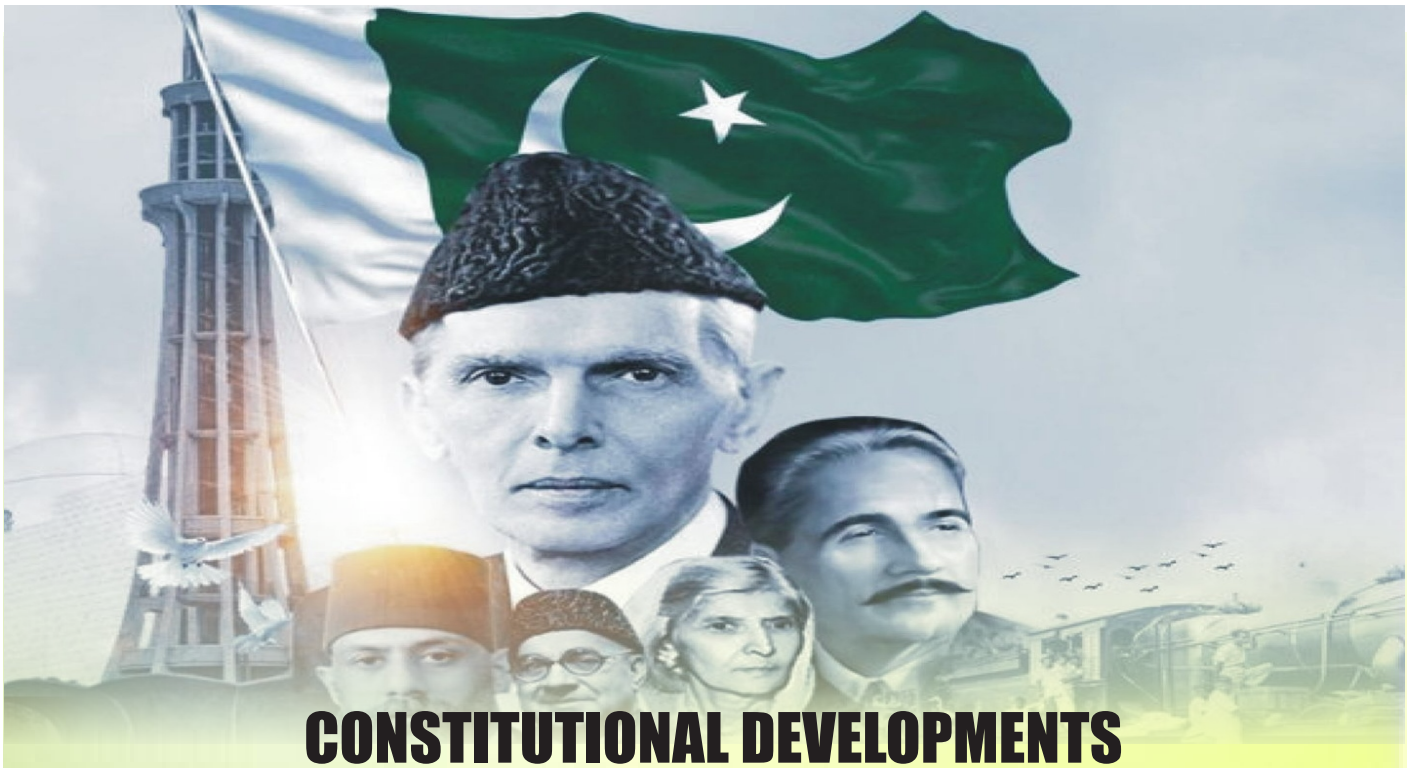


CONSTITUTIONAL DEVELOPMENTS
THE POLITICS OF AMENDMENTS

(BS PROGRAMME)

Code: 9373 **Units: 1–9**

Department of Pakistan Studies
Faculty of Social Sciences and Humanities
ALLAMA IQBAL OPEN UNIVERSITY

STUDY GUIDE

BS Pakistan Studies

CONSTITUTIONAL DEVELOPMENTS THE POLITICS OF AMENDMENTS

Code: 9373 **Units: 1–9**

Department of Pakistan Studies
Faculty of Social Sciences & Humanities
Allama Iqbal Open University, Islamabad

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FOREWORD

AIOU, as a premier educational institution of Pakistan with its unique distinction as a leading distance learning university, aims to provide education to all. It provides opportunities across the region and socio-economic classes for educational uplift and development. Its unique programmes with universal access have provided access to knowledge at the students' doorstep. AIOU plays a significant role in the socio-economic upliftment of the marginalized, deprived, and underdeveloped segments of society through educational development.

The BS Pakistan Studies program aims to promote academic insights about the society, history, politics, economy, and geography of Pakistan. The diverse range of courses offered by the department aims to enlighten the students about the history, political developments, the role of institutions, and the constitutional structure of the state. The courses are designed to enhance the understanding of the students about the structure and functioning of the state and society. It also develops the capacity of the student to appreciate the geographical, linguistic, and cultural diversity of Pakistan.

This course aims to enhance the knowledge of the students about the nature and structure of the political institutions, the political culture, and the political systems in Pakistan. It analyses the role of different institutions and personalities in shaping the political landscape of Pakistan. It also sheds light on the constitutional structure of the state of Pakistan, the duties and performance of state institutions according to the constitutional scheme. It also traces the shifting trends in politics and their impacts on the polity of Pakistan. The constitutional and political restructuring of the state and society through constitutional amendments and political reforms is discussed in detail for a better and holistic understanding of the students.

Prof. Dr. Nasir Mahmood
Vice Chancellor

ACKNOWLEDGEMENTS

I would like to express my deep gratitude to all those who supported me in the completion of this study guide titled Constitutional Developments: The Politics of Amendments. I am indebted to the Dean of the Faculty of Social Sciences and Humanities, Prof. Dr. Abdul Aziz Sahir, for his kind support to all the academic programs of the Department and especially to this course. My Chairperson, Dr. Samina Yasmeen, deserves the acknowledgement for her trust in my abilities and for her constant motivation. The Course team has been instrumental in the process from conceiving the idea to the final materialization of this course content. I am obliged to reviewers for their expert knowledge, insightful feedback, and constant support in shaping this guide. And finally, the editor, Mr. Fazal Karim, is appreciated for taking the time to complete the momentous task of editing the manuscript.

Dr. Muhammad Sajid Khan
Course Development Coordinator

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STRUCTURE OF THE COURSE

A three-credit-hour course consists of nine units. The coursework of one unit will include the study of compulsory reading material and suggested books. It would help if you made a timetable for studies to complete the work within the allocated time.

Every course has a study package including compulsory reading material and suggested readings. For the books suggested at the end of each unit, you can visit a nearby library/study center or the Central library at the main campus in AIOU.

GUIDELINES TO STUDY MATERIAL

For a course, you are required to prepare yourself to get the maximum benefit from it. You are required to follow the following steps.

Step 1

Go through the:

1. Course Outline
2. Course Introduction
3. Course Objectives
4. Structure of the Course
5. Assessment
6. Recommended Books
7. Suggested Readings

Step 2

Read the whole unit and make notes of those points that you could not fully understand or wish to discuss with your teacher.

Step 3

Go through the self-assessment questions at the end of each unit. If you find any difficulty in comprehension or locating relevant material, then discuss it with your teacher.

Step 4

Read thoroughly the study guide and course outline. In case any explanation is needed regarding the comprehension of the text, consult your teacher.

Step 5

First, read the entire assignment you are required to do for this course. Highlight all the points that you find difficult to tackle, and then discuss them in detail with your teacher. This exercise will save you from a lot of trouble and ensure good results.

Assessment

For each course, you will be assessed as follows:

- 2 Assignments (continuous assessment).
- Final Examination (a three-hour written examination will take place at the end of the semester)
- Workshop
- Quiz

The condition to qualify each component is given below:

1. A minimum of 50% in each assignment.
2. A minimum of 50% of the final written examination.
3. An aggregate of 50% of both the components i.e., assignments and final examination, is required to pass the course.
4. The assignment is compulsory for the appearance in the final examination.

Assignments

Assignments are written exercises that are required to be completed at your own home or place of work after having studied different parts of the suggested reading material within the scheduled period of study. (See the assignments scheduled).

- For this course, you will receive 02 assignments in the mailing package. You are advised to complete your assignments within the provided schedule.
- This is compulsory coursework, and its successful completion will make you eligible to take the final examination at the end of the semester.
- To qualify for each assignment, you need to obtain a minimum of 50% marks.

Workshop

An online workshop for each course is mandatory to attend.

Revision before the Final Examination

You must revise as systematically as you have been studying.
You may find the following suggestions helpful.

- Go through the course unit one by one, using your study notes to remind you of the key topics, concepts or theories. If you have not already made notes, do so now.
- Note the key terms associated with each topic.
- Go through your assignments and test yourself on each of the main topics, writing down the main points or revising them verbally.

- Make sure to attend the workshops and discuss all the points that you find difficult to comprehend.
- Try to get together with a small group of fellow students. Each person revises their topics intensively and, then in a group session, summarizes them for the other members, who should raise queries and questions. This approach will make your studies interesting and provide you with an opportunity to revise thoroughly.
- The paper in the final exam will be on the pattern of questions given at the end of each unit.
- Before your final exams, make sure
  - You get your roll number slip,
  - You know where the examination centre is,
  - You know the date and time of the examination.

Note:

- You can get information regarding your assignments, workshop Schedule, and Assignment results
- and final examination from the AIOU website: www.aiou.edu.pk.
- You are advised to regularly visit the university website to update yourself about the activities of the university.

INTRODUCTION TO THE COURSE

The course Constitutional Development: The Politics of Amendments (9373) deals with the political and constitutional history of Pakistan. After a long struggle and a tragic episode of dismemberment of the state due to constitutional and political crisis, Pakistan finally adopted a sustainable constitutional document in 1973. After its adoption, the constitution faced many challenges, and two dictators, after the imposition of martial law, suspended and afterward partially modified it through amendments. In 2010, the democratic forces successfully revived the original constitution through the 18th amendment. So far, twenty-six constitutional amendments have been introduced in this longest-surviving constitutional document. This course attempted to understand the political and constitutional dynamics of these amendments and their political and constitutional implications on the structure of the state and polity of Pakistan.

Pakistan witnessed a chequered constitutional history. The first two constitutions, i.e. 1956 and 1962, were abrogated shortly. The 1973 Constitution was suspended twice by two military dictators, but it survived with many alterations and restructuring through constitutional amendments. Bhutto assumed Power as the Civilian Chief Martial Law Administrator after the dismemberment of Pakistan. The ruling coalition enjoys a numerical majority of 110 members in the House of 146. Bhutto's regime appointed 25 members of the constitutional Committee, including six members from the opposition side, on 17 April 1972. A national consensus emerged that the future constitution would be a federal Parliamentary system with maximum Provincial autonomy. The office of the Prime Minister was substantially empowered. While the office of the President was reduced to a constitutional head of state with symbolic powers. Pakistan adopted a bicameral legislature, the upper house Senate, as the House of Federation and the Lower House, the National Assembly, as the House of People.

The opposition and Islamic Parties insisted on more democratic and Islamic provisions, and most of the demands were accommodated through prolonged negotiations, ultimately resulting in national consensus and the constitutional draft was adopted on 10 April 1973. It was decided that a new constitution would be promulgated on 14 August 1973.

After the secession of East Pakistan, the political parties were reluctant to recognize the state of Bangladesh due to political implications. The regime availed the occasion of the second OIC summit, through the first amendment in the constitution, to extend recognition to Bangladesh to facilitate its participation in the summit. Article 1 of the Constitution was amended and clause 2 was deleted.

The second amendment deals with the more sensitive Ahmadiyya question, which emerged as a potential fault line and destabilizing agent due to its immense agitational potential. Islamist parties previously exploited that problem in the 1953 agitation. On 29th May 1974 Rabwah incident sparked that agitation again. Bhutto brought that issue to parliament and after a heated closed-door debate, the Assembly adopted a second amendment in September 1974. The amendment added clause 3 to Article 260 and declared that a person should be treated as non-Muslim, who does not believe in the absolute and unqualified finality of the Prophethood of Muhammad (PBUH). While Article 160 was amended, and the Ahmadiyya Community was included in the list of minorities.

Bhutto's regime gradually lost its democratic credentials and adopted more repressive strategies to crush its political opponents .The regime introduced the third, fourth and fifth amendments to increase the detention powers, to curtail the Judicial powers. The opposition Party NAP (National Awami Party) faced a ban through the Supreme Court's verdict. The fifth and sixth amendments also deal with the issue of the appointment of a Chief Justice and the age of retirement. In a surprise move, Bhutto dissolved the Assemblies and decided to hold fresh elections in March 1977. Most of the opposition parties joined hands and created the PNA (Pakistan National Alliance). Unfortunately, the democratic regime failed to hold free and fair elections. The opposition alliance leveled charges of massive rigging and boycotted the provincial elections. The opposition resorted to mass agitation and the government adopted a repressive strategy. The political deadlock persisted, despite a round of negotiations, due to mistrust between the political leadership. Bhutto decided to introduce the 7th amendment in the constitution on 16 May 1977. It provided the option of the referendum as a demonstration of people's support for the Prime Minister. The opposition rejected that option and insisted on fresh elections.

The military Junta under Zia emerged as the beneficiary of political polarization and imposed a draconian martial law. Although Zia assumed power as a transnational regime with the promise of elections within 90 days, ultimately elections were held after 90 months in February 1985. He claims that the less managed electoral exercises facilitated the restoration of democracy. As a bargaining chip, he decided to introduce the most controversial 8th Amendment. It largely transformed the political and constitutional structures, and 65 articles were amended or modified.

The office of the president was empowered at the cost of the office of the Prime Minister and Parliament. The president acquired the power through Article 58 (2B) to dismiss the government and dissolve the Assembly. Many other constitutional restructurings have been introduced, including articles 62 and 63. Subsequently, the

powerful president effectively derailed the democratic process, and four elected regimes were dismissed prematurely at the behest of the powerful establishment. Except in the case of Nawaz Sharif's dissolution in 1993 Judiciary endorsed the president's decision and extended judicial legitimacy.

The Zia regime introduced the ninth amendment to impose Shariah law as the Supreme law. The Bill was adopted by the Senate and not approved by the National Assembly. Later, Nawaz's regime also introduced the Shariah bill as the 15th amendment, but it failed to receive legislative approval in 1997. The 10th Amendment was introduced to lessen the interval between sessions of parliament. While the 11th amendment was introduced to revise women's representation in the National and Provincial Assemblies. Afterward, in August 1992, the amendment was withdrawn. The Nawaz regime introduced the 12th amendment for the creation of special speedy courts for the trial of heinous offenses for a period of three years.

After the repeated dismissal of elected governments, the democratic forces decided to remove Article 58 (2-B) through the 13th amendment. Nawaz Sharif received a two-thirds majority in the 1997 elections, and even his adversary Benazir Bhutto extended support to punish President Farooq Leghari by stripping his power. The Nawaz regime also introduced an amendment to block defections from the party. It proposed the disqualification of the defective party members. Although the amendment was introduced to create political stability and check defection at the behest of the establishment, it effectively shrinks the internal democracy within the parties and space for dissident voices.
The introduction of the 15th amendment further cemented the impression that Nawaz Sharif wanted absolute power and through the imposition of the Shariah bill, he was aspiring for the position of Amir-ul-Momineen. The 16th Amendment was introduced in 1999 to extend the quota system for forty years instead of the original twenty years.

Musharraf adopted the strategy of his predecessor for the restoration of the democratic process through electoral management in favor of the King's party. After the 2002 elections, it bargained with political leaders and introduced the 17th Amendment to the Constitution. The semi-presidential system of the Zia era has largely been restored with a number of structural and constitutional amendments. So, our cyclical journey on the democratic path again reached its point zero. The democratic forces signed the Charter of Democracy in 2006 to restore the original constitutional structure of 1973. After the electoral victory of the 2008 elections by the democratic forces, a twenty-eight-member Constitutional Reform Committee was constituted under the leadership of Raza Rabbani, with representation from all parliamentary political forces. The committee created a national consensus and radically altered the constitution with 101 amended articles. It restored

parliamentary supremacy. It introduced Provincial autonomy, political and economic decentralization, and the creation of a more democratic and participatory federation. The amendment strengthened the democratic forces and most of the constitutional and legal loopholes were plugged.

The newly restored and empowered Judiciary under Iftikhar Chaudhary raised objections regarding the process of appointment of the Judges in the Supreme Court and High Courts. The Judiciary's concerns were addressed and accommodated through the 19th Amendment. The parliamentary oversight regarding the appointment of Judges was compromised and the Judicial Commission was empowered regarding the appointment of Judges. The 20th and 21st amendments were introduced in 2012 and 2016 for the reconstitution of the Election Commission of Pakistan through mutual consultation between democratic forces. It also empowered the ECP to conduct free and fair elections. The technocrats were allowed to become the chief Election Commission and members of the ECP.

The 21st Amendment was introduced in 2015 for the establishment of military courts for the trial of terrorists. The 23rd Amendment further extended the term of military courts for two years. After the 2017 census report, the representation in the National Assembly was revised through the 24th constitutional amendment, according to shifting demographic trends. The 24th and 25th amendments deal with the merger of FATA in KP and reallocation of reserved seats for ex-FATA and the reconstitution of the provincial assembly of KP.

In a nutshell, mostof the constitutional amendments were introduced to resolve some constitutional and legal ambiguities, while some of the amendments with long-term implications radically transformed the constitutional structure of Pakistan and some others were introduced to reverse these alterations and constitutional restructurings.

COURSE OBJECTIVES

After the completion of this course, you will be able to;

1. Have a comprehensive understanding of Pakistan's constitutional evolution through a historical and legal lens
2. Learn about the major constitutional amendments, their political motivations, and their implications for governance, judicial independence, and the balance of power.
3. Examine the impact of legal cases and socio-political dynamics on the development of the constitution, encouraging critical analysis of the interplay between law, politics, and society.

COURSE OUTLINE

Unit 1: Dismemberment of Pakistan

- Breakdown of the System
- Dismemberment and Attempt at Salvage
- End of Military Rule and the Rise of Bangladesh
- Civilian Martial Law
- Asma Jilani Case

Unit 2: The Framing of the Constitution

- Interim Constitution of 1972
- Efforts for Consensus Building
- Constitutional Consensus
- Consensus: Myth or Reality
- Basic Features of the 1973 Constitution

Unit 3: Important Parts and Chapters of the Constitution

- Part I Introductory
- Part II Chapter 2 Principles of Policy
- Part III Federation of Pakistan, President, Parliament
- Part IV Provinces
- Part VII The Judicature
- Part VIII Elections
- Part IX Islamic Provisions
- Part X Emergency Provisions

Unit 4: Fundamental Rights

- Supremacy of Fundamental Rights
- Article 4: Right of the Individual to be dealt with in Accordance with Law
- Right to Life and Liberty
- Security, Safeguard, Fair Trial and Due Process
- Protection against Slavery, retrospective punishment, double punishment and self-incrimination
- Inviolability of the dignity of man
- Freedom of movement, assembly, association, trade, business or profession, speech, religion and information
- Safeguard against taxation for purposes of any particular religion and safeguards as to educational institutions in respect of religion.
- Right to Property and Education
- Equality and non-discrimination
- Preservation of language, script and culture

Unit 5: The Judicature

- The Courts
- Supreme Court of Pakistan and its Powers
- Articles 189 and 190
- High Courts and their Powers
- Federal Shariat Court and its Powers

Unit 6: Amendments in the Bhutto Era

- Amendment of the Constitution (Articles 238 and 239)
- First Amendment
- Second Amendment

- Third Amendment
- Fourth Amendment
- Fifth Amendment
- Sixth Amendment
- Seventh Amendment

Unit 7: Amendments from 1984 to 1993

- Nusrat Bhutto Case
- Eighth Amendment
- Ninth Amendment
- Tenth Amendment
- Haji Saifullah Case
- Eleventh Amendment (20 Women Seats)
- Twelfth Amendment (Special Courts)
- Ahmed Tariq Rahim Case
- Nawaz Sharif Case

Unit 8: Amendments from 1997 to 2008

- Thirteenth Amendment (Reversing Eighth Amendment)
- Fourteenth Amendment (Outlawing Floor Crossing)
- Fifteenth Amendment (Enforcement of Shariah)
- Sixteenth Amendment (20 Years Extension in Special Quota)
- Zafar Ali Shah Case
- Seventeenth Amendment (Restoring Eighth Amendment and Legalizing Musharraf's Acts)
- Dismissal of The Chief Justice
- November 2007 PCO
- The Lawyer Movement for the Restoration of the Judiciary in Pakistan

Unit 9: Amendments from 2009 to date

- PCO Judges Case
- Eighteenth Amendment (Reversing the Seventh Amendment and Devolving Powers)
- Munir Hussain Bhatti and Sindh High Court Bar Case
- Nineteenth Amendment (Appointment of Judges)
- Imran Khan Case
- Twentieth Amendment (Protecting By-Elections)
- Twenty-first Amendment (Military Courts)
- District Bar Association, Rawalpindi Case
- Twenty-Second Amendment (Chief Election Commissioner Powers)
- Twenty-Third Amendment (Extension of Military Courts)

UNIT 1

DISMEMBERMENT OF PAKISTAN

Written by:
Dr. Muhammad Sajid Khan
Reviewed by:
Dr. Muhammad Abrar Zahoor

CONTENTS

UNIT 1:DISMEMBERMENT OF PAKISTAN

1.1 Breakdown of the System

1.2 Dismemberment and Attempt at Salvage

1.3 End of Military Rule and the Rise of Bangladesh

1.4 Civilian Martial Law

1.5 Asma Jilani Case

INTRODUCTION

The creation of Pakistan in 1947 was founded on the Two-Nation Theory, uniting diverse cultural, linguistic, and ethnic groups under a shared Muslim identity. However, the geographical, economic, and political disparities between East and West Pakistan soon began to strain this unity. East Pakistan's distinct linguistic, cultural, and political identity led to rising tensions, further exacerbated by perceptions of economic exploitation and underrepresentation in governance.

This unit investigates the events that culminated in the dismemberment of Pakistan in 1971, focusing on the breakdown of the system, the rise of Bengali nationalism, and the subsequent creation of Bangladesh. Key developments, including the establishment of Civilian Martial Law and the landmark Asma Jilani Case, are analyzed to understand their implications for Pakistan's political and constitutional history.

OBJECTIVES

After the study of this unit, you will be able to:

1. Trace the historical, political, and economic factors that led to the dismemberment of Pakistan.
2. Examine the role of Bengali nationalism and its assertion of a separate identity.
3. Analyze the 1970 elections and their role in intensifying East-West political rifts.
4. Evaluate the legal and constitutional significance of the Asma Jilani Case.

LEARNING OUTCOMES

After the study of this unit, you will be able to:

1. Explain the historical and ideological underpinnings of the Two-Nation Theory and its challenges post-1947.
2. Identify key factors contributing to the separation of East Pakistan, including economic disparities, political alienation, and cultural differences.
3. Assess the role of key political events, such as the 1970 elections and the military crackdown of March 1971, in shaping the conflict.
4. Critically evaluate the Asma Jilani Case and its implications for Pakistan's judiciary and constitutional history.
5. Reflect on the lessons learned from the dismemberment and its implications for national unity and governance.

Breakdown of the System

The state of Pakistan was created based on the two-nation theory. The Muslim identity served as a binding force among the culturally, linguistically and ethnically diverse regions. The ideologically driven state comprised two distinct geographical zones of West Pakistan and East Pakistan. Bengal had maintained to some extent its distinct identity in the subcontinent for centuries and asserted its racial, linguistic, political and regional identity, which had manifested in the establishment of regional autonomous political dynasties that resisted the central authority in Medieval India. The distinct geographical location of Bengal had played a vital role in the formation and flourishing of this identity.

The partition of Bengal in 1905 had proliferated not only the Indian nationalism, but it had also started a new process of identity formation, which cracked the existing nationalist construct. The xenophobia against the British had transformed into a new shape of xenophobia in the Bengali Muslim elite against the domination of the Hindu classes and achieved its geographical manifestation in Eastern Bengal against the domination of Western Bengal. The xenophobia and geographical location had played a significant role in the assertion of Bengali Muslim's 'selfhood against the 'otherhood' of Hindus.

The asymmetrical position, which had clearly manifested in the economic and political marginalization of Muslims in United Bengal, had further sharpened the Bengali Muslim elite's consciousness of selfhood, and their xenophobia had pushed and hard-pressed them to join the ranks of Muslim nationalists and they emerged as the forerunners of the demand for a Muslim separate homeland. This convergence of regional interest in a trans-regional alliance with its inherent contradiction had pushed the Bengali Muslim elite into the ranks of the All India Muslim League. Suhrawardy and Abul Hashim launched a radical campaign of political recruitment for AIML in the 1940s; the Bengal Muslim League membership exceeded the membership of all other provincial Leagues of India.[1]

The shared Hindu xenophobia of the Muslim political elite of both regions was transmitted and penetrated in the minds of the Muslim franchise and they voted in favor of the Muslim League in 1946, which paved the way for the establishment of a Muslim separate state with two distinct geographical units in East and West of India with Muslim numerical majorities. After the achievement of the primary objective of deliverance from Hindu domination, the inherent contradictions of this constructed 'selfhood' surfaced and were contested in different spheres of the newly crafted power structure in Pakistan. Bengali Muslim leadership extended support to the idea of Pakistan for regional autonomy, as Abul Hashim perceives that Pakistan would be a "socially just" state, with equal opportunities and freedom from economic exploitation, a "people's Pakistan".[2]

The Bengali language had emerged as the first strong identity marker of a separate racial and national identity. The construction of Bengalis 'selfhood' was further facilitated by the geographical and cultural disparities, representation in political

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[1] Rizwan Kokab and Masarrat Abid, 'A Factor in East Pakistan's Separation: Political Parties or leadership', *Pakistan Vision*, 14, no. 1 (June 2013) (Lahore: Pakistan Study Center), 11.

