988 to 6 th Aug. 1990
Mr. Ghulam Mustafa Jatoi (Caretaker Prime Minister)	National People's Party	6 th Aug. 1990 to 6 th Nov. 1990
Mian Muhammad Nawaz Sharif (Headed the Office of the Prime Minister)	Pakistan Muslim League (N)	6 th Nov. 1990 to 18 th April 1993
Mr. Balakh Sher Mazaari (Caretaker Prime Minister)	Pakistan People's Party	18 th April 1993 to 26 th May 1993
Mian Muhammad Nawaz Sharif (Headed the Office of the Prime Minister)	Pakistan Muslim League (N)	26 th May 1993 to 18 th July 1993
Moeenuddin Ahmad Qureshi (Caretaker Prime Minister)		18 th July 1993 to 19 th Oct. 1993
Mohtrama Benazir Bhutto (Headed the Office of the Prime Minister)	Pakistan People's Party	19 th Oct. 1993 to 5 th Nov. 1996
Malik Meraj Khalid (Caretaker Prime Minister)		5 th Nov. 1996 to 17 th Feb. 1997
Mian Muhammad Nawaz Sharif (Heading the Office of the Prime Minister)	Pakistan Muslim League (N)	17 th Feb. 1997 to 12 th Oct. 1999
Zafarullah Khan Jamali	Pakistan Muslim League (Q)	21 st Nov. 2002 to 26 th June 2004.
Chaudhry Shujaat Hussain	Pakistan Muslim League (Q)	30 th June 2004 to 20 th Aug. 2004
Shaukat Aziz	Pakistan Muslim League (Q)	20 th Aug. 2004 to 16 th Nov. 2007
Muhammad Mian Soomro	Pakistan Muslim League (Q)	16 th Nov. 2007 to 25 th March 2008
Mr. Yousaf Raza Gillani (Headed the Office of the Prime Minister)	Pakistan People's Party	25 th March 2008 to 19 th June 2012
Raja Pervaiz Ashraf (Headed the Office of the Prime Minister)	--do--	22 th June 2012 to 25 th March 2013

Note:

This is an expanded version of the lecture which was based on author's note.