[2] Neilesh Bos, 'Purba Pakistan Zindabad: Bengali Visions of Pakistan, 1940-1947', *Modern Asian Studies*, 48, part 1, (January 2014) (United Kingdom: Cambridge University Press, 2014), 21.

and administrative structures and resource distribution in the new state. The Bengali political elite had exploited the socio-economic backwardness and under-representation of Bengalis in state institutions. They had propagated that Bengal's political and economic marginalization and backwardness were due to the West Pakistan's domination and their resource exploitation of the East. Later on, Punjab was singled out and declared the major culprit of the miseries of the East Bengalis. The Muslim League was portrayed as the agent of West Pakistan's domination and its Bengali leaders and other collaborators were declared as the stooges of West Pakistan or Punjab. To defeat the Muslim League in the East Pakistan election in 1954, a United Front of Bengali parties with divergent ideological orientations, like *Ganatantri Dal*, a leftist party, and *Nizam-i-Islam,* a religious party, emerged due to the xenophobia of West Pakistan. [3] The result of the elections also undermined the representative character and legitimacy of the Constituent Assembly of Pakistan. The members of the Constituent Assembly of Pakistan from East Pakistan had lost legitimacy and representative character due to the clear verdict of the Bengali franchise.

The establishment of One Unit was also a xenophobic response of West Pakistan against the perceived domination of East Pakistan due to its majority population and on the other side, it had further increased the East wing xenophobia with the perception that the establishment of One Unit was to deprive them of their democratic rights.[4] The concept of 'parity' between two wings in representative institutions further deep-rooted this mutual mistrust and widened the gulf and promoted hatred between the two wings. The separate electorate was also considered as the WWest Wing's other tool to reduce their majority. The Bengali elite was concerned to counterbalance the Western domination in administrative structures of the state, where they were a distinct minority among the majority in representative political institutions, but their bid was foiled due to the close nexus of the Western political elite and the civil-military establishment.

The 1956 Constitution was adopted by the Assembly despite the walkout of the Awami League and other opposition parties from East Pakistan, which strained the relationship between the two wings. Iskandar Mirza and Ayub Khan imposed Martial Law because they considered the election a dangerous exercise in the existing political situation in 1958.[5] The military dictatorship of Ayub Khan had increased the sense of political alienation, and the process of industrialization further aggravated their sense of deprivation and exploitation. The politicization of Bengali grievances was accelerated.

Although the Bengali sense of deprivation, exploitation and victimization was acute in political and economic spheres and the real issues were in these spheres. But the Bengali language emerged as a symbolic identity maker and it served as a tool of assertion and as well as the tool of exclusion of others, like the Biharis' exclusion from Bengali nationalism, although they had shared economic deprivations.

Mujib-ur-Rehman founded the East Pakistan Student League in the first week of January 1948, and it emerged as a front-line organization in agitation. The 1952

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[3] Ibid., 33.

[4] Yasmin Saikia, *Women, War and the Making of Bangladesh: Remembering 1971* (New York: Oxford, 2011), 46.

[5] Zaheer, *The Seperation of East Pakistan,* 73.

riots were depicted as oppression of the West wing through police and heroic resistance of Bengalis, and the first martyrs of the Bengali national movement.[6] The supporters of the Bengali language staged a protest and the police opened fire on the Bengali demonstrators on 21 February 1954; several were killed. A *Shaheed Minaar* (Martyr's Monument) was erected at the site of the firing to commemorate the Bengali resistance against West Pakistan domination and the day was celebrated every year. The reaction was so strong that it changed East-West relations and wiped out the Muslim League in the March 1954 Elections. The ruling Muslim League secured only 9 seats of the total Muslim seats of 237 in a house of 309 members.[7]

Feroz Ahmad also claimed that "with the intensification of economic exploitation and political repression, Bengali nationalism also grew more virulent, clouding the class issues and leading toward a generalized hatred of West Pakistanis.[8] At the time of independence, East Pakistan's GDP was 13,130 million Rupees, while West Pakistan's GDP was 11,830 million Rupees. But in the post-independence phase, West Pakistan, due to the concentration of resources, outclassed the East Pakistan and in 1968-69, East Pakistan's GDP was 20,670 million while West Pakistan's GDP was 27,744 million Rupees. East Pakistan had a better literacy rate with more college and university graduates as compared to West Pakistan in 1947, but later on, due to the low pace of development in the East wing and limited resource allocation to West Pakistan's monopoly in these spheres, it was deeply resented by Bengalis.[9]

After Ayub's decade of development, economic disparity increased between the two wings and the GDP of the West Wing was 30% more than that of the East Wing and the difference in per capita income was 62% and the average standard of living was 126% better in West Pakistan. This relative marginalization in the sphere of economic development was considered colonization and resource exploitation of East Pakistan.[10]

The political and economic deprivation of East Bengal's elite and middle class was related to the resource exploitation by the West. The floods of 1970 further added fuel to existing grievances and deprivation was politicized and manifested in election results. This natural calamity offered a promising opportunity to the Awami League, which efficiently capitalized on it and outclassed its local political rivals and secured a landslide electoral victory in subsequent elections.

After the floods of 1970, the relief activities were politicized due to the massive propaganda of the Awami League, which further complicated the situation. East

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[6] Sission, *War and Secession*, 9.
[7] Zaheer, *The Seperation of East Pakistan,* 27.
[8] Feroz Ahmad*, Ethnicity and Politics in Pakistan* (Karachi: Oxford, 1998), 30.
[9] Ibid., 15-16.
[10] Ibid., 23-24.

Pakistanis considered that West Pakistan's response was insufficient during the disaster, which further magnified their perception of the insensitivity of the West Pakistani elite to the welfare and interests of Bengalis." Maulana Bhashani demanded 'complete financial autonomy' and even threatened the separation of the East wing.[11] The 1970s floods further weakened the already fragile national bond and sharpened the sense of deprivation in Bengalis and strengthened the political support base of Awami League and discredited the administrative machinery of the state under the domination of West Pakistan.

The 1970s Elections fundamentally altered the political landscape of Pakistan and radically shattered the existing elite power structure. The mass political mobilization and active and excessive engagement of the political elite with the masses changed the dynamics of the power structure.[12] The excessive provincialization of the party system in the absence of a single national representative political party widens the gulf between the East and West wings, particularly. The politicians from the East and West wings emerged as the political rivals, and the masses were deeply politicized through mass mobilization in pre- and post-election scenarios. The East-West political divide further accelerated the process of assertion of identity in Bengal, which started in the 1947 partition and culminated in the 1971 partition.

The 1970s Elections proved to be the culmination of this process of political manifestation of this Bengali racial identity. It was effectively transmitted in the minds of the Bengalis. The *Awami* League, under the firebrand leadership of Sheikh Mujib-ur-Rehman, had secured a landslide victory in East Pakistan. It had secured 160 out of the 162 seats and bagged 75 percent of the cast votes in East Pakistan. It had not won a single seat in West Pakistan. Awami League had contested only 7 seats out of 138 in the West wing and concentrated on the East wing. Similarly, the PPP concentrated on West Pakistan and did not contest a single seat from the East wing. While smaller parties also enjoyed support in certain regions and no national party with a support base in both wings existed.[13]

Although the Awami League had a 38 % share of the national vote but it had captured 53% of the seats in the house of 300 members. On the other hand, Zulfiqar Ali Bhutto's Pakistan People's Party secured 81 out of 138 seats in West Pakistan and secured 20% of the national vote share and 27% of seats at the national level. The bastion of power for PPP was Punjab and Sind, where it secured respectively 62 out of 82 and 18 out of 27, and the remaining one seat from NWFP (Now

[11] Rose and Sission, *War and Secession*, 30.

[12] Ibid., 273.

[13] Rafique Afzal, *Pakistan: History and Politics 1947-1971* (New York: Oxford, 2005), 397-98.

KPK).[14] Although Mujib secured 75% of the votes in the East but it constituted 42% of the total registered voters. Despite all appeals of exploitation and discrimination East wing had a relatively low turnout of 56% while in Punjab turnout was 67%, in Sind, it was 58% and in NWFP(now KPK) and Baluchistan had 47% and 39% turnout respectively. [15] So the divided electoral verdict further complicated the process of the transfer of power.

These election results clearly depicted the effectiveness of the Awami League's propaganda of exploitation and victimization of the East by the West wing. The political elite had successfully politicized this xenophobia in East Bengal and sharpened the rifts between the two wings. The assertion of racial identity in Bengal had excluded the Bihari Muslims and declared them 'others' and equated them with West Pakistan, while including the Hindus due to shared linguistic and cultural identity markers and extended its relationship with India. While the West Pakistanis declared the East Bengalis as Hindu-like and portrayed them as the enemy of Pakistan and Islam and suppression and atrocities were justified. The xenophobia of others' hood played a significant role in the acceleration of violence during the armed conflict in the post-March 1971 period.

Mujib could not implement his Six Point agenda without the support from West Pakistan, either from the PPP or other smaller parties, for the adoption of the constitution, although he enjoyed the necessary simple majority required for the formation of the federal government. Bhutto considered that "Six Points was a concealed formula for secession in two strokes rather than one."[16] During his meetings with West Pakistan political leaders at Dahka in early February, Mujib had shared his fears with West Pakistan's political leaders that Yahya would not summon the Assembly and had no intentions to transfer power, and Bhutto had conspired with him and was working as his 'stalking-horse' and certain generals were also a part of this conspiracy.[17]

During political negotiation for constitutional consensus, the policy of the military establishment was passive and reactive rather than active and assertive.' The military establishment was deeply concerned with protecting its Corporate interests and maintaining its power leverage intact, although it was ready to transfer power and the establishment of the liberal constitutional regime, but on its own terms and conditions. The military establishment had failed to maintain its position of neutrality and emerged as the custodian of Western wing interest and with the

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[14]Sarmila Bose, *Dead Reckoning: Memories of the 1971 Bangladesh War* (New York: Oxford, 2011), 21.

[15] Ibid., 19.

[16] Zulfiqar Ali Bhutto, *The Great Tragedy* (Karachi: Vision Publication Ltd., 1971), 27.

[17] Rose and Sission, *War and Secession* , 77.

insistence of the coalition government with PPP, made it a partisan rather than neutral mediator.[18]

In post-1970's Elections political leaders were extensively engaged with the masses, held a frequent public meetings, and aroused popular sentiments to create pressure on their political rivals and to strengthen their position of political bargaining, but this unusual public contact in post-election scenario to exert pressure on their rival forces, ultimately reduced the bargaining capacity of leadership and strengthened the hawks on both sides of the political divide. This process also resulted in further fragmentation and accelerated the misperceptions and sharpened the respective identities and exposed the conflict of divergent interests in future power structures. The fear of domination and exploitation by the 'others' had deepened the crisis.

That crisis resulted in the civil war after the launch of the military operation on March 25, 1971. India, as an archenemy of Pakistan, availed that opportunity and added fuel to the volatile situation. The Bengali elements received financial, military and diplomatic support from the Indian state. It finally launched a military attack in East Pakistan. The surrender of E Eastern Command on December 16, 1971, resulted in the dismemberment of the state and the creation of a separate state of Bangladesh.

Civilian Martial Law:

Yahya Khan, after the embarrassing defeat on the Eastern Front on December 16, 1971, declared that the war on the Western Front went on. Despite that tragic incident under his leadership, he wanted to remain in power. Mrs. Indira Gandhi, under the American pressure, declared a unilateral ceasefire on all fronts. Pakistan also followed the same course. After the disintegration of the state, deep resentment and disappointment existed in military ranks and files. That resentment was reflected in junior officers' strong reaction during a meeting at Rawalpindi on December 19, 1971. The popular protest against the military regime also started on the streets on December 18, 1971.

These developments panicked the military leadership. Yahya Khan submitted his resignation and invited Z. A. Bhutto to assume the leadership of the country. Bhutto was sworn in as the civilian chief martial law administrator on December 20, 1971. He immediately released Sheikh Mujib-ur-Rehman under international pressure. Bhutto assumed the leadership of the new Pakistan and tried to restore national confidence. He was the leader of the second most popular political party after the Awami League. He commands the people's trust and confidence. During their war years and previous political career, he was perceived as a staunch nationalist and anti-India leader. He opted for the normalization path on the security front. He directed the people's attention by introducing promised socio-economic reforms

[18] Rose and Sission, *War and Secession,* 278.

for the provision of socio-economic justice. The civilian martial law lasted for a few months. With the support of the opposition, the process of constitution-making was initiated and Bhutto assumed the office of the President on April 21, 1972, under an interim constitution.

1.1 ASMA JILLANI CASE:

Yahya's martial law regime adopted repressive measures to control the situation during the post-election political crisis. Politicians Malik Ghulam Gillani from Lahore and Altaf Gauhar, Editor-in-Chief of Dawn, were detained under Martial Law Regulation No. 78 under the Defence of Pakistan Act. Asma Jillani challenged the detention of his father in the Lahore High Court. The Court refused to provide relief due to a jurisdiction question under martial law. The same ruling was adopted by the Sindh High Court in Gauhar's case in the light of the Doso case. In both cases, appeals were filed in the Supreme Court.

The Supreme Court, in its historic decision, takes a great departure from its previous track record, where it provided constitutional cover to the martial law regime's illegal and unconstitutional acts. The court claimed jurisdiction according to the 1962 constitution. The court declared that Ayub Khan was supposed to transfer power to the speaker of the National Assembly according to his own 1962 Constitution. The imposition of martial law and the abrogation of the 1962 Constitution had no legal justification. It was a violation of the Constitution and the Objective Resolution, where it was declared that state authority was exercised by the public representatives. The court also declared Yahya as an usurper who violated the constitution and did not allow all the constitutional machinery to come into effect. That bold move restored the constitutional spirit and the doctrine of necessity was revisited. The critics objected that the decision was issued when Yahya was not in power. Asma Jillani's case was considered an important milestone in the legal and political history of Pakistan.

Self-Assessment Questions

1. How did economic policies and resource allocation contribute to the sense of deprivation in East Pakistan?
2. In what ways did the 1970 elections intensify the political divide between East and West Pakistan?
3. What legal precedent did the Asma Jilani Case set in terms of martial law and judicial independence in Pakistan?
4. What lessons can be learned from the events leading to the separation of East Pakistan regarding national unity and governance?
5. How did the dismemberment of Pakistan influence subsequent constitutional and political developments in the country?

UNIT 2

THE FRAMING OF THE CONSTITUTION

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Unit 2: The Framing of the Constitution

2.1 Interim Constitution of 1972

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2.3 Constitutional Consensus

2.4 Consensus: Myth or Reality

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INTRODUCTION

The dismemberment of Pakistan in 1971 brought about a deep constitutional crisis and a pressing need to rebuild the nation's political and legal framework. This unit explores the challenges of achieving consensus in a politically shattered situation, the debates surrounding the drafting of the 1973 Constitution, and the compromises made to ensure national unity.

The 1973 Constitution remains a cornerstone of Pakistan's legal and political identity, embodying key principles of democracy, federalism, and fundamental rights. This unit critically examines the efforts to build consensus during its drafting, questions whether that consensus was enduring, and analyzes the Constitution's basic features to understand its strengths and limitations.

OBJECTIVES

After the study of this unit, you will be able to:

1. understand the complexities faced by Pakistan at the time of its dismemberment
2. learn the context in which the Constitution of 1973 was framed
3. analyze and interpret the process of consensus-building around the Constitution
4. know major milestones which led to the passing of the Constitution of Pakistan 1973
5. Analyze the efforts and challenges of consensus-building during the framing of the 1973 Constitution.
6. Evaluate the political and ideological compromises made in the pursuit of constitutional consensus.
7. Identify and discuss the basic features of the 1973 Constitution.
8. Reflect on the lasting impact of the 1973 Constitution on Pakistan's political system.

LEARNING OUTCOMES

After the study of this unit, you will be able to:

1. Explain the complexities faced by Pakistan at the time of its dismemberment
2. Assess the efforts made by political leaders to achieve consensus on the 1973 Constitution.
3. Critically evaluate the debates surrounding the federal and Islamic character of the Constitution.
4. Outline the basic features of the 1973 Constitution, including its democratic, federal, and Islamic provisions.
5. Discuss the lasting impact of the 1973 Constitution on Pakistan's political system.

2. THE FRAMING OF THE CONSTITUTION

INTRODUCTION

Due to multiple factors that stemmed from the long dictatorial rule of Ayub Khan and a centralized state structure that was antithetical to the vision of the All India Muslim League and British India's administrative design, the Pakistani state fell apart in 1971. People in the country, especially in East Pakistan, became disgruntled by the regional and class disparities created and nurtured during the long martial law regime. A movement of the people, especially students, was started and led by popular leaders such as Mujibur Rehman in East Pakistan and Zulfikar Ali Bhutto in West Pakistan. Confronted by the popularity of the movement, Ayub was replaced by Gen. Yahya Khan, who held elections in 1970 but did not transfer power to the majority party i.e. Awami League. Its leadership was arrested and Parliament could not be convened. Then, in March 1971, the civil war started in East Pakistan, which led to the breakup of the country and the establishment of Bangladesh. In the remaining part of Pakistan, the Pakistan People's Party was in the majority on the basis of the 1970 elections and it was invited by the Yahya regime to form its government. But the problem was that the country did not have a Constitution. Zulfikar Ali Bhutto took the oath as President and civilian martial law administrator for the time being and started a procedure of legislating a Constitution by developing a consensus. Being an adept negotiator, he was able to bring all the parties in the Parliament to participate in the process of drafting a constitution. Bhutto tirelessly tried to keep all the major opposition parties on board and, with their approval, brought forth two documents:

1. The 1972 Interim Constitution, enforced on April 21, 1972, replaced martial law.[19]
2. The 1973 Constitution was approved by the National Assembly on April 10, 1973, and enforced on August 14, 1973.[20]

2.1 INTERIM CONSTITUTION OF 1972

The 1972 Interim Constitution was eventually adopted by the National Assembly in its special session on April 17, 1972, and it was enforced on April 21. This remained effective until the regular Constitution of 1973 was enforced on August 14, 1973.[21]

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[19] Mahboob Hussain, *The Parliament of Pakistan: A History of Institution-building and (un)democratic Practices, 1971-77* (Karachi: Oxford University Press, 2019), 94.
[20] Anwar H. Syed, *The Discourse and Politics of Zulfikar Ali Bhutto* (London: The Macmillan Press, 1992), 117.
[21] Rizvi, *Pakistan Political and Constitutional Engineering,* 355.

The Interim Constitution was a detailed document with a preamble, 295 articles and seven schedules. It adopted ideas, principles and institutions from earlier constitutional milestones such as the Government of India Act of 1935, the Indian Independence Act of 1947, the Objectives Resolution and Pakistan's earlier constitutions of 1956 and 1962.[22]

It introduced a presidential system at the federal government level in which the President was to be elected by the national assembly for five years. The President must be a Muslim of at least 40 years of age and qualified to be elected as a member of the national assembly. The Assembly could impeach the President on the charges of violation of the Constitution or misconduct. The President combined the role of the head of state and the head of government and exercised sufficient executive authority to assert primacy.

The executive authority of the federal government was exercised in the name of the President. He was the supreme commander of the army and would appoint the chiefs of staff of the army, navy and air force. The President selected a cabinet consisting of ministers to aid and advise in the exercise of his powers. Likewise, several other judicial and executive appointments were made by the President. The ministers of the cabinet of the President were to be members of the national assembly or elected to the national assembly within 12 months of assuming office. The President was authorized to issue an ordinance for peace and good government, in case the assembly was not in session. The ordinance was to be valid for a fixed duration unless the national assembly approved it, by making it a law or otherwise.

It was the only Pakistani constitution that had the post of Vice President, who was elected by the National Assembly for a period of five years. Qualified on the basis of being a member of the national assembly and 40 years of age, he served as acting President in the absence of the President and was to be considered a member of the presidential cabinet, although with precedence over other members of the cabinet. The vice president was to perform the tasks assigned to him by the President.

The constitution established a single-house legislature at the federal and provincial levels. The national assembly was comprised of the members elected from West Pakistan in the elections of December 1970 and two members elected from East Pakistan (Nurul Amin, who was appointed first Vice President and Raja Tridiv Roy) who opted to stay in Pakistan.[23] Six seats were reserved for women. The term of office of the national assembly was to be five years from its first meeting and it functioned as a constitution-making body as well as a legislative body. Its role as a constituent assembly ended at the time of the enactment of a permanent

[22] Hussain, *The Parliament of Pakistan,* 94.
[23] Rizvi, *Pakistan Political and Constitutional Engineering,* 350.

constitution. It could legislate for the federal and concurrent lists and it had ample powers to control finances and to pass a federal annual budget.

The Interim Constitution enshrined a federal system of government. The executive provincial authority rested with the governors too, but the principles of the parliamentary system made it obligatory for governors to act on the advice of the chief ministers. The executive head of the province was the chief minister, who was appointed by the governor after being satisfied that he commanded the support of the majority members in a particular assembly.

The Interim Constitution divided authority into three categories: federal, concurrent and provincial. Nonetheless, the overall balance of power was tilted in favour of the federal government. The role and position of the federal government further increased in case the President imposed emergency powers in the whole country or in a province. It also authorized the President to assume "all or any of the functions of the government of the province" or direct the governor to do so if he was satisfied that "a situation has arisen in which the Government of a Province cannot be carried on in accordance with the provisions of this Constitution."[24] In such a situation, the powers of the provincial legislative assembly could be exercised by the federal legislature.

This constitution created a unified judicial system at the federal and provincial levels. In line with the past, it was headed by the Supreme Court, with one high court in each province. However, the joint Sindh-Baluchistan High Court, as it was at the time of the introduction of the constitution, continued to function under the Interim Constitution. It also included a Supreme Judicial Council. Some other important federal bodies were the National Economic Council, Public Service Commission and Election Commission.

Like the 1962 Constitution, it established an Advisory Council of Islamic Ideology with five to twelve members appointed by the President to advise the federal and provincial governments on "enabling the Muslims to organize their lives in accordance with the teachings and principles of Islam" and prepare recommendations for bringing the laws "in conformity with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah." It was mandatory for the President, the governors and the national and provincial assemblies to seek the Council's advice on whether a proposed law was in consonance with the teachings and principles of Islam. However, the opinion of the council was only advisory for the governments and legislatures. The Islamic Research Institute, established under the 1962 constitution, was also retained.

[24] Rizvi, *Pakistan Political and Constitutional Engineering,* 356.

It had multiple Islamic provisions in the continuity of the previous constitutions of 1956 and 1962. The preamble assigned sovereignty to "Allah Almighty alone" and identified Pakistan's political and constitutional system with the principles and teachings of Islam. Article 30 called for enabling the Muslims "individually and collectively to order their lives in accordance with the fundamental principles and basic concepts of Islam." However, the constitution acknowledged the right of the minorities to freely "profess and practice their religion and develop their culture."[25] It incorporated the well-known fundamental rights that were enshrined in democratic systems.

The President was empowered to amend or make provisions in the Constitution if necessary and expedient. He could invoke this power only up to March 31, 1973. This deadline was extended by the national assembly on March 28, 1973, to enable the President to exercise these powers until the enforcement of the permanent constitution. President Zulfikar Ali Bhutto used these powers more often than not for the effective enforcement of the constitution and to make up for omissions. Another important thing was that the Seventh Schedule of the Constitution provided legal cover to 26 martial law regulations and orders. In the same vein, all presidential orders, martial law regulations and orders, as well as other laws enforced after March 25, 1969, were given a legal cover.

2.2. EFFORTS FOR CONSENSUS BUILDING

By January 1972, the opposition parties, including the National Awami Party (NAP), Jamiat-i-Ulema-i-Islam (JUI), Tehrik-i-Istiqlal and Jamat-i-Islami mounted pressure on the PPP-led federal government to withdraw martial law, restore democracy and summon the session of the National Assembly for ensuring the normal functioning of the political system in the country. These demands were intensified by the opposition in February. The PPP agreed with these demands in principle but prioritized introducing economic reforms in the country and mobilizing support for Pakistan at the global level for starting the peace dialogue with India to bring POWs back to the country.

However, the ruling PPP engaged NAP and JUI in a dialogue on March 2-6, 1972, to evolve a roadmap for the return of democracy and constitutionalism as a replacement for martial law.[26] On March 6, these three parties signed a Tri-Partite Agreement with these features:

1. Members will be invited to attend the National Assembly session to

[25] *The Interim Constitution 1972,* 80-93.

[26] Hasan Askari Rizvi, *Pakistan Political and Constitutional Engineering* (Lahore: Sang-e-Meel Publications, 2024), 350.

commence on April 14 for a maximum period of three days to take up some specified issues.

2. The government would prepare a draft of the Interim Constitution for the consideration of the National Assembly. The Interim Constitution would be based on the Government of India Act 1935 and the Indian Independence Act 1947, along with necessary amendments to meet the current political requirements. It would be debated in the assembly for three days and only designated party leaders or their representatives would speak on it.

3. The government would obtain a vote of confidence from the National Assembly. The government would also seek approval from the National Assembly for the continuation of martial law up to August 14, 1972.

4. The National Assembly would appoint a committee to prepare the draft of the regular constitution by August 1, 1972.

5. The assembly would function both as a constitution-making body and a lawmaking body until the permanent constitution was legislated. The powers of the President under the declaration of emergency would continue till the lifting of the emergency.

6. The provincial assemblies would meet on April 21.

7. The federal and provincial governments would be formed based on a parliamentary majority. A person elected to two assemblies would retain both seats until the constitution was approved. Likewise, the president, vice president, governors, ministers and advisors could retain their seats.

8. The federal government would continue to appoint provincial governors until the permanent constitution was framed. However, it would consult the majority party in the assembly on the appointment of the governor.

9. In the provinces of NWFP (Khyber Pakhtunkhwa) and Baluchistan, the majority parties are JUI and NAP, who would form a government.

10. The elections to the local governments would be held on an agreed date soon after the convening of provincial assemblies.

2.3 CONSTITUTIONAL CONSENSUS

An environment of goodwill created by the Tripartite Agreement did not last for long and after two weeks, some NAP and JUI leaders, especially Abdul Wali Khan, questioned some of the issues agreed upon in the Agreement and expressed their doubt aboutwhether the PPP would implement all the aforementioned provisions of the Agreement. Abdul Wali Khan contended that the NAP and JUI would not vote for the extension of martial law up to August 14, 1972, and that they intended to stay away from the vote of confidence in the PPP government.[27] Actually, their major concern was whether the PPP would allow the NAP-JUI to form provincial

[27] Rizvi, *Pakistan Political and Constitutional Engineering,* 354.

governments in NWFP (now KPK) and Baluchistan and replace the incumbent governors of both of these provinces with new governors of the choice of NAP.

On the other hand, PPP was keen to ensure the participation of NAP-JUI in the National Assembly session that was to commence in the middle of April. It, therefore, approached the leaders of these parties and met in Peshawar on April 8. In this meeting, the PPP conceded that these two parties could stay away from the vote for an extension of martial law and a vote of confidence in the PPP government at the federal level. Hence, a new offer for political accommodation and consensus building was extended by the PPP on April 26, 1972, details of which were released on May 7, described as the second Tripartite Agreement. It also ensured NAP-JUI on the formation of provincial governments in NWFP and Balochistan.

2.4. CENSUS: MYTH OR REALITY

The debate around the census revolves not around its existence, but its accuracy and political implications. The results of the census are critical because they determine the allocation of financial resources (NFC awards), political representation (seat allocation in the National Assembly), and the delineation of constituencies.

- **Political Allegations:** Accusations, particularly from non-Punjabi areas, suggest the census is used to further the dominance of Punjab, the most populous province. There are claims that non-Punjabi regions are systematically undercounted, or that the interests of the Punjabi majority are presented as monolithic.

- **Methodological Concerns:** Issues like military involvement during the process and an unwillingness from certain demographics, such as working-class women, to participate fully due to a perceived lack of incentive or benefit, contribute to questions about the data's reliability.

- **Minority Data:** Figures for minority populations are often disputed by community organizations, who regard official census data as unreliable and out of date.

- **Function of Power:** Academics argue that the census in Pakistan has been used as a "technology of power" and a link in the chain of "biopolitics," rather than a neutral demographic exercise.

In essence, while a formal census does take place as a constitutional requirement, its outcomes are highly contentious, leading many to view the *accuracy and fairness* of the count as a "myth" in the context of equitable resource and power distribution in Pakistan.

2.5 BASIC FEATURES OF THE 1973 CONSTITUTION

The National Assembly constituted a 25-member committee on April 17, 1972, to prepare a draft of the permanent constitution by August 1.[28] This deadline was afterward extended to December 31. Later, five members (Ghulam Mustafa Khar, Mubashir Hasan, Malik Meraj Khalid, Mumtaz Ali Bhutto and Mir Ghous Bakhsh Bizenjo) resigned because of the heavy workload of their official positions. Chairman of the committee, Mian Mahmud Ali Kasuri, also resigned as the federal minister and Chairman of the committee in September 1972. His resignation was turned down by President Bhutto. Nonetheless, on his resignation again in October 1972, Bhutto accepted it. He resigned from his position as deputy leader of the PPP Parliamentary Party, too. On October 9, the Constitution Committee elected Abdul Hafiz Pirzada as the new Chairman, who had by then assumed the cabinet portfolio of Law and Parliamentary Affairs.[29]

The constitution-making process encountered several controversies due to distrust and jealousy between the ruling PPP and its allies and the NAP-JUI and its allied groups. They had differences of opinion on the role and position of the prime minister and the division of powers between the center and the provinces. The constitution-making had to address a structural imbalance in the post-1971 Pakistani federation, which favoured Punjab. On the pattern of the pre-separation of East Pakistan period, Punjab had more population than the other three provinces combined. Moreover, Punjab was ahead in economic resources and its representation in the military and bureaucracy.

The NAP-JUI had the idea of neutralizing Punjabi dominance by creating a weak federal government limited only to its role in three subjects of defense, foreign policy and currency and allocating the rest of the powers to provinces. The PPP and its allies shared the necessity of granting administrative autonomy to the provinces, but did not want to turn the federation into a feeble body. Thus, they strived for a balance between provincial autonomy and a viable federal government.

Another problem was about Bhutto's way of governance and management. He preferred a commanding role for himself in the new political system and gained his liking for the French political system rather than the British. He also talked about introducing some safeguards in the parliamentary system so that the prime minister may not become a hostage of the whims and wishes of the members of the parliament.

Bhutto agreed to NAP-JUI establishing their provincial governments in NWFP and Baluchistan and appointed their nominees as governors in these provinces, but

[28] Syed, *The Discourse and Politics of Zulfikar Ali Bhutto,* 172-178.
[29] Syed, *The Discourse and Politics of Zulfikar Ali Bhutto,* 172-178.

periodic fireworks continued between the PPP government in the center and these two provincial governments and their parent political parties. The PPP often questioned their loyalty to the state and accused them of working against the security and solidarity of the state. However, neither of these camps did not let the situation reach the point of no return. Their phases of ebb and flow of confrontation and accommodation continued and one example of their cooperation was the signing of the Constitutional Accord on October 20, 1972.[30]

President Bhutto invited the opposition leaders for talks on October 17-20 on constitutional issues, on the major features of the constitution on which the leaders consented and agreement was reached on the following principles:[31]

1. In Pakistan, there would be a federal parliamentary form of government with the primacy of the National Assembly.
2. The federal government's actions would be taken in the name of the President. However, the Prime Minister would be the Chief Executive whose advice would be binding on the President in all matters and in all respects.
3. The National Assembly would elect one of its members as Prime Minister, who would be called upon by the President to form the government. This provision meant that the head of state would have no discretion in the selection of the prime minister.
4. The prime minister would have the power to dissolve the national assembly at any time. This power could be exercised even if the prime minister faced a vote of no confidence.
5. Several steps were suggested for the working of the National and Provincial Assemblies to ensure political stability. These measures were: a) The resolution of a vote of no confidence in the Prime Minister would compulsorily include the name of another member of the Assembly to be his successor; b) The no-confidence motion could not be moved during the budget session; c) if a vote of no confidence was rejected, no new resolution of no confidence could be moved for at least six months; d) For a period of fifteen years or three general elections, whichever was longer, a vote of no confidence would fail unless it obtains at least two-thirds of the total votes of the Assembly concerned.[32]
6. The Prime Minister must be a member of the National Assembly. Other ministers could be either from the National Assembly or the Senate. However, the ministers from the Senate could not be more than one-fourth of the total members of the cabinet.

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[30] Rizvi, *Pakistan Political and Constitutional Engineering,* 362.
[31] Rizvi, *Pakistan Political and Constitutional Engineering,* 362-366.

[32] Rizvi, *Pakistan Political and Constitutional Engineering,* 362-363.

7. Pakistan would have a bicameral legislature at the federal level: the National Assembly (lower house) and the Senate (upper house).

8. The National Assembly would comprise 200 members elected directly on a universal franchise. Ten additional seats would be reserved for women for a period of 10 years, who would be elected by the elected members of the National Assembly from their respective provinces.

9. The National Assembly seats would be allocated to the provinces, the federally administered tribal areas and the national capital on a population basis.

10. The upper house, the Senate, would have 60 members. Each province would send 14 members: two seats each would be allocated to the federally administered areas and the national capital of Islamabad. The Senate seats allocated to the provinces would be elected by the respective provincial assemblies through a system of single transferable vote. The Senate members from the Tribal Areas would be elected by the National Assembly members from there. The members from the capital city would be elected through a procedure prescribed by the President on the advice of the Prime Minister.

11. There would be two legislative lists: Federal and Concurrent. The residuary legislative powers were left to the provinces. The Constitutional Accord proposed 60 items for inclusion in the Federal List and 47 items for the Concurrent List.

12. All money bills would originate and pass in the National Assembly. The Senate would not have any 'say' in this matter. The Senate would not be assigned any 'administrative or supervisory powers.'

13. The maximum qualifying age for the National and Provincial Assemblies would be 25 years. For the Senate, the maximum qualifying age would be 30 years.

14. The maximum qualifying age for the President would be 45 years. The President would be elected in a joint session of the Parliament by an absolute majority of the total membership of the Parliament.

15. The federal legislature would continue to exercise the taxation powers that it had under the Interim Constitution.

16. The net earnings from "excise duty and royalty recovered at the well-head on natural gas" should be paid to the province where the well-head was located. Keeping in view the current commitments, the needs of natural gas in the province where the well-head was located would be given priority.

17. A Council of Common Interests would be set up for "supervision and control on policy" regarding certain specified items in the federal and concurrent legislative lists. This council would be responsible to the Parliament through the Prime Minister. This Council would include four Chief Ministers and four federal cabinet members. The latter would be nominated by the Prime Minister.

18. Electricity would continue to be on the Concurrent List. The provincial governments could construct power houses, transmission lines and grid stations in

their provinces. The federal government and WAPDA would also construct power houses, inter-provincial transmission lines and grid stations in any province.

19. The net profit derived from bulk generation of power at a hydro-electric generation station by the federal government or the WAPDA would be paid to the province where the power was generated.

20. The federal government would continue to manage national planning and national economic coordination. The Planning Commission would have one member from each province, nominated by the President on the recommendation of the provincial governments.

21. The official title of the state would be "Islamic Republic of Pakistan." The President would be a Muslim and Islam would be designated as the State Religion. No law would violate the injunctions of Islam as laid down in the Quran and Sunnah. All the existing laws would be brought into conformity with the Islamic commands. The Council of Islamic Ideology would be set up to "pave the way for the positive implementation of the teachings of Islam."[33]

22. Any amendment in the constitution would have to be passed by two-thirds of the total members of the National Assembly and a simple majority in the Senate.

23. The Election Commission and the Judiciary would be independent of the executive. The constitution would guarantee fundamental rights and provide safeguards against preventive detention.

This accord was signed by ten political leaders: Z A Bhutto, Abdul Qayyum Khan, Ghous Bakhsh Bizenjo, Arbab Sikandar Khan Khalil, Maulana Mufti Mahmood, Sardar Shaukat Hayat Khan, Maj. Gen. Jamaldar Khan, Maulana Shah Ahmad Noorani, Prof. Ghafoor Ahmad and Sherbaz Mazari. It was welcomed by all political circles, although a few reservations were raised. It was labelled as the major milestone after the dismemberment of the country. The Constitutional Accord facilitated the formation of the draft of the constitution by the Constitution Committee. The draft of the new constitution in the form of a bill was introduced in the National Assembly on February 2, 1973.[34] The members got two weeks to review the constitution bill and the debate for its first reading started on February 17

The National Assembly approved the regular constitution on April 10, 1973, with 125 votes in its favour and none against; three members abstained from voting. They were Mian Mahmood Ali Kasuri, Ahmad Raza Kasuri and Maulana Shah Ahmad Noorani.[35] The master copy of the constitution was signed by 136 members of the National Assembly on April 12. President Bhutto authenticated the

[33] Rizvi, *Pakistan Political and Constitutional Engineering,* 365.
[34] Syed, *The Discourse and Politics of Zulfikar Ali Bhutto,* 172-178.
[35] Rizvi, *Pakistan Political and Constitutional Engineering,* 372.

constitution in a special ceremony on the same day. Shah Ahmad Noorani, who abstained from voting, signed the master copy. The 1973 Constitution was enforced on August 14, 1973. The unanimous framing of the Constitution was described as one of the most brilliant successes of the Parliament of Pakistan.

Self-Assessment Questions

1. What were the constitutional causes of the breakup of the state of Pakistan in 1971?

2. What were the salient features of the Tripartite Agreement on major points for the formulation of the Constitution of Pakistan 1973?

3. How was the consensus-building realized for the legislation of the Constitution of 1973?

4. What were the main points of agreement reached in the Constitutional Accord?

5. What are the fundamental features of the 1973 Constitution, and how do they reflect Pakistan's identity as an Islamic and federal state?

UNIT 3

IMPORTANT PARTS AND CHAPTERS OF THE CONSTITUTION

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UNIT 3: IMPORTANT PARTS AND CHAPTERS OF THE CONSTITUTION

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INTRODUCTION

This unit examines the important parts and chapters of the Constitution of the Islamic Republic of Pakistan, 1973. Pakistan adopted its third constitution after a parliamentary consensus on 12th April 1973 and it was promulgated on August 14, 1973. The 1973 Constitution of Pakistan is a comprehensive legal framework that defines the political structure of the state, the rights of its citizens, and the relationship between its different organs. This unit examines the key parts and chapters of the Constitution, each of which plays a vital role in shaping the functioning of the state. From the introductory provisions to the detailed chapters on the judiciary, elections, and Islamic provisions, this unit offers a thorough understanding of the constitutional structure.

Each part and chapter reflects the ideological, political, and legal principles upon which Pakistan is based. Understanding these parts is essential to grasping how the Constitution organizes state power, protects individual rights, and ensures the supremacy of law in governance. By exploring these fundamental sections, students will gain insights into Pakistan's federal structure, its political system, and the Islamic provisions that guide its legal framework.

OBJECTIVES

After the study of this unit, you will be able to:

1. Understand the structure and key provisions of the 1973 Constitution of Pakistan.
2. Analyze the significance of each part of the Constitution in relation to Pakistan's political and legal system.
3. Evaluate the impact of Islamic provisions and the emergency clauses within the Constitution.
4. Examine the role of the judiciary, the President, Parliament, and Provinces in the functioning of the state.
5. Gain an understanding of the electoral framework and emergency provisions within Pakistan's constitutional structure.

LEARNING OUTCOMES

After the study of this unit, you will be able to:

1. Identify and explain the key parts and chapters of the 1973 Constitution.

2. Describe the core principles outlined in the Principles of Policy and their implications for governance.
3. Outline the federal structure of Pakistan, the roles of the President, Parliament, and the Provinces, and the powers vested in these institutions.
4. Examine the role of the judiciary as provided in Part VII and its role in ensuring constitutional supremacy.
5. Understand the significance of the Islamic provisions and their influence on the legal and political framework.
6. Analyze the emergency provisions and their impact on governance during crises.

3.1 PART I INTRODUCTORY

The details are as follows.

1. **The Republic and its territories**

(1) Pakistan shall be a Federal Republic to be known as the Islamic Republic of Pakistan, hereinafter referred to as Pakistan.

(2) The territories of Pakistan shall comprise—

(a) the Provinces of 3 [Balochistan], the [Khyber Pakhtunkhwa], the Punjab and [Sindh];

(b) The Islamabad Capital Territory, hereinafter referred to as the Federal Capital; [and]

(c) such States and territories as are or may be included in Pakistan, whether by accession or otherwise.

(3) [Majlis-e-Shoora (Parliament)] may by law admit into the Federation new States or areas on such terms and conditions as it thinks fit.]

2. **Islam to be the State religion**

2. Islam shall be the State religion of Pakistan.

The Objectives Resolution is to form part of the substantive provisions

2A. The principles and provisions set out in the Objectives Resolution reproduced in the Annex are hereby made a substantive part of the Constitution and shall have effect accordingly.

3. Elimination of exploitation

The State shall ensure the elimination of all forms of exploitation and the gradual fulfillment of the fundamental principle, from each according to his ability to each according to his work.

Right of individuals to be dealt with in accordance with law, etc.

4. (1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen. Wherever he may be, and of every other person for the time being within Pakistan.

(2) In particular—

(a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

(b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and

(c) no person shall be compelled to do that which the law does not require him to do.

Loyalty to the State and obedience to the Constitution and law

5. (1) Loyalty to the State is the basic duty of every citizen.

(2) Obedience to the Constitution and law is the [inviolable] obligation of every citizen wherever he may be and of every other person for the time being within Pakistan.

High treason

6. (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 acts 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 a High Court.]

(3) [Majlis-e-Shoora (Parliament)] shall by law provide for the punishment of persons found guilty of high treason.

3.2 PART II CHAPTER 2 PRINCIPLES OF POLICY

Pakistan's 1973 Constitution, Part II, Chapter 2 (Principles of Policy) outlines guiding goals for the State, not enforceable rights, focusing on the Islamic way of life, promoting local government, discouraging prejudices, ensuring women's participation, protecting the family, strengthening Muslim unity, promoting peace, and supporting social justice, all subject to available resources. It directs all state organs to act in line with these principles for a just and Islamic society, covering areas like education, healthcare, social welfare, and international relations, serving as a policy framework for governance.

3.3 PART III FEDERATION OF PAKISTAN

Pakistan adopted a federal and parliamentary structure of the constitution. After different experiments in the 1956 Constitution, which was parliamentary in nature, with extraordinary powers available to the president of Pakistan. In the 1962 Constitution, Ayub Khan adopted a Presidential form of government. In the 1973 Constitution, the democratic forces evolved a rational consensus and decided to adopt a parliamentary form of government.

President

The office of the president was retained as the head of state with symbolic and ceremonial powers. The president is a representative of the unity of the federation and part of the parliament. The president also enjoys the status of supreme commander of the armed forces of Pakistan. The articles of the constitution from 41 to 49 deal with the office of the president, his qualifications and the constitutional role assigned to this office. Election to the office of President shall be held not earlier than sixty days and not later than thirty days before the expiration of the term of the President in office: Provided that, if the election cannot be held within the period aforesaid because the National Assembly is dissolved, it shall be held within thirty days of the general election to the Assembly. An election to fill a vacancy in the office of President shall be held not later than thirty days from the occurrence of the vacancy: Provided that, if the election cannot be held within the period aforesaid because the National Assembly is dissolved, it shall be held within thirty days of the general election to the Assembly. The validity of the election of the President shall not be called in question by or before any court or other authority.

The authority of the federal government is exercised by the prime minister and his/her cabinet of ministers in the name of the president. A president should be required to be a Muslim of 45 years of age and qualify to become a member of the National Assembly. His term of office would be five years. The electoral college for the presidential office comprised the Senate, the National Assembly and all four provincial assemblies. The method of the election is also prescribed in the constitution. After the adoption of the new constitution in 1973, Fazal-Ilahi Chaudhry was the first president of Pakistan and nowadays Asif Ali Zardari is serving as president of Pakistan for a second term. In the case of vacant positions, the election of the new president would be held not later than thirty days and not earlier than six months after the expiration of the term of the president.

The federal government is supposed to keep the president informed regarding the business of the state. The prime minister operates as the chief executive of the state and the president acts on the advice of the prime minister and his cabinet.

The Parliament:

In 1973 Constitution of Pakistan adopted a model of a bicameral legislature. The National Assembly, as a house of people, would be directly elected and operate as a house of people. The prime minister would be elected from the majority of votes in the lower house of the National Assembly. The Senate of Pakistan was introduced as the upper house and house of federation with equality of representation among the federating units.

The 1973 Constitution adopted the principle of a bicameral legislature, and it gave birth to the Senate of Pakistan as a house of the federation. As an upper house of the Parliament, it provided equality of representation to the federating units of the

state. Most of the federal states in the world adopted the system of a bicameral legislature, and even some unitary states like the United Kingdom and Japan also adopted bicameralism.

Political scientists preferred second chambers as guardians and custodians of the rights of the federating units/provinces and as a legislative check on hasty, ill-conceived, and impulsive legislative bills. It also provided sufficient pause for reflections and sober reconsiderations after the pacification of populist trends. It can also effectively check the populist legislative pieces around electoral cycles introduced for narrow political interests. In this opinion piece, a modest effort is made to trace the origin and history of the upper house in our state.

In British India bicameral legislative arrangement was first introduced through the 1919 Act. Along with 144 members of the Central Legislative Assembly, a Council of States was created with 60 members, of whom 34 were elected. In the legislative sphere, both houses enjoyed equal powers, while some additional powers were assigned to the lower house. The 1935 Act further enlarged the powers and numerical strength of both houses. The Central Legislative Assembly consisted of 375 members with a term of 5 years. The Act proposed the upper house maximum of 260 members, which the Council of States recommended as a permanent house with one-third of members retiring every three years. That federal legislative structure never came into existence due to the prevailing political situation. The Act also proposed the adoption of bicameral legislatures at the provincial tier; 6 out of 11 provinces adopted that arrangement with varying strengths of membership from 22 to 60.

The 1945-46 Elections were held for the central and provincial legislative assemblies and the idea of the bicameral legislature was not maintained in the Cabinet Mission Proposal and even in the Independence of India Act 1947. According to the Act newly created Constituent Assembly of Pakistan (CAP) was assigned the task of framing the constitution and it also served as the federal legislature. The CAP appointed a Basic Principles Committee after the adoption of the Objective Resolution in 1949. The Committee submitted its second draft report in December 1952, and it proposed a bicameral legislature for the new state of Pakistan. The proposed House of Units comprised 120 members, out of whom 60 were elected from East Pakistan based on proportional representation by means of a single transferable vote of the provincial legislature. The remaining 60 seats were distributed among the administrative units of West Pakistan with the same electoral mechanism. The 400-member House of People was going to be directly elected based on the universal adult franchise. The draft constitution of 1954 also proposed the bicameral structure by adopting the Bogra Formula of October 1953. The formula introduced the principle of parity of representation between East and West Pakistan. It proposed an indirectly elected Senate comprised of 50 members equally distributed among the 5 units, plus two women representatives each from both

wings. The lower house comprised 300 general seats and 14 reserved for women. Both houses enjoyed equal legislative and even financial powers. In case of disputes, they should be resolved through joint seating via majority votes.

The subsequent formation of One-Unit effectively derailed that arrangement, and the 1956 Constitution adopted a unicameral legislative structure with the parity of representation between East and West wings. These moves significantly undermined the federation and resulted in deep-rooted grievances among the provinces. The imposition of Ayub's martial law further complicated the situation. He appointed a Constitutional Commission under Justice Shahabuddin, which recommended a bicameral legislature with 48 members Upper House of the Senate. Among them, 40 members would be elected from both wings based on a parity of 20 each, while eight members will be nominated by the president amongst the meritorious personalities. The lower house comprised 200 members elected by popular vote. The proposed Senate enjoys legislative powers; it can propose amendments to the money bill to the lower house with a non-binding effect. The Senate also enjoyed the power to try the president, governors, ministers, judges, and other executive officers. It also enjoys the power to confirm the key appointments made by the president. Ayub rejected the proposed constitutional scheme and adopted a presidential form of government with an extraordinary concentration of powers in the office of the president. It also adopted a powerless unicameral legislative house. The National Assembly comprised 150 indirectly elected members from the electoral college of 80,000 Basic Democrats on the principle. These moves of personalization of power brought disastrous consequences for the harmonious working of the state and they aggravated the sense of political marginalization among the federating units. The federal principle and provincial autonomy were largely undermined in legislative and executive spheres and Pakistan predominantly operated under unitary state patterns. That constitutional arrangement was abrogated with the resignation of Ayub Khan.

Yahya's regime introduced the Legal Framework Order of 1970, which abolished the One-Unit along with the notorious parity principle. The military regime announced the first general elections of the national and provincial assemblies based on universal adult franchise. A unicameral house of the National Assembly, comprised of 300 general members and 13 women-reserved seats, was introduced. The constituencies were allocated among the federating units based on their respective demographic strengths. East Pakistan had a share of 162+7 seats, while West Pakistan provinces had 138+6 members.

After the disintegration of the state in 1971, Pakistan started its new political journey under the leadership of Z. A. Bhutto. The democratic forces evolved a political consensus on the adoption of the new federal parliamentary constitution.

They also proposed a bicameral legislature. The national consensus develops among the political leaders after intensive deliberations. They finally signed a constitutional accord in October 1972. Along with many other issues, it adopted the bicameral legislature and the Senate of Pakistan proposed a house of the federation in the new constitutional arrangement. The Senate had equal representation from the provinces; it comprised 45 members initially, with 10 each indirectly elected from the 4 provincial assemblies. 3 seats were reserved for FATA members and 2 seats were reserved for the federal capital. The elections of the first senate were held from July 6-10, 1973, for a four-year term.

The Senate, as a custodian of the constitution and guardian of democracy, was proposed as a permanent house. The first meeting of the Senate was held in the National Assembly hall on August 6, 1973, and senators elected Khan Habibullah as the first chairman of the Senate and Tahir Muhammad Khan as deputy chairman of the Senate. The Senate membership was further expanded after the 1977 general elections. It added 18 new members, 4 from each province and 2 additional members from FATA, which raised its total strength to 63. The imposition of martial law not only derailed the democratic process, but the Senate of Pakistan was also abolished despite constitutional protections as a permanent house. Zia restored the senate after the 1985 elections, which again faced derailment after Musharraf's martial law of 1999. The Senate was restored after the 2002 elections with an enlarged membership.

In the multi-ethnic, multi-cultural and multi-lingual federal state of Pakistan, the upper house offered equal representation, and it offered a common platform for diverse identities. It also helps to foster a sense of national unity, the supremacy of the constitution and democracy in Pakistan.

3.4 PART IV PROVINCES

The fourth part of the constitution comprises Articles 101 to 140 A of the constitution. These articles deal with the position and powers of the governors of the provinces, their constitutional powers and responsibilities in chapter one. Chapter 2 of this part deals with the Provincial Assemblies, their constitution, duration and the powers of the Speaker and Deputy Speaker. The functioning of the Assembly and its meeting rules are also defined. It also deals with the legislative and financial powers of the assemblies. The next chapter, from Articles 118 to 127, deals with financial procedures regarding provincial funds and public accounts, Annual budgets, supplementary grants and the procedure of their approval and sanctions. Chapter 3 of Part IV of the Constitution deals with the power and composition of Provincial Governments, the powers of the provincial executives, and the role and function of the cabinet and provincial ministers. It also deals with

the role of other provincial legal offices, including the Advocate General. This part is also reflected in the local government system.

3.5 PART VII THE JUDICATURE

THE COURTS

Establishment and jurisdiction of courts

(1) There shall be a Supreme Court of Pakistan, a High Court for each Province. and a High Court for the Islamabad Capital Territory and such other courts as may be established by law.

(2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.

(3) The Judiciary shall be separated progressively from the Executive within 3 [fourteen] years from the commencing day

Appointment of Judges to the Supreme Court, High Courts and the Federal Shariat Court

(1) There shall be a Judicial Commission of Pakistan, hereinafter in this Article referred to as the Commission, for the appointment of Judges of the Supreme Court, High Courts and the Federal Shariat Court, as hereinafter provided

(2) For appointment of Judges of the Supreme Court, the Commission shall consist of—

(i) Chief Justice of Pakistan; Chairman

(ii) [four] most senior Judges of the Supreme Members Court;

Members

(iii) a former Chief Justice or a former Judge Member of the Supreme Court of Pakistan to be nominated by the Chief Justice of Pakistan, in consultation with the 5 [four] member Judges, for a term of two years;

Member

(iv) Federal Minister for Law and Justice;

Member

(v) Attorney-General for Pakistan, and

Member

(vi) a Senior Advocate of the Supreme Court of Pakistan nominated by the Pakistan Bar Council for a term of two years.

Member

(3) Notwithstanding anything contained in clause (1) or clause (2), the President shall appoint the most senior Judge of the Supreme Court as the Chief Justice of Pakistan.

(4) The Commission may make rules regulating its procedure.

(5) For appointment of Judges of a High Court, the Commission in clause (2) shall also include the following, namely:—

(i) Chief Justice of the High Court to which the appointment is being made;

Member

(ii) The most senior Judge of that High Court;
Member
(iii) Provincial Minister for Law, and
Member
(iv) an advocate having not less than fifteen Member years practice in the HighCourt to be nominated by the concerned Bar Council for a term of two Members
(8) The Commission, by a majority of its total membership, shall nominate to the Parliamentary Committee one person for each vacancy of a Judge in the Supreme Court, a High Court, or the Federal Shariat Court, as the case may be.
(9) The Parliamentary Committee, hereinafter in this Article referred to as the Committee, shall consist of the following eight members, namely:—
(i) four members from the Senate; and
(ii) four members from the National Assembly:
[Provided that when the National Assembly is dissolved, the total membership of the Parliamentary Committee shall consist of the members from the Senate only mentioned in paragraph (i) and the provisions of this Article shall, mutatis mutandis, apply.]
(10) Out of the eight members of the Committee, four shall be from the Treasury Benches, two from each House and four from the Opposition Benches, two from each House. The nomination of members from the Treasury Benches shall be made by the Leader of the House and from the Opposition Benches by the Leader of the Opposition.
(11) The Secretary of the Senate shall act as the Secretary of the Committee.
(12) The Committee, on receipt of a nomination from the Commission, may confirm the nominee by a majority of its total membership within fourteen days, failing which the nomination shall be deemed to have been confirmed:
[Provided that the Committee, for reasons to be recorded, may not confirm the nomination by a three-fourths majority of its total membership within the said period:]
[Provided further that if a nomination is not confirmed by the Committee, it shall forward its decision with reasons so recorded to the Commission through the Prime Minister: Provided further that if a nomination is not confirmed, the Commission shall send another nomination.
(13) The Committee shall send the name of the nominee confirmed by it or deemed to have been confirmed to the Prime Minister, who shall forward the same to the President for appointment.
Retiring age 1 [179. A Judge of the Supreme Court shall hold office until he attains the age of sixty-five years unless he sooner resigns or is removed from office in accordance with the Constitution.]

Decisions of the Supreme Court are binding on other Courts

189. Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan. **190. Action in aid of the Supreme Court**

190. All executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court.

191. Rules of procedure

Subject to the Constitution and law, the Supreme Court may make rules regulating the practice and procedure of the Court.

3.6. PART VIII ELECTIONS

The 1973 constitution provided a permanent election commission of Pakistan as a constitutional body with the mandate of holding free, fair and transparent elections according to the law. Although Pakistan was created through an electoral and democratic process of the 1945-46 elections, where Muslims of India provided a mandate to AIML under the leadership of Jinnah to create a separate Muslim state. Pakistan failed to maintain democratic traditions; no general elections were held till 1970. The framers of the 1973 constitution decided to create an independent ECP to facilitate elections in Pakistan. Article 213 of the Constitution suggested the appointment of a Chief Election Commissioner.

CHAPTER 1.CHIEF ELECTION COMMISSIONER AND ELECTION COMMISSION

Chief Election Commissioner

(1) There shall be a Chief Election Commissioner (in this Part referred to as the Commissioner), who shall be appointed by the President.

(2) No person shall be appointed to be a Commissioner unless he has been a Judge of the Supreme Court or has been a senior civil servant or is a technocrat and is not more than sixty-eight years of age.

Explanation 1. "senior civil servant" means a civil servant who has served for at least twenty years under the Federal or Provincial Government and has retired in BPS-22 or above.

Explanation 2." Technocrat" means a person who is the holder of a degree requiring the conclusion of at least sixteen years of education, recognized by the Higher Education Commission and has at least twenty years of experience, including a record of achievements at the national or international level.]

(2A) The Prime Minister shall, in consultation with the Leader of the Opposition in the National Assembly, forward three names for appointment of the Commissioner to a Parliamentary Committee for hearing and confirmation of any one person.

[Provided that in case there is no consensus between the Prime Minister and the Leader of the Opposition, each shall forward separate lists to the Parliamentary Committee for consideration, which may confirm any one name.]

(2B) The Parliamentary Committee to be constituted by the Speaker shall comprise fifty percent members from the Treasury Benches and fifty percent from the Opposition Parties, based on their strength in Majlis-e-Shoora (Parliament), to be nominated by the respective Parliamentary Leaders:

[Provided [**] that the total strength of the Parliamentary Committee shall be twelve members, out of which one-third shall be from the Senate:]

Provided [further] that when the National Assembly is dissolved and a vacancy occurs in the office of the Chief Election Commissioner, 5 [total membership of the Parliamentary Committee shall consist of] the members from the Senate only and the foregoing provisions of this clause shall, mutatis mutandis, apply.]

(3) The Commissioner 6 [or a member] shall have such powers and functions as are conferred on him by the Constitution and law.

Oath of Office

Before entering upon office, the Commissioner shall make before the Chief Justice of Pakistan 8, and a member of the Election Commission shall make before the Commissioner, oath in the form set out in the Third Schedule.

Term of office of the Commissioner [and members]

(1) The Commissioner [and a member] shall, subject to this Article, hold office for a term of [five] years from the day he enters upon his office:

[Provided that two of the members shall retire after the expiration of the first two and a half years and two shall retire after the expiration of the next two and a half years:

Provided further that the Commission shall, for the first term of office of members, draw a lot as to which two members shall retire after the first two and a half years:

Provided also that the term of office of a member appointed to fill a casual vacancy shall be the unexpired term of the office of the member whose vacancy he has filled.]

(2) The Commissioner [or a member] shall not be removed from office except in the manner prescribed in Article 209 for the removal from office of a Judge and, in the application of the Article for the purposes of this clause, any reference in that Article to a Judge shall be construed as a reference to the Commissioner [or, as the case may be, a member].

(3) The Commissioner [or a member] may, by writing under his hand addressed to the President, resign his office.

(4) Vacancy in the office of the Commissioner or a member shall be filled within forty-five days.]

Election Commission

(1) For the purpose of election to both Houses of Majlis-e-Shoora (Parliament), Provincial Assemblies and for election to such other public offices as may be specified by law, a permanent Election Commission shall be constituted in accordance with this Article.]

(2) The Election Commission shall consist of—

(a) The Commissioner who shall be Chairman of the Commission; and

(b) four members, one from each Province, each of whom shall be a person who has been a judge of a High Court or has been a senior civil servant or is a technocrat and is not more than sixty-five years of age, to be appointed by the President in the manner provided for the appointment of the Commissioner in clauses (2A) and (2B) of Article 213.]

(3) It shall be the duty of the Election Commission 4 [Omitted] to organize and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with the law, and that corrupt practices are guarded against.

Duties of Commission

The [Commission] shall be charged with the duty of—

(a) preparing electoral rolls for election to the National Assembly, Provincial Assemblies and local governments, and revising such rolls periodically to keep them up-to-date;]

(b) organizing and conducting elections to the Senate or to fill casual vacancies in a House or a Provincial Assembly; and

(c) Appointing Election Tribunals

(d) The holding of general elections to the National Assembly, Provincial Assemblies and the local governments; and

(e) such other functions as may be specified by an Act of Majlis-e-Shoora (Parliament)

[Provided that till such time as the members of the Commission are first appointed in accordance with the provisions of paragraph (b) of clause (2) of Article 218 pursuant to the Constitution (Eighteenth Amendment) Act, 2010, and enter upon their office, the Commissioner shall remain charged with the duties enumerated in paragraphs (a), (b) and (c) of this Article.]

Executive authorities to assist the Commission, etc.

It shall be the duty of all executive authorities in the Federation and in the Provinces to assist the Commissioner and the Election Commission in the discharge of or their functions

.

3.7 PART IX ISLAMIC PROVISIONS:

The religious symbolism and idioms are frequently used by the All India Muslim League leadership during the Pakistan movement. The state was created to protect the religious identity of the Muslims and to safeguard their political and economic interests from dominating the Hindu majority. The creation of a separate Muslim homeland provided an opportunity for the citizens of Pakistan to adopt a political system of their own choice. Jinnah declared that the new state would follow the instructions of the Quran and Sunnah in framing its constitution. The Objective Resolution was considered a great milestone in the process of Islamization of the state in Pakistan.

The following Islamic provisions were introduced in different constitutions. The 1956, 1962 and 1973 Constitutions declared that Islam would be the state religion. The state assumed the responsibility to promote the Islamic way of life among its Muslim citizens.

The name of the state was declared as the Islamic Republic of Pakistan. The 1956 and 1973 Constitutions adopted the same name. In the case of the 1962 Constitution's initial draft, the name was suggested as the Republic of Pakistan, which was amended accordingly, and the word Islamic was included again.

The state will plan for the promotion of the Islamic way of life, including the organization of Zakat, Auqaf and mosques.

The Islamic Brotherhood should be promoted by the state and cooperation among the Muslim countries would be the priority of the state.

The president would be a Muslim. The 1956, 1962 and 1973 Constitutions retained that qualification for the office of the president. The 1973 Constitution also included the office of the Prime Minister as the chief executive of the state. The candidate is required to be a Muslim member of the National Assembly.

The constitution also declared that 'no law shall be enacted which is repugnant to the injunctions of Islam as laid down in the Holy Quran and the Sunnah. The state also declared that the existing laws "shall be brought into conformity with injunctions of Islam as laid down in the Holy Quran and Sunnah." Both provisions operated as guiding principles for Islamization.

The constitution also created a council of Islamic ideology, that an institution mandated to recommend to the parliament and provincial assemblies on the Islamization of the laws as an advisory body. The Council of Islamic Ideology was comprised of religious scholars and legal experts.

The teaching of the Holy Quran and Islamiat would be promoted by the state. The state will ensure the correct printing of the Holy Quran.

3.8 PART X EMERGENCY PROVISIONS

Proclamation of emergency on account of war, internal disturbance, etc.

(1) If the President is satisfied that a grave emergency exists in which the security of Pakistan, or any part thereof, is threatened by war or external

aggression, or by internal disturbance beyond the power of a Provincial Government to control, he may issue a Proclamation of Emergency.
[Provided that for imposition of emergency due to internal disturbances beyond the powers of a Provincial Government to control, a resolution from the Provincial Assembly of that Province shall be required: Provided further that if the President acts on his own, the Proclamation of Emergency shall be placed before both Houses of Majlise-Shoora (Parliament) for approval by each House within ten days.]

(2) Notwithstanding anything in the Constitution, while a Proclamation of Emergency is in force—

(a) Majlis-e-Shoora (Parliament) shall have the power to make laws for a Province, or any part thereof, with respect to any matter not enumerated in the Federal Legislative List

(b) The executive authority of the Federation shall extend to the giving of directions to a Province as to the manner in which the executive authority of the Province is to be exercised; and

(c) The Federal Government may by Order assume to itself, or direct the Governor of a Province to assume on behalf of the Federal Government, all or any of the functions of the Government of the Province, and all or any of the powers vested in, or exercisable by, anybody or authority in the Province other than the Provincial Assembly, and make such incidental and consequential provisions as appear to the Federal Government to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending, in whole or in part, the operation of any provisions of the Constitution relating to anybody or authority in the Province

Provided that nothing in paragraph (c) shall authorize the Federal Government to assume to itself or direct the Governor of the Province to assume on its behalf, any of the powers vested in or exercisable by a High Court, or to suspend either in whole or in part the operation of any provisions of the Constitution relating to High Courts.

(3) The power of [Majlis-e-Shoora (Parliament)] to make laws for a Province with respect to any matter shall include the power to make laws conferring powers and imposing duties or authorizing the conferring of powers and the imposition of duties upon the Federation, or officers and authorities of the Federation, as respects that matter.

(4) Nothing in this Article shall restrict the power of a Provincial Assembly to make any law which under the Constitution it has power to make, but if any provision of a Provincial law is repugnant to any provision of an Act of [Majlis-e-Shoora (Parliament)] which 1 [Majlis-e-Shoora (Parliament)] has under this Article power to make, the Act of 1 [Majlis-e-Shoora (Parliament)], whether passed before or after the Provincial law, shall prevail and the Provincial law shall, to the extent of the repugnancy, but so long only as the Act of 1 [Majlis-e-Shoora (Parliament)] continues to have effect, be void

(5) A law made by [Majlis-e-Shoora (Parliament)] which [Majlis-e-Shoora (Parliament)] would not but for the issue of a Proclamation of Emergency have been competent to make, shall, to the extent of the incompetency, cease to affect the expiration of a period of six months after the Proclamation of Emergency has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.

(6) While a Proclamation of emergency is in force, 1 [Majlis-e-Shoora (Parliament)] may by law extend the term of the National Assembly for a period not exceeding one year and not extending in any case beyond

(7) A Proclamation of Emergency shall be laid before a joint sitting which shall be summoned by the President to meet within thirty days of the Proclamation being issued and—

(a) shall cease to be in force at the expiration of two months unless, before the expiration of that period, it has been approved by a resolution of the joint sitting; and

(b) shall, subject to the provisions of paragraph (a), cease to be in force upon a resolution disapproving the proclamation being passed by the votes of the majority of the total membership of the two Houses in joint sitting.]

(8) Notwithstanding anything contained in clause (7), if the National Assembly stands dissolved at the time when a Proclamation of Emergency is issued, the Proclamation shall continue in force for a period of four months but, if a general election to the Assembly is not held before the expiration of that period; it shall cease to be in force at the expiration of that period unless it has earlier been approved by a resolution of the Senate.

Power to suspend Fundamental Rights, etc., during the emergency period

(1) Nothing contained in Articles 15, 16, 17, 18, 19, and 24 shall, while a Proclamation of Emergency is in force, restrict the power of the State as defined in Article 7 to make any law or to take any executive action which it would, but for the provisions in the said Articles, be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect, and shall be deemed to have been repealed, at the time when the Proclamation is revoked or has ceased to be in force.

(2) While a Proclamation of Emergency is in force, the President may, by Order,1 declare that the right to move any court for the enforcement of such of the Fundamental Rights conferred by Chapter 1 of Part II as may be specified in the Order, and any proceeding in any court which is for the enforcement, or involves the determination of any question as to the infringement, of any of the Rights so specified, shall remain suspended for the period during which the Proclamation is in force, and any such Order may be made in respect of the whole or any part of Pakistan.

(3) Every Order made under this Article shall, as soon as may be, be laid before 2 [both houses of Majlis-e-Shoora (Parliament), separately] for approval, and the provisions of clauses (7) and (8) of Article 232 shall apply to such an Order as they apply to a Proclamation of Emergency.

Power to issue a Proclamation in case of failure of the Constitutional machinery in a province

(1) If the President, on receipt of a report from the Governor of a Province is satisfied that a situation has arisen in which the Government of the Province cannot be carried on in accordance with the provisions of the Constitution, the President may, or if a resolution in this behalf is passed [by each House separately] shall, by Proclamation,

(a) assume to himself, or direct the Governor of the Province to assume on behalf of the President, all or any of the functions of the Government of the Province, and all or any of the powers vested in, or exercisable by, anybody or authority in the Province, other than the Provincial Assembly.

Proclamation in case of financial emergency

(1) If the President is satisfied that a situation has arisen whereby the economic life, financial stability or credit of Pakistan, or any part thereof, is threatened, he may, after consultation with the Governors of the Provinces or, as the case may be, the Governor of the Province concerned, by Proclamation make a declaration to that effect, and, while such a Proclamation is in force, the executive authority of the Federation shall extend to the giving of directions to any Province to observe such principles of financial propriety as may be specified in the directions, and to the giving of such other directions as the President may deem necessary in the interest of the economic life, financial stability or credit of Pakistan or any part thereof.

Revocation of Proclamation, etc.

(1) A Proclamation issued under this Part may be varied or revoked by a subsequent Proclamation. (2) The validity of any Proclamation issued or Order made under this part shall not be called into question in any court

(2) [Majlis-e-Shoora (Parliament)] may make laws of indemnity, etc. Nothing in the Constitution shall prevent [Majlis-e-Shoora (Parliament)] from

making any law indemnifying any person in the service of the Federal Government or a Provincial Government, or any other person, in respect of any act done in connection with the maintenance or restoration of order in any area in Pakistan.

Self-Assessment Questions

1. What is the significance of the introductory provisions of the 1973 Constitution?
2. What are the Principles of Policy, and how do they guide the actions of the state?
3. What powers and responsibilities are given to the President and Parliament under the 1973 Constitution?
4. What are the Islamic provisions in the 1973 Constitution, and why are they significant?
5. What emergency powers are outlined in the Constitution, and under what circumstances can they be invoked?

UNIT 4

FUNDAMENTAL RIGHTS

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UNIT 4:FUNDAMENTAL RIGHTS

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INTRODUCTION

The concept of fundamental rights forms the cornerstone of a democratic society, protecting individual freedoms and liberties against arbitrary state actions. The 1973 Constitution of Pakistan enshrines a wide range of fundamental rights, each safeguarding the personal and collective dignity of the citizens. This unit examines the fundamental rights guaranteed by the Constitution, which are essential to maintaining justice, equality, and the rule of law. The rights discussed in this unit cover areas ranging from personal freedoms to protection against exploitation, ensuring that the citizens of Pakistan are treated fairly and equitably.

The unit will analyse the supremacy of fundamental rights, the right to life and liberty, and the safeguards provided to ensure a fair trial, freedom of expression, and protection from oppression. Additionally, it explores the state's responsibility to protect rights related to freedom of movement, education, religion, property, and the preservation of cultural identity. Understanding these rights is crucial for appreciating the constitutional safeguards designed to maintain a just and inclusive society in Pakistan.

OBJECTIVES

After studying this unit, you will be able to

1. get acquainted with the fundamental rights according to the Constitution of Pakistan.
2. Comprehend and reflect on the efforts of parliament for the protection and enactment of Fundamental Rights,
3. analyze the historical context and amendments concerning the fundamental rights in Pakistan since its inception.

LEARNING OUTCOMES

After the study of this unit, you will be able to:

1. Identify the key provisions related to fundamental rights within the Constitution of Pakistan.
2. Evaluate, comprehend and reflect on the efforts of parliament for the protection and enactment of Fundamental Rights.
3. Describe the constitutional protections provided for the freedom of speech, religion, and the press in Pakistan.
4. Understand the constitutional safeguards against discrimination based on religion, ethnicity, or language.

The present unit deals with the constitution of Pakistan with special reference to fundamental rights. All the citizens of Pakistan are entitled to these rights irrespective of their caste, creed, ethnicity, and religion according to the Constitution of the Islamic Republic of Pakistan. The significance of fundamental rights may be realized by the fact that the very first chapter of the Constitution deals with the articles that are related to fundamental rights. The origin of fundamental rights may be traced to seventeenth and eighteenth-century ideas of *laissez-faire* and natural laws of the European philosophers, especially Locke and Rousseau.[36] In the modern world, the General Assembly of the United Nations approved the list of about thirty human rights regarded as fundamental rights and liberties. To designate a right as fundamental often means that the court has decided either that the right is politically essential to the existence of society, or that it is essential to individuals and their dignity and self-respect.[37] The State of Pakistan acknowledges the significance of Fundamental Rights and the very movement for Pakistan in colonial India was a struggle for the acquisition of fundamental rights. The establishment of Pakistan as an independent state took up the task of forming ing a constitution and therefore, it started working on documenting and guaranteeing fundamental rights, but the formal documentation took a little while to be implemented.

Though India has enjoyed the protection of fundamental rights since 1950, it was not until 1956 in Pakistan that the Government of India Act 1935 was replaced by a constitution and the fundamental rights came into force. [38] The parliament of Pakistan, since 1947, has been taking initiatives and making efforts for the protection and enactment of the fundamental rights of the citizens. The Senate Functional Committee on Human Rights, the Parliamentary Task Force on Millennium Development Goals (MDGs) and statutory institutions like the independent and autonomous National Commission for Human Rights(NCHR) and the National Commission on the Status of Women(NCSW) are a few to name in parliament's efforts in this regard.[39] Fundamental Right is a constitutional term, which, in various entrenched bills of rights, picks up a set of rights from the broader domain of ever-evolving human rights.[40] It is the responsibility of the state to ensure

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[36] Mohammad Hashim Kamali, *Freedom of Expression in Islam* (Cambridge: Islamic Texts Society, 1997), 19.

[37]Mohammad Hashim Kamali, *Freedom of Expression in Islam* (Cambridge: Islamic Texts Society, 1997), 20.

[38] Alan Gledhill, "Fundamental Rights in Pakistan" *Journal of the Indian Law Institute.* Vo. 7, no. ½ (Jan-June 1965), 70. pp.70-81.

[39] Zafarullah Khan, *Consistent Parliamentary Cord Fundamental Rights of the Citizens of Pakistan* (Islamabad: Senate of Pakistan, 2016), 8.

[40] Zafarullah Khan, *Consistent Parliamentary Cord Fundamental Rights of the Citizens of Pakistan* (Islamabad: Senate of Pakistan, 2016), 9.

and protect the fundamental rights of all citizens. The guiding principles were laid by the founding father, Muhammad Ali Jinnah, in his address to the first Constituent Assembly on August 11, 1947. He also chaired the first parliamentary committee, 'The Committee on Fundamental Rights of Citizens and Minorities of Pakistan', which was created on August 12, 1947, showing his commitment to the cause of fundamental rights. The Objective Resolution passed in 1949 and included as preamble of the Constitution of Pakistan guarantees the fundamental rights as "wherein shall be guaranteed fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality". The overview of constitutional development with reference to the protection of fundamental laws is discussed in the following paragraphs.

The Constituent cum Legislative Assembly (1947-1956), the National Assembly of Pakistan (1956-1973) and the Parliament comprising the National Assembly and the Senate of Pakistan had been upholding the codification of fundamental rights. In the year 1958, both the declaration of martial law as well as the Supreme Court's judgment in *Dosso*[41] resulted in the 1956 Constitution being abrogated. As a consequence, no fundamental right nor any provision of the abrogated constitution could now be a source or basis for any legal right.[42]The Constitution of 1962 was to become effective from June 8, 1962. The Constitution Commission had recommended retaining the Fundamental Rights from the abrogated Constitution of 1956, but the regime opted to reduce the very notion of citizens' rights to mere principles of Law-making and of Policy.[43] 274 days after the functionality of the rights-less Constitution of 1962, the then Law Minister, Khurshid Ahmad, introduced the Constitution (First Amendment) Bill on March 9, 1963, to 'bring back the Fundamental Rights' in the Constitution.[44]

The debate and discussion on the Amendment were carried out on December 24, 1963. It received the assent of the President on January 10, 1964, and it acknowledged nineteen Fundamental Rights including; Security of Person, Safeguards as to arrest and detention, Slavery and forced labour prohibited, Protection against retrospective punishment, Freedom of movement, Freedom of assembly, Freedom of association, Freedom of trade; business or profession,

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[41] *The State v Dosso* PLD [1958] SC 533. cited in Sadaf Aziz, *The Constitution of Pakistan: A Contextual Analysis* (Oxford: Hart Publishing, 2018), 186.

[42] ABM Patwari, *Fundamental Rights and Personal Liberty in India, Pakistan and Bangladesh* (New Delhi, Deep and Deep, 1988) 9.

[43] Zafarullah Khan, *Consistent Parliamentary Cord Fundamental Rights of the Citizens of Pakistan* (Islamabad: Senate of Pakistan, 2016), 53.

[44] Zafarullah Khan, *Consistent Parliamentary Cord Fundamental Rights of the Citizens of Pakistan* (Islamabad: Senate of Pakistan, 2016), 60.

Freedom of speech, Freedom to profess religion and to manage religious institutions, Safeguards against taxation for purposes of any particular religion, Safeguard as to educational institutions in respect of religion etc., Provision as to property, Protection of property rights, Equality of citizens, Non-discrimination in respect of access to public places, Safeguards against discrimination in services, Preservation of culture, script and language, and lastly, Abolition of untouchability.[45]

The Constitution was once again abrogated by the imposition of Martial Law by General Agha Muhammad Yahya Khan on March 25, and a Legal Framework Order (LFO) was presented on March 28, 1970. Regarding the fundamental principles for the future constitution, the LFO promised to guarantee the Fundamental rights in its context. The political turmoil and the debacle of East Pakistan were major challenges. Along with it, the Interim Constitution of the Islamic Republic of Pakistan was adopted on April 17, 1972, and was enforced on April 21, 1972, to provide a temporary legal umbrella to run the country pending the permanent Constitution. The Interim Constitution contained a Chapter on Fundamental Rights and Principles of Policy (Articles 6 to 49).[46]

On February 17, 1973, Abdul Hafeez Pirzada, the author of the Constitution, while explaining the chapter about Fundamental Rights, said in the Assembly that "we have provided for protection of citizenship rights, safeguards against distinction of service, preservation of language, script and culture of the people in Pakistan."[47] The Chapter of Fundamental Rights was approved on March 13-14, 1973. The Constitution was enforced on April 10, 1973. Fundamental rights as guaranteed in the Constitution of 1973 had been suspended the day after the Constitution was unanimously adopted.[48]

Within two years after the adoption of the Constitution, the Government at least thrice amended the Chapter of Fundamental Rights through the 1st, 3rd and 4th Constitutional Amendments in 1974 and 1975 to alter the scope of certain rights related to preventive detention, the Right to Association and the Freedom of Expression. On July 5, 1977, the Constitution was held in abeyance upon the imposition of Martial Law and the Fundamental Rights were gone along with the

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[45] Zafarullah Khan, *Consistent Parliamentary Cord Fundamental Rights of the Citizens of Pakistan* (Islamabad: Senate of Pakistan, 2016), 62-63.

[46] Zafarullah Khan, *Consistent Parliamentary Cord Fundamental Rights of the Citizens of Pakistan* (Islamabad: Senate of Pakistan, 2016), 64.

[47] Zafarullah Khan, *Consistent Parliamentary Cord Fundamental Rights of the Citizens of Pakistan* (Islamabad: Senate of Pakistan, 2016), 73.

[48] Stanley Wolpert, *Zulfi Bhutto of Pakistan: His Life and Times* (Karachi: OUP, 2007), 231.

curtailment of the jurisdiction of the Apex Court. Later, General Ziaul Haq and Mohammad Khan Junejo, through the 8th Constitutional Amendment, introduced a few minor changes. After the restoration of democracy in 1988, till the Military rule of October 1999, only the 16th Constitutional Amendment extended the quota system for employment from 20 to 40 years in Article 27. Later, the Legal Framework Order of General Pervez Musharraf and the subsequent 17th Constitutional Amendment also tinkered with a few Fundamental Rights.[49]

Former Chief Justice of Pakistan, Justice Anwar Zahid Jamali, believes that the essence and spirit of the Constitution includes the Preamble, the Principles of Policy, and Fundamental Rights. For him, without these elements, the Constitution would be a mechanical document structuring and distributing state power and authority. For the life and development of both state and society, these elements make the constitution a dynamic and vibrant document.[50] Fundamental Rights protect very basic "interests" that are considered "inviolable" and essential to the development of the human personality and society, such as life (art. 9), dignity (art. 14) and equality (art. 25). [51] He further elaborates, The pre-eminence of Fundamental Rights in the Constitutional scheme is evident from article 8 which provides that any law, custom or usage having the force of law may be declared void in so far as it is inconsistent with fundamental rights or "takes away" or "abridges" any right so conferred. Hence, to avoid needless litigation, the Legislature and the Executive must ensure that laws, policies, and their actions comply with Fundamental Rights to avoid being declared null and void by the Courts.

The Constitution of the Islamic Republic of Pakistan contains the following articles dealing with the Fundamental Rights of the citizens of Pakistan.

- Supremacy of fundamental rights
- Right of an individual to be dealt with in accordance with the law
- right to life and property
- security safeguards, fair trial and due process

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[49] Zafarullah Khan, *Consistent Parliamentary Cord Fundamental Rights of the Citizens of Pakistan* (Islamabad: Senate of Pakistan, 2016), 76.

[50] Address on 10 December 2015, of honourable Chief Justice of Pakistan Mr. Justice Anwar Zaheer Jamali as Chairman Law and Justice Commission of Pakistan, Government of Pakistan on fundamental rights the promise of a just society, available on chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/http://ljcp.gov.pk/nljcp/assets/dist/Publication/adf3f-fundamental-rights.pdf

[51] Chief Justice of Pakistan Anwar Zaheer Jamali's address on "Fundamental Rights: The Promise of a Just Society" on December 10, 2015.

- protection against slavery, retrospective punishment, double punishment, and self-incrimination
- inviolability of the dignity of man
- freedom of movement, assembly, association, trade, business or profession, speech, religion, and information
- safeguard against taxation for purposes of any particular religion and safeguards as to educational institutions in respect of religion
- right to property and education
- equality and non-discrimination

4.1 SUPREMACY OF FUNDAMENTAL RIGHTS

(1) Any law, or any custom or usage having the force of law, inso far as it is inconsistent with the rights conferred by this Chapter, shall,to the extent of such inconsistency, be void.

The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.

(2) The provisions of this Article shall not apply to—

(a) Any law relating to members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance ofdiscipline among them; or

[52] (b) any of the —

(i) laws specified in the First Schedule as in force immediately before the commencing day or as amended by any of the laws specified in that Schedule;

(ii) Other laws specified in Part I of the First Schedule;]

and no such law nor any provision thereof shall be void on the ground that such law or provision is inconsistent with, or repugnant to, any provision of this Chapter.

(3) Notwithstanding anything contained in paragraph (b) ofclause (3), within a period of two years from the commencing day, the appropriate Legislature shall bring the laws specified in [53][Part II of the First Schedule] into conformity with the rights conferred by this Chapter :

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[52] Subs. by the Constitution (Fourth Amdt.) Act, 1975 (71 of 1975), s. 2, for "paragraph (b)", *(w.e.f* the 21st November, 1985), which was previously amended by Act 33 of 1974, s. 3, *(w.e.f* 4th May, 1974).

[53] Subs. by the Constitution (Fourth Amdt.) Act, 1975 (71 of I975), s. 2, for "the First Schedule, not being a lawwhich relates to, or is connected with, economic reforms."

Provided that the appropriate Legislature may, by resolution, extendthe said period *of* two years by a period not exceeding six months.

Explanation.– If, in respect of any law [54][Majlis-e-Shoora (Parliament)] is the appropriate Legislature, such resolution shall be a resolution of the National Assembly.

(4) The rights conferred by this Chapter shall not be suspended except as expressly provided by the Constitution.

No person shall be deprived of life or liberty save in accordance with law.

4.2 ARTICLE 4: RIGHT OF THE INDIVIDUAL TO BE DEALT WITH IN ACCORDANCE WITH LAW

Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973, is titled **"Right of individuals to be dealt with in accordance with law, etc."**. It establishes the fundamental principle of the rule of law, and a specific sub-clause within it addresses the rights to life and liberty.

According to Article 4, every citizen and person in Pakistan has the inalienable right to legal protection and to be treated according to the law. Specifically, this includes protection against actions detrimental to their life, liberty, body, reputation, or property, unless done in accordance with the law. It also ensures that individuals are free to do anything not prohibited by law and cannot be forced to do anything not required by law.

While Article 4 provides a general framework for the protection of life and liberty, Article 9 of the Constitution focuses on "Security of person," explicitly stating that no one can be deprived of life or liberty except in accordance with the law. These articles have been interpreted by the courts to encompass a wider scope, including rights related to shelter, livelihood, and a healthy environment.

4.3 RIGHT TO LIFE AND LIBERTY

Pakistan's 1973 Constitution guarantees the right to life and liberty under Article 9 (Security of Person), stating no person shall be deprived of life or liberty except in accordance with law, and Article 4, which ensures everyone receives the law's protection and is treated lawfully, safeguarding life, liberty, and property. Key related rights include protection against arbitrary arrest (Article 10), right to a fair trial (Article 10A), and inviolability of dignity (Article 14), all forming a

[54]Subs. by the Revival of the Constitution of 1973, Order, 1985 (P.O. No. 14 of 1985), Art. 2 and Sch., for " Parliament".

framework for due process and human dignity

4.4 SECURITY, SAFEGUARD, FAIR TRIAL AND DUE PROCESS

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before a magistrate within a period of twenty-four hours *of* such arrest, excluding the time necessary for the journey from the place of arrest to the court of the nearest magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply to any personwho is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall be made exceptto deal with persons acting in a manner prejudicial to the integrity, security or defense of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services, and no such law shall authorise the detention of a person for a period exceeding [55][three months] unless the appropriate Review Board has, after affording him an opportunity of being heard in person, reviewed his case and reported, before the expiration of the said period, that there is, in its opinion, sufficient cause for such detention, and, if the detention is continued after the said period of '[three months], unless the appropriate Review Board has reviewed his case and reported, before the expiration ofeach period of three months, that there is, in its opinion, sufficient cause for such detention.

Explanation I.— In this Article, "the appropriate Review Board."means,

(i) in the case of a person detained under a Federal law, a Board appointed by the Chief Justice of Pakistan and consisting of a Chairman and two other persons, each of whom is or has beena Judge of the Supreme Court or a High Court; and

(ii) in the case of a person detained under a Provincial law, a Boardappointed by the Chief Justice of the High Court concerned and consisting of a Chairman and two other persons, each of whom is or has been a Judge of a

[55] Subs. by the Constitution (Third Amdt.) Act, 1975 (22 of 1975), s. 2, for "one month" (*w.e.f.* the 13th February. 1975).

High Court.

Explanation **II**..—The opinion of a Review Board shall beexpressed in terms of the views of the majority of its members.

(5) When any person is detained in pursuance of an order madeunder any law providing for preventive detention, the authority making theorder shall, [56][within fifteen days] from such detention, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order :

Provided that the authority making any such order may refuse todisclose facts which such authority considers it to be against the public interest to disclose.

(6) The authority making the order shall furnish to the appropriate Review Board all documents relevant to the case unless a certificate, signed by a Secretary to the Government concerned, to the effect that it is not in the public interest to furnish any documents, is produced.

(7) Within a period of twenty-four months commencing on the day of his first detention in pursuance of an order made under a law providing for preventive detention, no person shall be detained in pursuance of any such order for more than a total period of eight months in the case of a person detained for acting in a manner prejudicial to public order and twelve months in any other case :

Provided that this clause shall not apply to any person who is employed by, or works for, or acts on instructions received from, the enemy [57][, or who is acting or attempting to act in a manner prejudicial to the integrity, security or defense of Pakistan or any part thereof or who commits or attempts to commit any act which amounts to an anti-national activity as defined in Federal law or is a member of any association which has for its objects, or which indulges in, any such anti-national activity].

(8) The appropriate Review Board shall determine the place of detention of the person detained and fix a reasonable subsistence allowance for his family.

(9) Nothing in this Article shall apply to any person who, for the

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[56] Subs. *ibid.,* for "as soon as may be, but not later than one week" (*w.e.f.* the 13th February, 1975).

[57] Added by the Constitution (Third Amdt.) Act, 1975 (22 of 1975), s. 2.

time being, is an enemy alien.

[58] [**10A.** For the determination of his civil rights and obligations orin any criminal charge against him, a person shall be entitled to a fair trialand due process.]

4.5. PROTECTION AGAINST SLAVERY, RETROSPECTIVE PUNISHMENT, DOUBLE PUNISHMENT AND SELF - INCRIMINATION

(1) Slavery is non-existent and forbidden and no law shallpermit or facilitate its introduction into Pakistan in any form.

(2) All forms of forced labour and traffic in human beings areprohibited.

(3) No child below the age of fourteen years shall be engaged inany factory or mine or any other hazardous employment.

(4) Nothing in this Article shall be deemed to affect compulsory

service

(a) by any person undergoing punishment for anoffense against any law; or

(b) required by any law for a public purpose:

Provided that no compulsory service shall be of a cruel nature orincompatible with human dignity.

(1) No law shall authorize the punishment of a person—

(a) for an act or omission that was not punishable by law at the time of the act or omission; or

(b) for an offence by a penalty greater than, or of a kinddifferent from, the penalty prescribed by law for that offense at the time the offense was committed.

(2) Nothing in clause (1) or in Article 270 shall apply to any law-making acts of abrogation or subversion of a Constitution in force in Pakistan at any time since the twenty-third day of March, one thousand nine hundred and fifty-

[58] New Article 10 A ins. by the Constitution (Eighteenth Amdt.) Act, 2010 (10 of 2010), s. 5.

six, an offense.

No person—

(a) shall be prosecuted or punished for the same more than once; or

(b) shall, when accused of an offense, be compelled tobe a witness against himself.

4.6 INVIOLABILITY OF THE DIGNITY OF MAN, ETC.

11. (1) The dignity of man and, subject to law, the privacy ofhome, shall be inviolable.

(2) No person shall be subjected to torture for the purpose of extracting evidence.

4.7 FREEDOM OF MOVEMENT, ASSEMBLY, ASSOCIATION, TRADE, BUSINESS OR PROFESSION, SPEECH, RELIGION AND INFORMATIONETC.

12. Every citizen shall have the right to remain in, and, subject to any reasonable restriction imposed by law in the public interest, enter and move freely throughout Pakistan and to reside and settle in any partthereof.

13. Every citizen shall have the right to assemble peacefully and without arms, subject to any reasonable restrictions imposed by law in the interest of public order.

[59] [**17.** (1) Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality.

(2) Every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereigntyor integrity of Pakistan and such law shall provide that where the Federal Government declares that any political party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan, the Federal Government shall, within fifteen days of such declaration, refer the matter

[59] Subs. by the Constitution (Eighteenth Amdt.) Act, 2010 (10 of 2010), s. 6.for ―Article 17**1**.

to the Supreme Court whose decision on suchreference shall be final.

(3) Every political party shall account for the source of its funds in accordance with law.]

18. Subject to such qualifications, if any, as may be prescribed bylaw, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business:

Provided that nothing in this Article shall prevent—

(a) the regulation of any trade or profession by a licensingsystem; or

(b) the regulation of trade, commerce or industryin the interest of free competition therein; or

(c) The carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons.

19. Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or sdefense of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality,or in relation to contempt of court, [60][commission of] or incitement to an offense.

[61] [**19A.** Every citizen shall have the right to have access to information in all matters of public importance, subject to regulation and reasonable restrictions imposed by law.

4.8 SAFEGUARD AGAINST TAXATION FOR PURPOSES OF ANY PARTICULARRELIGION AND SAFEGUARDS AS TO EDUCATIONAL INSTITUTIONS IN RESPECT OF RELIGION.

20. Subject to law, public order and morality,—

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[60] Subs. by the Constitution (Fourth Amdt.) Act, 1975 (71 of 1975), s. 4, for "defamation" (*w.e.f* the 21st November, 1975).

[61] New Article 19A ins. by the Constitution (Eighteenth Amdt.) Act, 2010 (10 of 2010), s. 7.

(a) every citizen shall have the right to profess, practice and propagate his religion; and

(b) Every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.

No person shall be compelled to pay any special tax the proceedsof which are to be spent on the propagation or maintenance of any religionother than his own.

(1) No person attending any educational institution shall be required to receive religious instruction, or take part in any religious ceremony, or attend religious worship if such instruction, ceremony or worship relates to a religion other than his own.

(2) In respect of any religious institution, there shall be no discrimination against any community in the granting of exemption or concession in relation to taxation.

(3) Subject to law,

(a) no religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any educational institution maintained wholly by that community or denomination; and

(b) no citizen shall be denied admission to any educational institution receiving aid from public revenueson the grounds only of race, religion, caste or place of birth.

(4) Nothing in this Article shall prevent any public authority from making provision for the advancement of any socially or educationally backward class of citizens.

4.9 RIGHT TO PROPERTY AND EDUCATION

21. Every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan, subject to the Constitution and anyreasonable restrictions imposed by law in the public interest.

22. (1) No person shall be deprived of his property save in accordance with law.

(2) No property shall be compulsorily acquired or taken possession of

save for a public purpose, and save by the authority of law which provides for compensation therefor and either fixes the amount of compensation or specifies the principles on and the manner in whichcompensation is to be determined and given.

(3) Nothing in this Article shall affect the validity of—

(a) any law permitting the compulsory acquisition or takingpossession of any property for preventing danger to life,property or public health; or

(b) any law permitting the taking over of any property which has been acquired by, or come into the possession of, any person by any unfair means, or in any manner, contrary to law; or

(c) any law relating to the acquisition, administration or disposal of any property which is or is deemed to be enemy property or evacuee property under any law (notbeing property which has ceased to be evacuee property under any law); or

(d) any law providing for the taking over of the management of any property by the State for a limited period, either in the public interest or in order to secure the proper management of the property, or for the benefit of its owner; or

(e) any law providing for the acquisition of any class of property for the purpose of—

(i) providing education and medical aid to all or any specified class of citizens; or

(ii) providing housing and public facilities and services such as roads, water supply, sewerage, gas and electric power to all or any specified class of citizens; or

(iii) providing maintenance to those who, on account of unemployment, sickness, infirmity or old age, are unable to maintain themselves; or

(f) any existing law or any law made in pursuance of Article 253.

(4) The adequacy or otherwise of any compensation provided for by any such law as is referred to in this Article, or determined in pursuance thereof, shall not be called in question in any court.

4.10 EQUALITY AND NON-DISCRIMINATION

25. (1) All citizens are equal before the law and are entitled to equal protection of the law.

(2) There shall be no discrimination on the basis of sex [62]*.

(3) Nothing in this Article shall prevent the State from makingany special provision for the protection of women and children.

[63][**25A.** The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law.]

26 (1) In respect of access to places of public entertainment or resort, not intended for religious purposes only, there shall be no discrimination against any citizen on the grounds only of race, religion, caste, sex, residence or place of birth.

(2) Nothing in clause (1) shall prevent the State from makingany special provision for women and children.

27 (1) No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the grounds only of race, religion, caste, sex, residence or place of birth:

Provided that, for a period not exceeding [64][forty] years from the commencing day, posts may be reserved for persons belonging to any class or area to secure their adequate representation in the service ofPakistan:

Provided further that, in the interest of the said service, specified posts or services may be reserved for members of either sex if such posts or services entail the performance of duties and functions which cannot be adequately performed by members of the other sex [65][:]

[66] [Provided also that under-representation of any class or area in theservice of Pakistan may be redressed in such manner as may be determined by an Act of Majlis-e-Shoora (Parliament)].

(2) Nothing in clause (1) shall prevent any Provincial Government, or any local or other authority in a Province, from prescribing, in relation to any

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[62]* The word ―alone omitted by the Constitution (Eighteenth Amdt.) Act, 2010 (10 of 2010), s. 8.
[63] New Article 25A ins. Ibid., s. 9.
[64] Subs. and shall be deemed always to have been so subs. by the Constitution (Sixteenth Amendment) Act, 1999 (7 of 1999), s. 2, for "twenty", which was previously subs. by P.O. No. 14 of 1985, Art. 2 and Sch., for "ten".
[65]Subs. by the Constitution (Eighteenth Amdt.) Act, 2010 (10 of 2010), s. 10 for the full-stop.
[66] New proviso ins. Ibid.

post or class of service under that Government or authority, conditions as to residence in the Province, for a period not exceeding three years, prior to appointment under that Government or authority.

4.11. PRESERVATION OF LANGUAGE, SCRIPT AND CULTURE

28. Subject to Article 251, any section of citizens having a distinct language, script or culture shall have the right to preserve and promote thesame and subject to law, establish institutions for that purpose.

Self-Assessment Questions

1. Identify the key provisions related to fundamental rights within the Constitution of Pakistan.
2. Recognize and explain the fundamental rights guaranteed by the 1973 Constitution of Pakistan.
3. Discuss the protection of property rights, the right to education, and the preservation of cultural identity under the Constitution.

UNIT 5

THE JUDICATURE

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CONTENTS

UNIT 5: THE JUDICATURE

5.1 The Courts

5.2 Supreme Court of Pakistan and its Powers

5.3 Articles 189 and 190

5.4 High Courts and their Powers

5.5 Federal Shariat Court and its Powers

INTRODUCTION

A state comprises three main pillars. The Executive also called the Government runs the affairs of the state, the Legislature, consisting of parliament and assemblies, frames laws according to the constitution and the Judiciary, comprising the Supreme Court, High Courts and Federal Shariat Court, checks the working of the first two organs of the state.

All three organs significantly perform their functions by operating within their constitutional domains. The present unit deals with the third organ, "The Judicature or the Judiciary", which performs an essential role in determining the legal and political spectrum of the country. This unit examines the historical evolution of the judiciary, its organizational structure, main functions, and powers with reference to the preservation of the constitution and ensuring justice.

In the constitutional history of Pakistan, the judiciary has been instrumental in the interpretation of constitutional provisions and the adjudication of disputes concerning the executive and legislative. The judiciary has been fundamental in holding the rule of law, interpreting the Constitution, and preserving the rights of the citizens of Pakistan. In this unit, you will learn about the judiciary as an important state pillar with reference to the Supreme Court, High Courts, and the Federal Shariat Court.

OBJECTIVES

After going through this unit, students will be able to:

1. Understand the historical evolution of the judiciary as an institution.
2. Comprehend the various tiers of judicial hierarchy in Pakistan according to the Constitution of Pakistan 1973.
3. Examine the structure, functions and powers of the Supreme Court, High Courts, and Federal Shariat Court.
4. Explore the role of the Federal Shariat Court in Pakistan's legal framework.

LEARNING OUTCOMES

After completing this unit, you will be able to;

1. Identify and describe the key components of Pakistan's judicial system, including the Supreme Court, High Courts, and the Federal Shariat Court.
2. Discuss the powers and functions of the Supreme Court of Pakistan under the Constitution.

3. Explain the provisions of Articles 189 and 190 and their impact on the functioning of the judiciary.
4. Understand the structure and jurisdiction of the High Courts in Pakistan and their role in the legal system.
5. Analyze the role and powers of the Federal Shariat Court in ensuring compliance with Islamic law.

The judiciary in Pakistan has its origin in British India. The institution of the judiciary was one of the foremost institutions introduced in India by the British administrators. The British argued that the judiciary was the principal organ of government that introduced the rule of law in India. It was claimed that the judiciary became a model for enforcing law and order in a country that had suffered from widespread anarchy and chaos for a century and during the twilight of the Mughal Empire. Since it was inherently a British institution, after independence, it was burdened with the responsibility of introducing Islamic legal norms during judicial dispensation. This was necessitated because the country was born in the name of Islam and the Two-Nation Theory. Therefore, it became an arch responsibility of the judiciary to maintain a distinction from the Indian legal system and move towards a new judicial path integrating Islamic dispensation. Another motive behind treading the new path for the judiciary was that those regions that Pakistan comprised as a result of partition did not have courts. In British India, the Federal Court was established in Delhi under the Government of India Act 1935, which remained in India; the Federal Court in Pakistan was established in 1949 with Mian Abdul Rashid as the first Chief Justice. Similarly, the High Courts under the British rule were established in Calcutta, Bombay and Madras and all these areas after the partition of India had become part of India. Hence, a new High Court was established in Dhaka, the new capital of Pakistan.

After the War of Independence in 1857 and the formal control of the British Crown in India, along with other institutions, the Indian court system in India was introduced on the pattern of the British legal system. Subordinate Courts, which included the courts of first instance and first appellate courts, were also introduced throughout British India at the district level. Over and above the Subordinate Courts, High Courts, and Chief Courts were also introduced, from time to time, in the British Indian provinces to serve as apex courts in their respective provinces. The High Courts were first established in Calcutta, Bombay and Madras, having jurisdiction over the entire provinces and presidencies. High courts were later established at Ahmadabad, Patna, Nagpur, Lahore, and Rangoon, which had jurisdiction over the provinces of Agra, Bihar, the Central Provinces, Punjab, and Burma, respectively. The areas that comprised Pakistan after partition in 1947 inherited the Chief Court at Lahore (established in 1865), which was elevated to High Court in 1919 as the Lahore High Court. The separation of Sindh from the Bombay presidency facilitated the establishment of the Chief Court of Sindh at Karachi in 1937. At other places, there were Courts of the Judicial Commissioner at Peshawar, the province of the former NWFP.[i]

When India was partitioned, along with other assets, the judiciary was also to be divided between the two newly independent states. It included the division of the courts, the creation and establishment of new courts, and the framing of new

constitutions for India and Pakistan. The Lahore High Court continued to exist with its former nomenclature after the partition of India in 1947. The Chief Justice and judges of the Lahore High Court continued on the same terms and conditions as applied to them before August 15, 1947, under the same rules and procedures. It was headed by Justice Mian Sir Abdul Rashid as its Chief Justice. Justice Abdur Rehman, Justice Muhammad Munir, Justice Muhammad Sharif, Justice Atta Muhammad Jan, Justice S. A. Rahman and Justice A. R. Cornelius opted for Pakistan. A Judicial commissioner Court had been working in Karachi since 1931, which was abolished in 1940 to establish the Chief Court of Sindh. Justice Hatim Badruddin Tyabji headed the Chief Court of Sindh after partition. The other Judges were Justice T. V. Thadani, Justice Hassanali G. Agha, Justice M. R. Mehar, Justice Dennis O'Sullivan and Justice orGeorge Constantine. Peshawar and Quetta had Judicial Commissioner's Courts. Muhammad Ibrahim Khan and Malik Khuda Bakhsh were in the Peshawar Judicial Commissioner's Courts, whereas the judicial commissioners of Quetta were A. R. Khan and Bacon. For Bengal, a new High Court was established at Dhakka on September 13, 1947. Justice Nurul Azim Khundkar became Chief Justice; others included Justice Abu Saleh Mohamed Akram, Justice Amiruddin Ahmad, Justice Amin Ahmed, Justice Mohammad Shahabuddin and Justice Thomas Hobart Ellis, who opted for Pakistan.

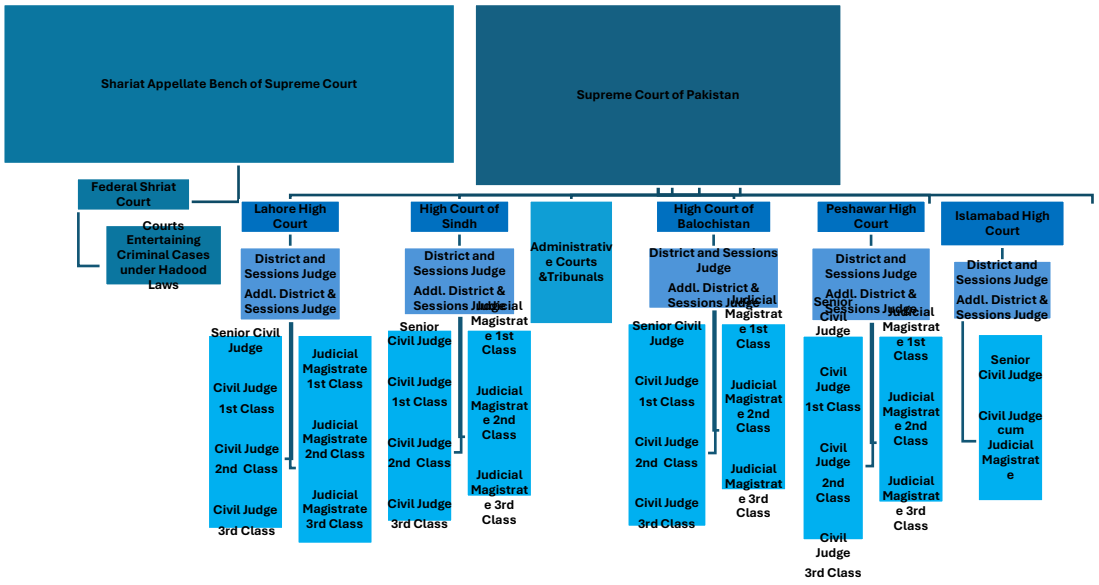
At the time of partition, there was no Federal Court in Pakistan. Under section 9 of the Indian Independence Act, 1947, the Governor General of Pakistan promulgated the Federal Court of Pakistan Order, 1948, on February 23, 1948. It provided for a Federal Court of Pakistan, which would be deemed to have been established with effect from August 15, 1947. However, the Federal Court of Pakistan was established in May 1949 with Justice Mian Abdul Rashid as Chief Justice of Pakistan; Justice Abdur Rahman and Justice Abu Saleh Mohamed Akram were also appointed to the Federal Court. Section 9 of the Indian Independence Act of 1947 empowered the Governor General to make necessary adaptations in the Government of India Act, 1935. Muhammad Ali Jinnah, as the Governor General of Pakistan, promulgated the Pakistan (Provisional Constitution) Order, 1947. The second amendment in the Pakistan Provisional Constitution was promulgated on March 11, 1948.[ii]

The Government of India Act, 1935, was amended in 1954 and empowered the High Courts to issue the prerogative writs. The first constitution of Pakistan in 1956 renamed the federal court as the Supreme Court of Pakistan. The Constitutions of 1956, 1962 and 1973 maintained the existing judicial structure. The constitution of 1973 upgraded the Chief Court of NWFP and the Judicial Commissioner Court of Baluchistan into High Courts. In 1980, the Federal Shariat Court was set up 1980 with jurisdiction to determine if any law is repugnant to the injunctions of Islam.

5.1. THE COURTS

In the judicial pyramid, the Supreme Court is at the apex and the court of Civil Judge-cum-Judicial Magistrate is at the base. The apex Court/Supreme Court is the Court of ultimate appeal and final arbiter of deciding all civil and criminal disputes and interpreting the law and the Constitution. Its precedents are binding on all other courts in the country. The High Court is the principal court of the province and exercises control/supervision over the Subordinate Courts. The Supreme Court, the High Courts and the Federal Shariat Court are the superior judiciary, whereas the Subordinate Courts, Special Courts and Administrative Tribunals also constitute the judicial structure. Following is the organogram to understand the structure of the judiciary.

Organogram of Courts



5.2 SUPREME COURT OF PAKISTAN AND ITS POWERS

The Supreme Court is the apex court of Pakistan, exercising original, appellate, and advisory jurisdiction.[iii] It is the Court of ultimate appeal and final arbiter of law and the Constitution. Its decisions are binding on all other courts.[iv] The court consists

of a Chief Justice and other judges,[v] appointed by the president as per the procedure laid down in the Constitution.[vi] An Act of Parliament has fixed the number of judges at 17, i-e Chief Justice and 16 judges.[vii] There is also provision for the appointment of acting judges as well as ad hoc judges in the court.[viii] A person with five years' experience as a judge of a High Court or 15 years' standing as an advocate of a High Court is eligible to be appointed as a judge of the Supreme Court.[ix]

The Court exercises original jurisdiction in settling intergovernmental disputes,[x] whether the dispute is between the federal government and a provincial government or among provincial governments. The Court also exercises original jurisdiction concurrently with High Courts for the enforcement of Fundamental Rights, where a question of "public importance" is involved.[xi] The Court has appellate jurisdiction in civil and criminal matters.[xii] Furthermore, the Court has advisory jurisdiction in giving an opinion to the government on a question of law.[xiii] To facilitate the litigant public and ensure prompt disposal of cases, the Court generally operates through benches, working at the Principal Seat and the four Branch Registries, one at each provincial metropolis. In short, the Supreme Court of Pakistan has the powers of appellate jurisdiction (hears appeals against the High Courts and the subordinate courts), advisory jurisdiction (can advise on constitutional matters of public importance), and original jurisdiction (in disputes between the federal and provincial governments and enforcing fundamental rights).

5.3 ARTICLES 189 AND 190[xiv]

The Constitution of Pakistan empowers the Supreme Court of Pakistan with articles 189 and 190. These articles are significant to comprehending the binding nature of the highest Court's judgments and require the government and authorities to execute the orders of the Supreme Court. Article 189 of the Constitution of Pakistan demands that all other courts in Pakistan are bound to respect the verdict. It states, "Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan." Article 190 states, "All executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court." Hence directs complete assistance to the Supreme Court of Pakistan for the implementation of its orders. These articles establish the ultimate authority of the Supreme Court over all other institutions and branches of the Federal and Provincial Governments. Hence, the Supreme Court is the final arbiter of legal disputes and the supreme interpreter of the Constitution.

5.4 HIGH COURTS AND THEIR POWERS

In Pakistan's judicial system, there is a High Court in each province and one High Court for the Islamabad Capital Territory. Each High Court consists of a Chief Justice and other puisne judges. The strength of the Lahore High Court is fixed at

60, the High Court of Sindh at 40, the Peshawar High Court at 20, the High Court of Baluchistan at 11, and the Islamabad High Court at 7. A person with 10 years of experience as an advocate of a High Court or 10 years' service as a civil servant, including three years' experience as a District Judge or 10 years' experience in a judicial office, is qualified to be a Judge in the High Court.[xv] The Court exercises original jurisdiction in the enforcement of Fundamental Rights and appellate jurisdiction in respect of judgments/orders of the Subordinate Courts in all civil and criminal matters. Appeals are entertained against orders/judgments of Special Courts. The High Court supervises and controls all the Courts subordinate to it.[xvi] It appoints its own staff[xvii] and frames rules of procedure for itself as well as courts subordinate to it.[xviii] In short, the High Court has the wit jurisdiction (to implement fundamental rights), appellate jurisdiction (to examine appeals against decisions made by lower courts, including civil and criminal cases), and supervisory jurisdiction (to supervise the subordinate courts to ensure proper administration of justice).

5.5 FEDERAL SHARIAT COURT AND ITS POWERS

The Court consists of eight Muslim judges, including the Chief Justice of Pakistan.[xix] The judges of the Federal Shariat Court are appointed through the Judicial Commission, which comprises the Chief Justice of Pakistan, as chairman with four senior-most judges of the Supreme Court, one former Chief Justice or a retired judge of the Supreme Court, appointed by the Chairman, in consultation with the four-member judges of the Supreme Court, Attorney General for Pakistan, the federal minister for Law and Justice, Chief Justice of Federal Shariat Court and most senior judge of the Federal Shariat Court, as members. The recommendation of the Judicial Commission then goes to an eight-member Parliamentary Committee that has equal representation of the government and the opposition, as well as of the two houses, i-e, the National Assembly and the Senate. The Committee, within two weeks, reviews the recommendation and if it is approved, it goes to the Prime Minister, who forwards the same to the President for appointment. Of the eight judges, three are required to be Ulema who are well-versed in Islamic law. The judges hold office for a period of three years and the President may further extend such period.[xx] The Court may take Suo Moto or through a petition by any citizen or the government may examine and determine as to whether or not a certain provision of law is repugnant to the injunctions of Islam.[xxi] Appeal against its decision lies to the Shariat Appellate Bench of the Supreme Court, consisting of three Muslim judges of the Supreme Court and not more than two Ulema appointed by the President.[xxii] If a certain provision of a law is declared to be repugnant to the injunctions of Islam, the government is required to take necessary steps to amend the law, to bring it into conformity with the Islamic laws. The Court also exercises appellate and revisional jurisdiction over the

criminal courts, deciding Hadood cases.[xxiii] The decisions of the Court are binding on the High Courts as well as the Subordinate Judiciary.[xxiv] In short, the Federal Shariat Court can review laws in accordance with Islam, has an advisory role on matters of Islamic jurisprudence and has jurisdiction over the Hadood cases.

1. For a detailed study, see Hamid Khan, *A History of the Judiciary in Pakistan.* (Karachi: OUP, 2019), 9-17.
2. Articles 184, 185, 186.
3. Article 189.
4. Article 176.
5. Article 175 A.
6. *The Supreme Court Number of Judges Act (Act No. XXXIII) of 1997*.
7. Article 181, 182
8. Article 177.
9. Article 184 (1).
10. Article 184 (3).
11. Article 185.
12. Article 186.
13. *The Constitution of the Islamic Republic of Pakistan (As modified up to February 12, 2012)*, Articles 189 & 190, 131.
14. Article 193.
15. Article 203.
16. Article 208.
17. Article 202.
18. Article203-C.
19. Article 203-C.
20. Article 203-D.
21. Article 203-F.
22. Article 203-D.
23. Article 203-G

SELF-ASSESSMENT QUESTIONS

1. Discuss in detail the organizational structure of the judiciary in Pakistan.
2. Examine the structure, functions and powers of the Supreme Court of Pakistan.
3. Analyze the structure and Functions of the High Courts of Pakistan according to the Constitution.
4. Define the Federal Shariat Court and analyse its main responsibilities.
5. Write a comprehensive note on the evolution of the institution of Judicature in British India and Pakistan.

UNIT 6

AMENDMENTS IN THE CONSTITUTION OF PAKISTAN 1973 FROM ONE TO SEVEN

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CONTENTS

UNIT 6: AMENDMENTS IN THE BHUTTO ERA

6.1 Amendment of the Constitution (Articles 238 and 239)

6.2 First Amendment

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6.7 Sixth Amendment

6.8 Seventh Amendment

INTRODUCTION

The period of Zulfikar Ali Bhutto's leadership in Pakistan witnessed significant changes to the Constitution of 1973. These amendments were designed to address various political and social challenges facing the country. This unit will focus on the key amendments made during Bhutto's era, analyzing their impact on the political structure, the balance of power, and the legal framework of Pakistan. By exploring the first through seventh constitutional amendments, students will gain an understanding of how these changes shaped Pakistan's political and legal environment.

OBJECTIVES

After the study of this unit, you will be able to:

1. Understand the significance of constitutional amendments during the Bhutto era.
2. Analyze the purpose and impact of each amendment made between 1973 and 1977.
3. Examine the role of Articles 238 and 239 in amending the Constitution.
4. Explore the political and legal context surrounding each amendment, including its implications for governance, power distribution, and fundamental rights.

LEARNING OUTCOMES

After the study of this unit, you will be able to:

1. Identify the key amendments made to the Constitution during the Bhutto era.
2. Discuss the political, legal, and social context in which these amendments were made.
3. Analyze the impact of these amendments on Pakistan's political system, particularly regarding the powers of the President and the Parliament.
4. Explain the role of constitutional amendments in shaping the government and politics in Pakistan.

6.1 AMENDMENT IN THE CONSTITUTION 1973 (ARTICLES 238 AND 239)

The Constitution of 1973 was the result of a national consensus among representatives of all provinces. It was deliberated by directly elected representatives of the people and unanimously acknowledged by all members of the Parliament. Under the constitution federal parliamentary system was adopted, which was considered an appropriate system for a heterogeneous society like Pakistan. The credit for constitution-making goes to Z.A. Bhutto. It was a social contract among all political parties for the smooth running of state affairs. Soon after its implementation, differences arose on the issue of power sharing and the distribution of authority. Seven amendments were made to the Constitution to cope with the prevalent issues. In this chapter, an analysis will be provided about the causes of amendments by their creators and why/how the federal principles were overrun.

The federal parliamentary system was introduced by Quaid-i-Azam Muhammad Ali Jinnah after consultation with the first Constituent Assembly of Pakistan.[1] The federal system works on the principle of 'Unity in Diversity', under which mutually diverse elements accommodate each other for their common interests. This system has been successful in diverse and heterogeneous societies like Pakistan. Unfortunately, due to centralist tendencies, the federal system could not remain operative properly in Pakistan, which led to the failure of democracy as well as the decline of Muslim League rule during the early phase of Pakistani politics.

The constitutional history in Pakistan has always been under criticism since the beginning. The constitution of any nation reflects the aspirations of the nation. People are guaranteed personal and collective liberty and their basic rights are safeguarded. The constitution elaborates on the infrastructure of administrative, judicial, political and democratic systems. The constitution of any nation is a legal document of a collective institution that declares an individual as a representative unit and establishes its relations with other individuals as well as society. The constitution-making in Pakistan had been delayed rather than suspended for a long time. The main reasons were the problems faced by the country during the initial phase, i.e., unstable governments and severe differences in ideological and regional contexts. The tale starts from the Interim Constitution [2] and continues with Objective Resolution [3], Basic Principles Committees [4], Bogra Formula [5] and violation of federal principles. That damaged the distribution of power and authority among different organs of the state, which created an imbalance between federating units.

The Constitution of Pakistan 1973 was adopted after a long struggle and passing through the bitter experiences and consequences of the 1956 and 1962 constitutions. It was a misfortune for the country that constitutional development

took place at a slow pace due to hurdles from unseen forces of autocracy and dictatorship. The constitution of Pakistan in 1956 was a good start. It was highly objected to soon after its implementation due to certain flaws.[6] It was a first experience, almost at such a time when democracy was going to be derailed. The constitution could be improved gradually, but the show of power politics did not allow it. The constitution of Pakistan 1962 under the Ayub Regime was a reflection of highly centralist tendencies and was declared as 'One Man Show,' and Syed Noor Ahmed rightly said that the position of President in the constitution was of 'Clock Tower' of Lyallpur. This constitution was abrogated after the decline of Ayub Khan.

The nation was the victim of disappointment after the separation of East Pakistan in 1971, along with other reasons, one of which was the constitutional issues and ignoring the spirit of federalism, due to which the national life in Pakistan became paralyzed. After the resignation of Yahya Khan, the powers were handed over to Zulfikar Ali Bhutto, the majority party leader of the rest of Pakistan after 1971. The first priority of the new government was constitution-making. Generally, all political parties and politicians were of the view that the constitution of Pakistan should be based on parliamentary democracy. Some political parties were in favour of a weak federation and demanded more authority and provincial autonomy for the provinces. The issue remained under discussion in the assembly for two years. At last, the constitution of 1973 was approved unanimously and implemented on August 14, 1973. It was a federal, parliamentary and Islamic constitution.

The laws generally start with a certain preamble that explains the causes and objectives of the law. It is such an introductory part of the constitution or law that provides a rationale for constitution-making. It explains the aims, objectives and sources of constitution making along with principles of law. The preamble is not a part of the Constitution but has constitutional importance. It actually elaborates the unclear and vague words, terminologies and orders. It cannot be implemented legally, but can be helpful for the elaboration of the constitution.

The preamble of the Constitution of 1973 is based on the principles laid down in the objective resolution. This resolution was unanimously approved by the first constituent assembly of Pakistan on March 12, 1949. It was a milestone in the constitution-making process. These principles have been permanently included in the Constitution of 1973. These are as follows;

1. Complete sovereignty of Allah Almighty
2. Democratic State
3. Islamic injunctions
4. Federation

5. Solidarity of the Federation of Pakistan
6. Basic rights
7. Safeguard of minority rights
8. Independence of the judiciary
9. World prosperity and the welfare of the people of Pakistan

It has been elaborated clearly that Allah Almighty is the supreme sovereign over the whole of the universe. Its main objective is that the determination of power and authority of government cannot be determined by the endless human sovereign but is limited by the divine sphere of sovereignty. The people and government of Pakistan have acknowledged the divine authority, but could not shape the system of state on theocratic lines. Pakistan has been declared a democratic state. It is the aim and objective of the people of Pakistan to constitute such a system under which the state should exercise its authority through the elected representatives of the people. The system of government is adopted under federal lines in this constitution. It has been elaborated that areas and provinces in the Federation of Pakistan have to accept certain limitations on their power and authority so that the federation may not be a titular state. Certain federal units have to surrender their rights in favor of the federation. The solidarity of the area included in the federation, independence of the federation and safeguards of federal rights have been ensured.

The constitution of 1973 was a unanimously agreed document of all divergent forces having representation in the National Assembly of Pakistan. Its architect had high hopes regarding its practicability. As far as the domination of the centre and administrative dictatorship is concerned, Bhutto's rule was not much different from the previous regime. The acceptance of federal and regional boundaries by provincial leaders was a good start under this constitution for provincial autonomy. The justified participation in resource distribution and allocation of residual powers to provinces was also granted in this constitution, though the concurrent list was also there.

The Constitution does not provide a guarantee for any system unless it is adopted in letter and spirit. Despite the implementation of the 1973 constitution, the executive was made more powerful as compared to other institutions, whichis are strong indicator of Centralism. The Prime Minister had the upper hand compared to the President, along with the National Assembly. It was ensured that the Prime Minister would countersign the orders issued by the President and the National Assembly's authority of No Confidence against the Cabinet was limited.

Therefore, Bhutto strengthened his position through constitutional amendments and this weakened the assembly and judiciary subsequently.

The Constitution of Pakistan 1973 has dual features of being hard and flexible at the same time. In a hard constitution, the process of amendment is difficult and complicated, whereas under a flexible constitution, the amendment can be made at any time with a simple majority and a simple process. A simple majority in parliament is required for the approval of ordinary or institutional bills, whereas a 2/3 majority is required for an amendment bill in the constitution. Despite this difficult majority, the Pakistani constitution is considered more flexible in comparison to the American constitution. The amendment process in the American Constitution is harder.

Articles 238 and 239 under Section 11 of The Constitution of Pakistan 1973 provide a procedure for the constitutional amendment. Moreover, Article 76 provides a procedure for approval of the Bill by the President.

The following are the procedural steps for the constitutional amendment.

1. The constitutional amendment is carried out through an act of Parliament.
2 The amendment bill can be proceeded with initially in any house of the Parliament i.e. National Assembly or the Senate.
3 After the approval of the amendment bill from one house of Parliament is sent to the other.
4 If the approved bill of one house is approved with some change from another house is resent for review to the house from where it originated. Under such conditions, again 2/3 majority of the concerned house is mandatory.
5 2/3 majority of the total membership is mandatory for approval of a constitutional amendment without any change from each house of the Parliament.
6 The amendment bill regarding the change in provincial boundaries after the approval of both houses is sent to the concerned provincial assembly for approval and finally submitted to the President.
7 Under Article 75 of the Constitution, when any bill is submitted to the President for approval. The President has to approve it or return it to the Parliament in case of certain objections for rectification within the time limit of 10 days.
8 The bill is reviewed in the joint session of Parliament and is resubmitted with changes or without change by the majority of members available. The President approves it within 10 days; otherwise, the draft of the constitution is considered approved.
9 Any amendment to the Constitution cannot be inquired into in any court on any basis. Moreover, there is no ban on the authority of Parliament for the constitutional amendment in any section.

6.2. FIRST CONSTITUTIONAL AMENDMENT

The seven amendments to the Constitution were made in a short span of four years. The first amendment was regarding the recognition of Bangladesh. Since the fall of Dhaka, the recognition of Bangladesh has been of a sensitive nature. Although Bhutto himself was convinced to recognize Bangladesh, there was pressure from opposition parties. Bhutto was under severe criticism for being one of the characters behind the separation of East Pakistan. At the time of the implementation of the 1973 constitution, the matter of recognition of Bangladesh was pending with the Supreme Court. Later on, on the eve of the second Islamic Summit at Lahore in February 1974, Pakistan had to recognize Bangladesh under the pressure of King Faisal of Saudi Arabia, Col Qaddafi of Libya and others. It had become a separate entity till that time. There was no other chance of its re-merger into Pakistan. As a result of recognizing Bangladesh, the amendment to the constitution of Pakistan was a necessity. Therefore, Article 1 of the Constitution was amended under the first amendment, under clause 2, which was about the representation of East Pakistan in the Federation of Pakistan.[8]

Under the amendment, the areas of Pakistan were re-specified. The area of East Pakistan was excluded and Balochistan, NWFP (Khyber Pakhtunkhwa), Punjab, Sindh, the federal capital Islamabad, and the Federally Administered Tribal Area i.e. Fata, later included in KP, were declared part of Pakistan. Another part of the amendments was about establishing political organizations. In regard to it, sections 2 and 3 were added in Article 17 of the constitution under which the government was granted permission to ban a political party from adopting an anti-Pakistan stance. Under section 3, all parties were bound to reveal the sources of party funds to the government. Due to the same amendment, Prime Minister Zulfikar Ali Bhutto banned the National Awami Party. The inter-session interval between two consecutive sessions of any house of Parliament was decreased to 90 days in spite of 120 days. It was also made possible that the chief justice of any High Court may include the Judge of another High Court in his court with the consent of a concerned judge, the concerned High Court chief justice and the President of Pakistan.[9]

6.3. SECOND AMENDMENT

The second amendment was regarding the declaration of Ahmadis as non-Muslims. Anti Ahmadi movement started in Pakistan back in the early 1950s. The situation became worse and agitation led to martial law in Lahore in March 1953. It led to the dissolution of the Daultana Ministry in Punjab and severe problems for the Nazimuddun Ministry at the centre. During the Bhutto rule same type of agitation spread in 1974. It was based on the clash between students and Ahmadis at Rabwa Railway Station.[10] The news of this incident spread countrywide, causing anti-Ahmadi processions and public meetings under political parties, especially Jamiat Ulema-i-Pakistan, Jamiat Ulema-i-Isam, Jamat-i-Islami and others. It was the unanimous demand of the people to declare Ahmadis as non-Muslims. Finally,

Prime Minister Bhutto referred the issue to the National Assembly. After detailed deliberations and debatesin National Assembly unanimously approved the second amendment bill in the constitution. According to clause (3), which was added to Article 260, which was explaining that who was a Muslim. A new clause was added, which stated that

… a person who does not believe in the absolute and unqualified finality of the Prophet Muhammad (Peace be upon Him) as the last of the prophets or claim to be a prophet in any sense of the word or of any description whatsoever, after Muhammad (Peace be upon Him) or recognizes such a claimant as a prophet or a religious reformer is not a Muslim.[11]

6.4 THIRD AMENDMENT

The third amendment in the Constitution was made on February 18, 1975.[12.] It was introduced to curtail the rights of prisoners detained under law for preventive detention, hence extending the powers of the detaining authority.[13] It is quite clear that the Third Amendment limited the rights of political prisoners and consequently the powers of government were increased. Under the amendment government got powers to keep political opponents under detention for an indefinite time by alleging them to be involved in anti-state activities. The Bhutto government during the period 1974-75 had become much more authoritative and intolerant. He wanted to teach a lesson to his political opponents. When some political opponents consulted courts, due to a lack of high morals, the judgments were mostly in favour of the government and rarely was any relief granted to political opponents. Such a type of limited relaxation under judicial authority was not supported and favoured by Bhutto and his colleagues. Therefore, the policy of curtailment of the powers of the judiciary was planned. This amendment was based on ill intentions under which the political victims, especially the NAP leadership, were already on trial and were dealt with harshly. This amendment extended the powers of the president regarding the extension of the period of emergency, which was a maximum of six months, after the recommendations of a joint session of parliament.[14] This amendment provided a clause to continue the emergency for an unlimited period of time. It reflected the autocratic style of governance.

6.5 FOURTH AMENDMENT

The fourth amendment was approved by the National Assembly on November 21, 1975.[15.] The PPP aimed to limit the power and jurisdiction of courts, especially grants related to political opponents under Article 199. In the wake of dictatorship and authoritative rule, Bhutto de-shaped the constitution of 1973 himself. The High Courts were deprived of the power to grant bail to the detainee under preventive detention. In this way, High Courts became helpless to provide justice to political victims. Under the amendment, minorities were allocated six special seats in the

National Assembly and an increase of seats in the Punjab Assembly from three to five. The codal procedure for the approval of the Fourth Amendment was not adopted. The opposition members of the National Assembly wanted to have a discussion on the pros and cons of the amendment regarding the reduction of the High Court's powers. They were not allowed to speak and were maltreated on the floor of the assembly by security staff. Some of them were physically thrown out of the assembly by security staff. It was managed to get the amendment approved during the absence of opposition members. It was ridiculous because PPP holds a 2/3 majority requisite for approval of any bill. The way adopted by the Bhutto Government with the opposition was humiliating.

6.6 FIFTH AMENDMENT

The 5th Amendment was approved by the National Assembly on September 5, 1976. According to the official version, it was introduced to curtail the trespassing of the judiciary into the executive sphere. There had been certain repeated decisions under the judiciary that affected the executive. Initially, the provision of separate High Courts for Sindh and Baluchistan was granted and the extending the period of separation of judiciary from the executive, fixation of term of Chief Justices of Supreme Court and High Courts and compulsory transfer of judges from one court to the other, process of punishment of contempt of court and restriction of the jurisdiction of High Court to grant Bail.[16]

The judiciary was severely criticized when the Bill was debated in the National Assembly. Abdul Hafeez Pirzada blamed the judiciary for interrupting the affairs of the Legislature and Executive. He was of the view that there was confusion about the power limits of the judiciary and only the Legislature could decide about that. The judiciary got power from the constitution and it could impart its decisions within the prescribed jurisdiction. Any decision beyond the limits of the power jurisdiction would be considered subversive and high treason. While giving his postulates, he proposed the fixation of tenures of the chief justices of the Supreme Court and High Courts, like the President, Prime Minister, Governors and Members of Parliament. He said that if the Judges of the High Court would not accept appointment to the Supreme Court, his retirement would be justified. In the case of Justice Sardar Iqbal and Justice Maulvi Mushtaq Hussain, when both of them had not accepted the post of Judge at the Supreme Court and opted to stay at Lahore High Court, two rival groups emerged soon after. The Judiciary was divided from the court to the Bar level, which damaged the cause of the Judiciary. Bhutto, in his concluding speech at the approval of the 5th amendment, stated, "Government wanted harmonious co-existence of all the organs of state, legislature, executive and the judiciary and none of them transgressing into the sphere of others".[17] The positive effect of the amendment was that separate High Courts for Sindh and Baluchistan were constituted by dividing the Sindh and Baluchistan High Courts.

6.7 SIXTH AMENDMENT

The Sixth Amendment in the Constitution was made in haste. It was presented and approved during the last session of the assembly before its dissolution for the conduct of the upcoming elections in 1977. The main content of the amendment was about extension in the terms of the Chief Justices of the Supreme Court and High Courts beyond the retirement age. It was opposed that the Chief Justice of the Supreme Court, who had reached the age of retirement, i.e., sixty-five years and the Chief Justice of the High Court at the retirement age of sixty-two years and had not completed the term in office for five and four years respectively, would continue to hold a post until the completion of their respective term of office.[18] Under this amendment, an addition was made in Article 260 of the constitution and the portfolios of advisors to the Prime Minister and Chief Minister, Parliamentary Secretaries, Chairman of the Law Commission and Special Assistant to the Prime Minister were defined.

This amendment in the constitution reflects the authoritarian style of governance of Bhutto. Firstly, the chief justices were forced to retire before reaching retirement age and secondly, they were allowed to continue under the 6th Amendment. It is also a unique example in the constitutional history of Pakistan that the amendment was made to accommodate the chief justice of the Supreme Court, Yaqoob Ali Khan, who was going to retire in the middle of 1977 and had served only for two years as Chief Justice. He was a close friend of Bhutto, for whom the constitution of Pakistan was amended.

6.8 SEVENTH AMENDMENT

The seventh amendment in the Constitution was approved on May 16, 1977. Under this amendment, the elected Prime Minister was enabled to hold a national referendum.[19] Due to the deadlock in dialogues between the PPP and PNA, Bhutto proposed a solution under which the joint session of parliament would pass an amendment to hold a referendum. The referendum had to be materialized under a law made by the President. Under this provision, if the Prime Minister fails to get a majority, then he would have to resign from office. This amendment was unusual and disgraceful for the parliamentary system, according to some parliamentarians. Under settled norms, the vote of confidence is obtained through parliament, not through a referendum. Due to insincerity and lack of time, no arrangements could be made to hold a referendum. It was necessary to set up a referendum commission and to propagate the cause of the referendum before the masses, which could not be materialized. This amendment proved helpful for General Zia and General Musharraf to conduct referendums under vested interest for legislation during their rule.

The constitutional amendments during Bhutto's rule revealed the dictatorial setup of his government.[20] If Bhutto had the temperament to bear the opposition, then he might have been the elected leader and could have enjoyed power without taking

strict measures against the opposition. He was sure, like Ayub Khan, that political solidarity and national unity could be achieved through the 'Strong Centre'. Moreover, it was also necessary to materialize Bhutto's preference for political and economic power through the centre. He also wanted to keep the political and economic power of Punjab under certain limits. Until July 5, 1977, about 30 articles of the constitution were amended more or less. If the last amendment had been enacted, the conditions would be different. If the PNA had agreed with the proposal of holding a referendum, the assembly could have been saved in either condition.

The constitutional history of Pakistan is a nightmare and regretful, also. After the provincial Constitution of 1947, about 6 different constitutional drafts were prepared, out of which three remained successful for implementation i.e. 1956, 1962 and 1973. The constitutions of 1956 and 1962 were abrogated, while the 1973 constitution is still functional with about 26 amendments. It is questionable why certain regimes amended the constitution under their own vested interests. The constitutional provisions were utilized for the benefit of the government. The upper political hierarchy is the beneficiary of such amendments; the general masses are the least benefited. Even the apex constitutional institutions are helpless to interpret and implement the Constitution of 1973 in letter and spirit.

Parliamentary democracy is actually a national government and mostly the feudal class gets elected under parliamentary democracy. There is a large contradiction between parliamentary democracy and feudalism. The exertion of authority through the rule of power is the nature of feudalism and there is no tolerance or difference of opinion under this system. Unfortunately, until feudalism could occupy national politics, the pattern of governance would be adversely affected.

Notes & References

1 A.H. Kardar, *Pakistan's Soldiers of Fortune* (Lahore: Ferozsons Pvt.Ltd, 1988), p. 16 In fa

2 CIt was a temporary arrangement and the government of India Act 1935 was adopted with some changes and called the Interim Constitution, 1947.

3 The document was designed on the basis of the recommendations of the leading Ulema of Pakistan, who initiated the famous 22 points, prominent among them were Maulana Shabbir Ahmed Usmani and Maulana Syed Abdul Aala Maudoodi.

4 The committees were formed to create consensus on the grounds for the future constitution of Pakistan, but the target was not achieved.

5 Muhammad Ali Bogra, the then Prime Minster presented his formula on October 7, 1953, which was aimed primarily to curtail the powers of the Governor General.

6 The constitution did not provide any clarification about the nature of elections and the distribution of power.

7 Syed Noor Ahmad, in his work *Martial Law to Martial Law,* has thrown light on the causes that culminated in the first Martial Law in Pakistan, which subsequently brought the constitution in 1962.

8 The Constitution of Pakistan (First Amendment), Act, 1974, Act XXXIII of 1974.

9 Hamid Khan, Constitutional and Political History of Pakistan (New York: Oxford University Press, 2005), p.4

10 The students of Nishtar Medical College, Multan, were on a trip to Peshawar. They had a petty quarrel at Rabwa Railway Station while going towards Peshawar. In return, they were attacked by Ahmadies under a plan giving it the colour of religious conflict.

11 The Constitution of Pakistan (Second Amendment), Act 1974, XLIX of 1974 PLD.

12 The Constitution of Pakistan (Third Amendment), Act 1974, XXII of 1975 PLD.

13 Article 10 of the Constitution, 1973, provided certain safeguards against preventive detention.

14 The Constitution of Pakistan, Article 232.

15 The Constitution of Pakistan (Fourth Amendment), Act 1975, LXXI of 1975 PLD.

16 Dawn, Karachi, September 2, 1976.

17 Ibid. 6, 1976.

18 The Constitution of Pakistan (Sixth Amendment), Act 1976, Act LXXXIV of 1976 PLD.

19 Dawn, Karachi, February 3, 1978.

20 Mehrunisa Ali, *"Pakistan; Aftermath of the March 1977 election,* Pakistan Horizon (Karachi; Vol. 13 Issue No.3, 4, 1977) pp. 77-102

Self-Assessment Questions

1. Identify the key amendments made to the Constitution during the Bhutto era.
2. Discuss the political, legal, and social context in which the constitutional amendments were made during 1973-77.
3. Analyze the impact of the first seven constitutional amendments on Pakistan's political system, particularly regarding the powers of the President and the Parliament.
4. Explain the role of constitutional amendments in shaping Pakistan's governance.

UNIT 7

AMENDMENTS FROM 1984 TO 1993

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UNIT 7: AMENDMENTS FROM 1984 TO 1993

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INTRODUCTION

The period from 1984 to 1993 saw several important amendments to the Constitution, reflecting political instability, changing leadership, and efforts to address legal and constitutional challenges. This unit will cover significant amendments during this period, including the Eighth through Twelfth Amendments. We will explore landmark cases such as the Nusrat Bhutto case, Haji Saifullah case, and the impact of amendments related to the powers of the President, the introduction of women's seats in Parliament, and special courts. Students will critically assess these amendments and their implications on Pakistan's political system and the judicial framework.

OBJECTIVES

After the study of this unit, you will be able to:

1. Understand the significance of the constitutional amendments between 1984 and 1993.
2. Analyze the constitutional amendments in light of the political developments of the period.
3. Evaluate the impact of landmark judicial cases on constitutional amendments.
4. Discuss the role of these amendments in shaping Pakistan's governance, legal framework, and democratic processes.

LEARNING OUTCOMES

After the study of this unit, you will be able to:

1. Identify and describe the key amendments introduced between 1984 and 1993.
2. Understand the context in which these amendments were introduced, including the political and legal environment.
3. Analyze the role of judicial cases like Nusrat Bhutto and Haji Saifullah in influencing amendments.
4. Explain the specific impact of each amendment on the functioning of Pakistan's democracy, Parliament, and judicial system.
5. Discuss the introduction of women's seats and the creation of special courts in the context of these amendments.

7.1 NUSRAT BHUTTO CASE

General Zia-ul-Haq imposed martial law on July 5, 1997, dismissed the civilian government of Z.A. Bhutto, partially suspended the constitution partially and arrested political leaders. The action was launched as " Operation Fair Play" aimed to facilitate the elections as a transactional regime. Military leadership took advantage of the deadlock and rifts between the PPP and PNA and captured power. Zia's regime decided to withdraw constitutional amendments 5th and 6th, which were introduced by Bhutto's regime. It resulted in the retirement of Chief Justice Yaqoob Ali Khan and the appointment of the new Chief Justice, Anwar-ul-Haq. (Hamud Khan, 326). The imposition of martial law, the suspension of the constitution and the detention of political leadership, as challenged by Begum Nusrat Bhutto, the wife of ex-prime minister Bhutto. Yahya Bakhtiar was the lawyer from the Bhutto side. The hearing of the case started on September 25, 1977. Chief Justice Anwar-ul-Haq headed a nine-member bench of the Supreme Court. Yahya Bakhtiar mainly relied on the Supreme Court's verdict in Asma Jillan's case. He asserted that Zia had no legal and constitutional authority to impose martial law. The article of the 1973 constitution treated that constitutional suspension as an act of high treason. He stressed that martial law orders had no legal authority and that detention of political leaders, including Bhutto, was an illegal act of the military regime. He prayed that the doctrine of necessity had lost its relevance after the Asma Jillani case. He further highlighted that Bhutto and the PPP leadership's arrest denied them equal opportunity in the electoral process. Zia claimed that the Constitution was not abrogated; it held in abeyance certain parts of the Constitution for the time being. The regime's mandate was to create a peaceful environment to hold elections and restore the democratic process.

A.K. Brohi, a leading constitutional lawyer, defended the military regime and challenged the maintainability of the partition on technical grounds. He asserted that due to the suspension of fundamental rights by the military regime, courts had no power to entertain this kind of petition. Sharifuddin Pirzad, who was appointed as Attorney General of the Zia regime, asserted that the Bhutto regime had lost its legal and constitutional authority due to alleged rigging in elections. The imposition of martial law was a temporary measure and it should be justified under the doctrine of state necessity.

Unfortunately, the Chief Justice and other judges of the Supreme Court provided legal cover to illegal and unconstitutional acts of military Janet. It adopted the theory of revolutionary legality and state necessity. These asserted that Zia's martial law was a temporary measure. In due course of time, the constitutional and democratic process would be restored. It empowered the regime to amend the constitution. No deadline was provided to the Zia regime for holding elections. These asserted that the public accepted the martial law regime by not agitating against the imposition of martial law. The chief justice concluded that the illegal acts taken by armed forces were required as a matter of state necessity and the welfare of the people. Zia's dismissal of the government and suspension of the constitution were perceived as a temporary act for holding free and fair elections. That decision revived the inglorious traditions of the judiciary as a subordinate institution of the military establishment. It also provided legal cover for the empowerment of the Zia regime, which proved to be the longest and most repressive military regime in the history of Pakistan. The martial law, which was

imposed for holiday elections within 90 days, actually lasted for eleven long years from 1977 to 1111988. Nusrat Bhutto's case decision, which was announced on November 10, 1977, added another dark chapter to our legal and constitutional history.

7.2 EIGHTH AMENDMENT

Pakistan adopted a parliamentary form of government after the formation of the state while Pakistan adopted a parliamentary form of government after the formation of the state. Pakistan inherited a centralized bureaucratic state structure, where parliament played the role of a debating club. The notion of parliamentary supremacy and civilian control failed to develop roots in Pakistan's political system. The first decade (1997-58) witnessed a rising trend of authorial tendencies of the civil-military bureaucratic elite. The 1956 constitution was a document of compromise, although it adopted a parliamentary form of government, it substantially empowered the office of the Governor General. The 1962 constitution entrusted all powers to the office president. The presidential form failed to receive approval from the democratic forces. A political consensus emerged on the adoption of a parliamentary form of government in 1973. The office of the Prime Minister was empowered and civilian supremacy was established. The prime minister was appointed as the chief executive of the state and he commands the support of the majority in the parliament. The Bhutto era was the only exception to civilian supremacy in the political history of Pakistan. The office of the president was just reduced to a constitutional head with a ceremonial role. The powers of the president are seriously checked by the Constitution. Parliamentary supremacy was established in the legislative sphere. All the key appointments of the state institutions were made on the advice of the prime minister. The office was responsible for formulating the policies for the running of the state.

After the electoral management through party-less elections of 1985, the Zia regime sought the introduction of constitutional engineering. The E Eighth Amendment was offered as a price for the restoration of the democratic process to the newly elected parliament. The amendment was aimed at shifting the balance of power from elected representation to the powerful establishment through constitutional distortion. The parliamentary form of government was radically transformed into a quasi-presidential form of government. Pakistan replicated the hybrid system of the 1956 constitution through this amendment, in which post-1985 parliamentary and presidential forms of government were amalgamated. The system was parliamentary but presidential in essence, where responsibility lies with parliamentary forces, while authority was shifted into the hands of the president. After party-less elections in February 1985, the newly elected assembly held its first session on 3rd March 1985. Zia took the oath as the president of Pakistan for the next five years on the basis of a fraudulent referendum. He nominated a less controversial, less ambitious and moderate person, Muhammad Khan Junejo, as the next prime minister. The regime secured a unanimous vote of confidence for the newly nominated Prime Minister after the initial embarrassment of the defeat of the official candidate for the office of the Speaker National Assembly. (Muhammad Waseem 12) Syed Fakhar Imam, with the support of an independent group able to defeat Khwaja Safdar, who was backed up by the official group, detailed deliberation and active participation by the independent parliamentary group, and

the amendment was adopted by the assembly with modifications and alterations. On October 1, it was tabled in the Senate and after its approval, the president signed it on November 9, 1985. The following are silent features of the amendment:

1. The president would act on the advice of the president and the cabinet. He could send it back to the cabinet for reconsideration.
2. The time limit for the president's assent to the legislature was reduced from 45 to 30 days.
3. Through Article 58-28 president was empowered to dissolve the national assembly and dismiss the government at his discretion. The new assembly would be elected within 90 days of that dissolution.
4. The president can nominate at his discretion the prime minister till March 30, 1990. After that date, the National Assembly was empowered to elect its leader of the house with a majority of votes of the total strength of the assembly.

After an extraordinary delay, the Zia regime finally started a process of civilizing the military rule. First, he elected himself as president through a referendum in December 1984. At a later stage, he ordered the party-less elections and installed the government under Junejo after the February 1985 elections. On March 2, 1985, Zia issued the Revival of the Constitution Order (RCO). It added, deleted and amended 66 articles of the constitution and also modified two schedules. It shifted the balance of power in favor of the president and provided legitimacy and blanket constitutional and legal cover through articles 207-A and 207-B to the actions of the Zia regime since July 55, 1977. RCO was then taken by the parliament in the form of the 8th constitutional amendment. The amendment was first introduced in the National Assembly in the month of September 1985. The president retained the most crucial power of the appointment of the military service chiefs, the Chief Election Commission, the provincial governors and other key constitutional offices. On the issue of the appointment of the provincial governor, the Prime Minister's advice was required.

1. The proposed National Security Council under the RCO was abolished.
2. The amendment provided validity and indemnity to the actions of the military regime.

After the passage of the 8th amendment, Zia, at the demand of the Prime Minister, decided to end martial law on December 30, 1985. The amended 1973 constitution was restored with the claim of completion of the democratic transition from military to civilian rule. In the province, civilian governors were appointed; however, Zia retained the command of the armed forces as Chief of Army Staff. The army was the core constituency of Zias. He remained in that office till his death on August 17, 1988.

7.3 NINTH AMENDMENT

After the democratic process, the civilian region under Juneja started to function. After lifting martial law, the constitution was restored with the 8th Amendment. Zia reluctantly shared power with the civilian government under the leadership of Prime Minister Muhammad Khan Juneja. It resulted in the emergence of two centers of power within the ruling group, one group was pro-Zia Zia and the other

group was pro-Juenjo. The pro-Zia group was more inclined towards Islamization. It introduced the Ninth Constitutional Amendment and proposed to amend the article of the Constitution. Ti suggested adding the following words, and the injunction of Islam as laid down in the holy Quran and sunnah shall be the supreme law and source of guidance for legislation to be administered through laws enacted by the parliament and provincial assemblies, and for policy making by the government. It also suggested amendments in articles 203b and 203d. These suggested changes in Muslim personal laws and fiscal laws. The amendment was introduced in December 1985 in the Senate. Which was finally approved in July 1986. The government was reluctant to adopt the bill in its present form. Prime Minister Junejo suggested the amendment to the bill for a more comprehensive and in accordance with the Sharate-i- Mohammadi. Law minister Waseem Sajjad claimed that the amendment in the bill 'World creates an insurmountable difference in Pakistan society'. Through that bill, the Zia group maintained its pressure on Junejo due to the sensitive nature of the bill. The government's opposition to the bill had great potential of station. The government was using delaying tactics and the bill was not passed by the national assembly till its dissolution in May 1988.

7.4 TENTH AMENDMENT

The tenth constitutional amendment was passed by the two houses of the parliament in the month of March 1987. The president of the Islamic Republic of Pakistan signed the bill on March 25, 1987, and it became the law of the land. In the bill amendment, Article 54 of the Constitution, the word sixty was replaced with the word thirty.

The bill also reduced the working days of the parliament in a parliamentary year. Previously, the parliament was supposed to work for one hundred and sixty days. The amendment reduced the working days of the parliament to one to one hundred and thirty days in a parliamentary year.

7.5 HAJI SAIFULLAH CASE

Zia's dismissal of the Junejo government in May 1988 through Article 58-2B created another political and constitutional process. Zia had little regard for the constitution; he appointed a new caretaker cabinet without the prime minister. After Zia's assassination on August 17, 1988, the chairman of the Senate, Ghulam Ishaq Khan, assumed the office of the acting president. He continued with the existing cabinet and did not bother to appoint a prime minister. After the holding of the elections, Benazir Bhutto assumed the office of prime minister in December 1988. During the previous six months, there was no prime minister in Pakistan, which was a constitutionally required office. Haji Saifuallh, who was a senior parliamentarian and legal expert, challenged it in the Supreme Court of Pakistan. He questioned the legal and constitutional status of actions taken during that period. He also contested that a cabinet without a prime minister altered the constitutional arrangement under a parliamentary system and assured the role of a president in the cabinet, under the presidential form of government. The court admitted the petition

and declared illegal all the appointments and actions taken by the president, which required the advice of the prime minister during the period from May 29, 1988, to December 2, 1988. All these actions and appointments required regularization and reaffirmation. The court held that such relief was requested from the court, which was and granted by the court. The count recommended that the distribution of functions of the government should be regarded in the future according to the constitution.

7.6 ELEVENTH AMENDMENT (20 WOMEN SEATS)

The 1973 constitution provided 20 reserved seats for women in the National Assembly until the holding of the third general elections. The limit of the third general election expired with the holding of the 1988 General elections. The concept of women's representation in reserved seats was introduced to provide representation to the women's section of society in political institutions. They were largely marginalized and deprived of equal opportunities for political participation. In the 1977 elections, Begum Nasim Wali Khan was the only woman who got elected from two general seats of the National Assembly from the PNA platform. In the 1985 partyless elections, Syeda Abid Hussain won elections from the Jhang constituency of Punjab province. In the 1988 elections, PPP entered the electoral arena under the leadership of Benazir Bhutto and Nusrat Bhutto, both of whom were elected in the National Assembly as well. The young Benazir Bhutto assumed the office of the Prime Minister of the Islamic Republic of Pakistan as the first woman prime minister of the Muslim world. She was an exceptional case; generally, women have no representation in the elected houses. The eleventh amendment was moved in the Senate on December 31, 1989, by Senators Muhammad Ali Khan, Dr. Noor Jehan Pame Zai and Syed Faseih Iqbal. The relevant standing committee submitted its report on August 29, 1990. The amendment asked for an extension of the reserved seats of women till 4th general election instead of the third election. The amendment was finally withdrawn by its movers on August 23, 1992, after the assurance from the law minister for legislation on the said issue. The IJI and PPP failed to achieve consensus due to political polarization and politics of conformation. Due to the absence of legislation, women were deprived of the reserved seats previously available to them; ultimately, women's representation was restored during the Musharraf era.

7.7 TWELFTH CONSTITUTIONAL AMENDMENT

During the 1980s and 1990s, Pakistan witnessed a rising trend of extermination and military. The Pakistani society was militarized during that era, and weapon culture was promoted as well. Along with religious extremism, sectarianism also extended into the body politic of Pakistan. There were armed clashes among different groups in different pockets of Pakistan. The sectarian violence witnessed a tremendous

rise. The Judicial system of the state failed to deliver speedy justice to check these heinous crimes and acts of terrorism.

Prime Minister Nawaz Sharif's government decided to establish special courts for the trial of these gruesome and heinous crimes. These special courts were established as a temporary measure; they would expire after three years. Their term started from July 1991 to July 1994. The special courts were comprised of Judges, eligible to become judges of the High Court. The special courts were assigned these responsibilities to conduct the trials of heinous crimes and acts of terror. The Courts were instructed to conduct speedy trials for the quick dispensation of Justice. The right of appeal was granted to the Supreme Court as an appellate tribunal. The government can determine the territorial limits of these courts in the case of more than one court in an area. After three years of functioning, the courts would expire and the new Article 212-B would cease to be part of the constitution. Through the amendment in the 5th schedule of the Constitution government also decided to raise the salaries and pensions of the Judges of the High Courts and the Supreme Court.

7.8 AHMAD TARIQ RAHIM CASE

President Ghulam Ishaq Khan, at the behest of the establishment, dismissed the government of Benazir Bhutto on August 6, 1990. The application of Article 58-2B was used again to dismiss the elected government and elected national and provincial Assemblies. The presidential order was challenged initially in the different high courts and then in the Supreme Court after the Lahore High Court's decision to uphold the order. The high courts also validated the reasons for the dismissal of the government levelled by the president. That decision was challenged in the Supreme Court by Khanja Ahmad Tariq Rahim, who was a Senior lawyer and political leader of the PPP. The Supreme Court, after hearing the case, upheld the decision of the Lahore High Court by a majority decision. The court also examined the reasons for the dismissal of the government by the president in a dissolution order. The court determined that a constitutional crisis existed due to the government's failure to create a council of common interest and its failure regarding the National Finance Commission Award. The political tension between the central and provincial governments was also highlighted. The court also highlighted the defection of the members of the National Assembly during the no-confidence move against the democratic norms and political culture. Justis Abdul Shakor and Justice Sajid Ali Shah differed on the majority decision for different reasons. That decision further tarnished the image of the PPP and undermined min its electoral performance. The IJI under Nawaz Sharif emerged as the beneficiary of the situation and received the support of the establishment as well.

7.9 NAWAZ SHARIF CASE

In the 1990 elections, IJI emerged as a leading alliance; it recaptured 105 seats, while PDA captured only 45 seats. Nawaz Sharif became the Prime Minister and Behazir Bhuttoo assumed the role of opposition leader. Ms. Bhutto alleged that

elections were rigged in favor of IJI by the establishment. Soon, conflicts emerged between President Ghulam Ishaq Khan and Prime Minister Nawaz Sharif on the exercise of powers and the issue of key appointments. The conflict reached its climax when Nawaz Sharif addressed the nation and accused the president of destabilizing the government. In retaliation president dismissed the government and dissolved the Assemblies on April 18, 1993. The presidential order was challenged in the Supreme Court by Ghoar Ayub Khan, the speaker of the National Assembly. The elevenmembers -member bench of the Supreme Court, under the leadership of Chief Justice Nasim Hassan Shah, started day-to-day hearing of the case. The majority of the Judges restored the Prime Minister, his cabinet and the Assembly; only Justice Sajjad ALI Shah differed with the majority decision. He differed on the merit and the question of maintainability. He also observed that the prime minister of Sindh was not restored previously, while the PM from Punjab was restored. The majority of judges observed that the president destabilized the system. Nobody can destroy a state organ that comprisedof a chosen representative of the people. They also refuted the allegations leveled by the president. Justice Rafiq Tarar, in his additional note, declared that presidential action and use of Article 58 2B without substantial grounds should be treated as a violation of the constitution. After his historic restoration, PM assumed power again, and the conflict between the president and PM entered into a new phase, which ultimately resulted in the removal of both from power after the intervention of the Chief of Army Staff in July 1993. A new caretaker setup was installed for the holding of fresh elections in Pakistan.

Self-Assessment Questions

1. What were the key political and legal challenges faced by Pakistan between 1984 and 1993 that led to constitutional amendments?
2. What was the significance of the Nusrat Bhutto case in the context of constitutional amendments?
3. What were the main provisions of the Eighth Amendment, and how did it affect the powers of the President? Also, discuss its long-term impacts.
4. What changes did the Ninth and Tenth Amendments introduce to the Constitution?
5. How did the Haji Saifullah case challenge the legal framework of Pakistan, and what was its impact on subsequent amendments?

UNIT 8

AMENDMENTS FROM 1997 TO 2008

Written by:
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UNIT 8: AMENDMENTS FROM 1997 TO 2008

8.1 Thirteenth Amendment (Reversing Eighth Amendment)

8.2 Fourteenth Amendment (Outlawing Floor Crossing)

8.3 Fifteenth Amendment (Enforcement of Shariah)

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8.5 Zafar Ali Shah Case

8.6 Seventeenth Amendment (Restoring Eighth Amendment and Legalizing Musharraf's Acts)

8.7 Dismissal of The Chief Justice

8.8 November 2007 PCO

8.9 The Lawyer Movement for the Restoration of the Judiciary in Pakistan

INTRODUCTION

In the constitutional history of Pakistan, the period from 1997 to 2008 is very important. The period from 1997 to 2008 in Pakistan was marked by significant constitutional amendments that shaped the country's political landscape. This unit critically examines the key amendments and events during this period, highlighting their implications for democracy, judicial independence, and civil society. Along with key amendments, judicial cases, and the notable Lawyer Movement that emerged during this tumultuous era are discussed. The unit also explores significant events like the Zafar Ali Shah case, the dismissal of the Chief Justice, and the Lawyers' Movement for judicial restoration. Students will critically examine how these amendments reflected the tension between executive authority and judicial independence, as well as their lasting effects on Pakistan's constitutional framework.

OBJECTIVES

After the study of this unit, you will be able to:

1. Understand the constitutional journey in Pakistan from 1997 to 2008.
2. Comprehend the various amendments introduced in the Constitution of Pakistan.
3. Examine the different events that occurred in connection with these constitutional amendments.
4. Understand the significance of the constitutional amendments introduced from 1997 to 2008.
5. Analyze the political and legal motivations behind each amendment, particularly the reversal of the Eighth Amendment and the outlawing of floor-crossing.
6. Discuss the role of these amendments in strengthening or weakening Pakistan's political and judicial systems.
7. Examine key legal cases, such as Zafar Ali Shah and political events, such as the dismissal of the Chief Justice, in shaping these amendments.
8. Assess the impact of the Lawyer's Movement and the restoration of the judiciary on the constitutional amendments.

LEARNING OUTCOMES

After the study of this unit, you will be able to:

1. Identify and describe the major amendments introduced from 1997 to 2008, including the Thirteenth to Seventeenth Amendments.
2. Understand the context in which these amendments were passed and their implications for the political and judicial landscape of Pakistan.
3. Evaluate the role of the judiciary, executive, and political actors in influencing these amendments.
4. Critically assess the long-term impact of the amendments on Pakistan's democracy, particularly in relation to judicial independence and political stability.
5. Explain the significance of key legal cases, such as the Zafar Ali Shah case, and political movements in influencing constitutional change.

8.1 THIRTEENTH AMENDMENT (REVERSING EIGHTH AMENDMENT)

The Thirteenth Amendment, enacted in 1997, sought to reverse the Eighth Amendment, which had previously granted extensive powers to the President of Pakistan, including the authority to dissolve the National Assembly. This amendment was a crucial step towards restoring parliamentary sovereignty, as it eliminated the President's power to unilaterally dismiss the elected government.

The move was hailed by many as a return to democratic principles, emphasizing the importance of parliamentary governance.

The Thirteenth Amendment underscored a growing consensus among political leaders that the concentration of power in the presidency was detrimental to democracy.

It was a clear indication of the commitment to strengthening the legislative branch of government and ensuring that elected representatives retained their authority.

8.2 FOURTEENTH AMENDMENT (OUTLAWING FLOOR CROSSING)

Shortly after the Thirteenth Amendment, the Fourteenth Amendment was introduced to outlaw "floor crossing." This practice, wherein members of the legislature changed their political allegiance after elections, was seen as a threat to political stability and party integrity.

The amendment aimed to curb defections and maintain the legitimacy of electoral mandates.

By disallowing floor crossing, the Fourteenth Amendment sought to promote party loyalty and discourage opportunism among politicians.

However, critics argued that it also restricted the political rights of individuals, as it limited their ability to change parties based on political realities or ideological shifts.

The debate surrounding this amendment highlighted the tension between party discipline and individual political freedom in Pakistan's evolving democracy.

8.3 FIFTEENTH AMENDMENT (ENFORCEMENT OF SHARIAH)

The Fifteenth Amendment was introduced in 2003, seeking to enforce Shariah law in the country. This amendment emerged in the context of rising Islamic sentiments and demands for the implementation of Shariah principles in governance. It aimed

to align Pakistani laws with Islamic injunctions, reflecting the influence of religious parties in the political arena.

However, the amendment raised concerns among secular and liberal segments of society, who feared that its implementation could undermine the constitutional guarantees of minority rights and lead to an erosion of civil liberties. The debate surrounding the Fifteenth Amendment illustrated the ongoing struggle between secularism and religious conservatism in Pakistan's constitutional and political framework.

8.4 SIXTEENTH AMENDMENT (20 YEARS EXTENSION IN SPECIAL QUOTA)

The Sixteenth Amendment, passed in 2004, extended the special quota system for 20 years. This system was designed to provide representation and opportunities to marginalized groups and regions, particularly in the context of socio-economic disparities. The amendment aimed to ensure continued support for these groups, recognizing the historical injustices they faced.

While the special quota system was intended to promote inclusivity, it also sparked debates about meritocracy and the potential for patronage politics. Critics argued that extending the quota could perpetuate inequalities rather than address them, raising questions about the effectiveness of such measures in achieving true representation and equity.

8.5 ZAFAR ALI SHAH CASE

The Zafar Ali Shah Case was a landmark judicial decision that had significant implications for the political landscape of Pakistan. The case arose in the aftermath of General Pervez Musharraf's coup in 1999, which led to the suspension of the constitution. Zafar Ali Shah, a lawyer, challenged the legality of Musharraf's actions and sought the restoration of the constitution.

The Supreme Court's ruling in this case was pivotal in legitimizing Musharraf's regime while also emphasizing the need for constitutional governance. The court upheld Musharraf's decision to abrogate the constitution but mandated that elections be held within a specified timeframe. This ruling demonstrated the judiciary's complex role in balancing the demands of democracy with the realities of military rule.

8.6 SEVENTEENTH AMENDMENT (RESTORING EIGHTH AMENDMENT AND LEGALIZING MUSHARRAF'S ACTS)

In 2003, the Seventeenth Amendment was enacted, effectively restoring many provisions of the Eighth Amendment, which had been reversed by the Thirteenth

Amendment. This amendment aimed to legalize actions taken by General Musharraf during his rule, including the dismissal of the judiciary and the imposition of the Provisional Constitutional Order (PCO).

The Seventeenth Amendment was controversial, as it raised questions about the judiciary's independence and the legitimacy of the military's role in politics. Critics argued that the amendment undermined the principles of accountability and the rule of law, reinforcing the perception of a military-dominated political environment.

8.7 DISMISSAL OF THE CHIEF JUSTICE

One of the most contentious events during this period was the dismissal of Chief Justice Iftikhar Muhammad Chaudhry in March 2007. His removal was justified by the government on grounds of misconduct; however, many viewed it as an attempt to undermine the judiciary's independence and curb its authority.

The dismissal triggered widespread protests and marked the beginning of the Lawyer Movement, as lawyers and civil society rallied to demand the restoration of the Chief Justice. This movement played a crucial role in mobilizing public opinion against the military regime and highlighted the importance of judicial independence in a democratic society.

8.8 NOVEMBER 2007 PCO

In November 2007, General Musharraf declared a state of emergency, suspending the constitution once again and imposing the Provisional Constitutional Order (PCO). This move was met with widespread condemnation both domestically and internationally, as it represented a significant setback for democratic governance in Pakistan.

The PCO effectively nullified the authority of the judiciary, leading to the detention of numerous judges and lawyers who opposed Musharraf's actions. The declaration of emergency marked a critical juncture in Pakistan's political history, as it intensified public dissent and galvanized the Lawyer Movement against the military's encroachment on civil liberties.

8.9 THE LAWYER MOVEMENT FOR THE RESTORATION OF THE JUDICIARY IN PAKISTAN

The Lawyer Movement emerged as a powerful force advocating for the restoration of the judiciary and the rule of law in Pakistan. Spearheaded by lawyers and supported by civil society, the movement organized protests, sit-ins, and campaigns to demand the reinstatement of Chief Justice Iftikhar Chaudhry and the independence of the judiciary.

The movement gained significant momentum, drawing attention to the violations of human rights and the erosion of democratic institutions under military rule. It united various segments of society, including political parties, students, and activists, in a common cause to challenge the authoritarianism of Musharraf's regime.

The culmination of the Lawyer Movement came in 2008 when the Pakistan Peoples Party (PPP) and the Pakistan Muslim League-Nawaz (PML-N) formed a coalition government after winning the general elections. The new government faced immense pressure to restore the judiciary, leading to the eventual reinstatement of Chief Justice Iftikhar Chaudhry in July 2009.

8.10 CONCLUSION

The amendments to the Constitution of Pakistan from 1997 to 2008 reflect a complex interplay of political forces, judicial developments, and civil society activism. While some amendments aimed to strengthen democratic principles, others were seen as attempts to consolidate power and undermine the judiciary's independence.

The period was marked by significant events, including the rise of the Lawyer Movement, which played a crucial role in advocating for judicial restoration and democratic governance. As Pakistan continues to navigate its political landscape, the legacy of these amendments and movements remains a critical aspect of the ongoing struggle for democracy and the rule of law in the country.

In retrospect, this era serves as a reminder of the fragility of democratic institutions and the need for vigilance in safeguarding constitutional rights and liberties. The lessons learned from this tumultuous period remain relevant as Pakistan grapples with its identity as a democratic nation in a challenging geopolitical context.

- Thirteenth Amendment (Reversing Eighth Amendment)
- Fourteenth Amendment (Outlawing Floor Crossing)
- Fifteenth Amendment (Enforcement of Shariah)
- Sixteenth Amendment (20 Years Extension in Special Quota)
- Zafar Ali Shah Case
- Seventeenth Amendment (Restoring Eighth Amendment and Legalizing Musharraf's Acts)
- Dismissal of The Chief Justice
- November 2007 PCO

The Lawyer Movement for the Restoration of the Judiciary

Self-Assessment Questions

1. Discuss in detail the constitutional journey of Pakistan from 1997 to 1999.
2. Critically examine the constitutional amendments introduced in the second term of Mian Muhammad Nawaz Sharif.
3. Discuss the seventeenth constitutional amendment introduced in the Musharraf Era.
4. Discuss the Zafar Ali Shah Case.
5. Write a comprehensive note, “The Lawyer Movement for the Restoration of Judiciary in Pakistan”.

UNIT 9

AMENDMENTS FROM 2009 TODATE

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CONTENTS

UNIT 9: AMENDMENTS FROM 2009 TO DATE

9.1 PCO Judges Case

9.2 Eighteenth Amendment (Reversing the Seventh Amendment and Devolving Powers)

9.3 Munir Hussain Bhatti and Sindh High Court Bar Case

9.4 Nineteenth Amendment (Appointment of Judges)

9.5 Imran Khan Case

9.6 Twentieth Amendment (Protecting By-Elections)

9.7 Twenty-first Amendment (Military Courts)

9.8 District Bar Association, Rawalpindi Case

9.9 Twenty-Second Amendment (Chief Election Commissioner Powers)

9.10 Twenty-Third Amendment (Extension of Military Courts)

INTRODUCTION

The period from 2009 to the present has witnessed significant constitutional amendments in Pakistan, reflecting the evolving political and judicial landscape. These amendments aim to address governance issues, judicial independence, and the balance of power between the executive, judiciary, and military. Key amendments such as the Eighteenth Amendment, which reversed the Seventeenth Amendment and devolved powers to provinces, and the Nineteenth Amendment, which reformed the process of judicial appointments, have had a lasting impact on Pakistan's political framework. Additionally, the Twenty-first Amendment, which established military courts, and the Twenty-third Amendment, which extended military court jurisdiction, have been pivotal in addressing national security concerns. This unit examines these amendments and the legal cases that have shaped them, offering a comprehensive overview of Pakistan's constitutional evolution in recent years.

OBJECTIVES

After the study of this unit, you will be able to:

1. understand the significance of the eighteenth constitutional amendment in Pakistan's constitutional history
2. learn the political context of Pakistan in which various amendments were carried out
3. analyze the impact of the nineteenth amendment on the apex Judiciary
4. no amendments that allowed the establishment of military courts
5. understand the significance of constitutional amendments from 2009 to date, including the Eighteenth to Twenty-third Amendments.
6. analyze the reasons behind these amendments, particularly in relation to judicial reforms, the devolution of powers, and the expansion of military authority.
7. discuss key legal cases, such as the PCO Judges Case, Munir Hussain Bhatti Case, and District Bar Association, Rawalpindi Case, in shaping the constitutional amendments.
8. evaluate the impact of these amendments on the balance of power between different branches of government in Pakistan.
9. Assess the role of these amendments in addressing political, judicial, and security challenges in Pakistan.

LEARNING OUTCOMES

After the study of this unit, you will be able to:

1. Examine the significance of the eighteenth constitutional amendment in Pakistan's constitutional history

2. Evaluate the political context of Pakistan in which various amendments were carried out
3. Comprehend and discuss the impact of the Nineteenth Amendment on the apex Judiciary
4. No amendments that allowed the establishment of military courts
5. Identify and describe the major constitutional amendments from 2009 to date, including the Eighteenth to Twenty-third Amendments.
6. Critically evaluate the political, legal, and social motivations behind these amendments and their implications for Pakistan's governance.
7. Understand the impact of legal cases like the PCO Judges Case and Munir Hussain Bhatti Case on the constitutional landscape.
8. Discuss the effects of military court legislation, particularly the Twenty-first and Twenty-third Amendments, on the legal system and human rights in Pakistan.
9. Reflect on the role of the judiciary and executive in shaping these constitutional reforms, particularly in relation to judicial independence and national security.

9.1 THE PCO JUDGES CASE

The PCO (Provisional Constitutional Order) Judges case refers to cases heard and decided by the Pakistan Supreme Court related to the High Court and Supreme Court judges who took their oaths of office under the PCO in 2007. On 3 November 2007, President Pervez Musharraf declared a Provisional Constitutional Order that declared a state of emergency and suspended the Constitution of Pakistan. According to these emergency laws, all the Supreme Court justices, including High Court judges, were asked to take an oath under this Provisional Constitutional Order. Those who did not comply were placed under forcible house arrest. A bench comprising seven members issued a restraining order on the same day, barring the government from implementing emergency rule.

The Provisional Constitutional Order Judges case examined the constitutionality and legality of the steps taken by Musharraf in declaring a state of emergency, and contempt of court charges against justices who took an oath under the Provisional Constitutional Order in violation of the restraining order.

On July 31, 2009, after hearing constitutional petitions related to PCO judges, the appointment of various judges, and the steps taken in declaring an emergency in the country in 2007, the Supreme Court decided the declaration of emergency rule by Musharraf as unconstitutional under Article 279 of the Constitution. The Supreme Court also declared the steps taken by declaring the state of emergency as null and void *ab initio* and particularly ruled that the judges' removal was an unconstitutional and illegal measure.

This included the removal from office of the Chaudhry and other justices. The appointment of Abdul Hamid Dogar and all justices from 3 November 2007 to 24 March 2008 was deemed unconstitutional. Musharraf's increase in the number of judges, realized through a finance bill, was declared unconstitutional, and the number of judges was fixed at seventeen. The verdict did not change the legality of the new government nor the presidential oath taken by Asif Ali Zardari.

9.2 EIGHTEENTH AMENDMENT (REVERSING THE SEVENTH AMENDMENT AND DEVOLVING POWERS)

The Eighteenth Constitutional Amendment is a landmark document in the constitutional and political history of the country. It incorporated the largest number of changes in the Constitution as compared to any other single constitutional amendment. It introduced 97 alterations, deletions, replacements, and additions in the main text of the Constitution of Pakistan 1973. One addition was made in the

Annex and four changes and deletions were made in the third, fourth, sixth and seventh Schedules. This brings the total changes to 102.[67]

The history of the eighteenth amendment can be traced from the fact that during 2007-2008, different political parties expressed their intent to amend the constitution to strengthen its democratic and parliamentary character and review the changes made by the military governments of Zia ul-Haq and Pervez Musharraf. Asif Ali Zardari, soon after assuming power as President in 2008, expressed his desire to shift some important Presidential powers to the Prime Minister and the Parliament. Hence, it was in June 2009 that a committee was formed in both houses of the parliament under the title of Parliamentary Committee on Constitutional Reforms.[68]

The committee was comprised of twenty-six members from two major political parties i.e. PPP and PML (N) and twelve other political parties. One independent member was also included in the exercise. The parliamentary committee elected Mian Raza Rabbani as its head in its first meeting on June 25, 2009.

This parliamentary committee invited suggestions and ideas for the changes to be introduced in the constitution and any citizen could send in his/her recommendations. It received 982 proposals and recommendations from the public, which were all discussed in detail in the committee meetings. In addition, the committee also reviewed the three drafts of constitutional amendments circulated by the PML-N, PML-Q and MQM before constituting the Parliamentary Committee. The members representing different political parties presented diversified political opinions and views on constitutional issues. However, all of them exhibited flexibility in their opinions so that a consensus could be created on a draft of the amendments. A few political parties attached their brief notes of dissent, described as the notes for reiteration of their party's official positions on constitutional issues. Despite minor differences on some issues, all of the members signed the mutually agreed draft bill on March 31, 2010.[69]

Senator Raza Rabbani, chair of the Parliamentary Committee on Constitutional Reforms, maintained that the new amendments emphasized the accommodation of cultural and ethnic diversity "to strengthen cohesion and solidarity of the federation," provincial autonomy and participatory federation "wherein provinces feel that they are part of the federation and citizens feel that they have some stakes

[67] Rizvi, *Pakistan Political and Constitutional Engineering,* 617.
[68] Rizvi, *Pakistan Political and Constitutional Engineering,* 618.
[69] Daily *Dawn*, 31 March, 2010.

in Pakistan"; interprovincial harmony and addressing the issues through dialogue within the framework of the constitution.[70]

President Asif Ali Zardari argued that the amendments would lead to a new beginning and that these changes would make the constitution "truly democratic and federal in character and guarantee rights and sovereignty for provinces." The prominent features of the Eighteenth Constitutional Amendment are as follows:

1. The spellings of Sind and Baluchistan were changed to Sindh and Balochistan. The province, NWFP, was renamed as Khyber-Pakhtunkhwa (KP). The change of name proved to be a controversial exercise because its rationale was questioned by some members, particularly those demanding a separate province of Hazara in KP.
2. The scope of Article 6 (1) dealing with High Treason was expanded. The revised provision reads: "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 force or show of force or by any other unconstitutional means shall be guilty of high treason." The sub-clause (2) stipulates that "Any person aiding or abetting or collaborating" the acts mentioned in 6 (1) would also be guilty of high treason. The Supreme Court or a High Court would not validate an act of High Treason.
3. Three new fundamental rights were added to the Constitution. These were Article 10-A, the right to a fair trial and due process; Article 19-A, the right of citizens to obtain information about all issues of public importance; Article 25-A, the state's obligation to provide "free and compulsory" education to all children between the ages of five and sixteen years in a manner determined by law.
4. The powers of the President were reduced and the balance of power was decisively tilted in favour of the Prime Minister and the Parliament. The PM was designated as the chief executive who, along with the cabinet, exercised the executive powers in the name of the President. His advice was binding on the President. However, within fifteen days of receiving the advice, the President could ask the Prime Minister and the cabinet to reconsider it. If the advice was sent back to the President after reconsideration, the President was bound to act on it within ten days.
5. The President's power to dissolve the National Assembly in his discretion (Article 58-2b) was repealed. He could dissolve the National Assembly on the advice of the Prime Minister only. The only time the President could exercise his discretion for dissolving the National Assembly was when a

[70] Rizvi, *Pakistan Political and Constitutional Engineering,* 620.

VONC had been passed against the Prime Minister and no other member of the National Assembly was in a position to command the confidence of the majority of the members of the National Assembly, as proved in the session of the National Assembly summoned for that purpose. The powers of provincial governors were also reduced in relation to the Chief Minister in line with the new equation between the President and the Prime Minister.

6. The President could issue an ordinance except when the Senate or the National Assembly was in session. The ordinance remained effective for 120 days unless approved by the Parliament. Such an ordinance could be reissued only by a resolution of either house of Parliament.
7. The size of the cabinet was also fixed by this amendment. The strength of the cabinet –ministers and ministers of state—would not exceed eleven percent of the total membership of the parliament. In the case of provinces, the size of the cabinet could not exceed 15 members or 11 percent of the total membership of a provincial assembly, whichever is larger. The maximum strength of the Senators in the Federal Cabinet would not exceed one-fourth of the number of federal ministers.
8. The restriction imposed by the government of Pervez Musharraf in 2002, prohibiting a person from holding the office of Prime Minister or Chief Minister for more than two terms, was removed. After this amendment, a person could hold these offices as many times as the National Assembly or the Provincial Assembly elected him/her.
9. The strength of the Senate was increased from 100 members to 104 by reserving four seats for non-Muslims, one from each province. Mandatory working days of the Senate were fixed as 110 in a parliamentary year. The federal cabinet was declared as collectively answerable to both houses of Parliament. The government's report on the implementation of the principles of policy would also be placed before the Senate.
10. A person would be disqualified from becoming a member of the Parliament for five years from the date of conviction by a court for propagating an opinion or undermining the ideology of Pakistan or the sovereignty and security of the country, ridiculing the judiciary and armed forces.
11. Article 63-A provided that a parliamentarian could be disqualified if he resigned from his party or joined another party or voted or abstained from voting in violation of the directions given by the "Parliamentary Party" about four issues: election of the Prime Minister or a Chief Minister, a vote of confidence or no-confidence, money bill/budget, and a constitutional amendment.
12. The procedures for the appointment of judges of the S Supreme Court, high courts, and Federal Shariat Court were changed. A judicial commission was set up to recommend the names for these appointments. For the appointment

of a judge of the S Supreme Court, the Judicial Commission comprised seven members: the Chief Justice of Pakistan (Chairman), two senior-most judges of the Supreme Court, a former chief justice or a former judge of the Supreme Court, federal minister for law and justice, Attorney General of Pakistan and a lawyer nominated by the Pakistan Bar Council for a period of two years. Likewise, a similar procedure was laid out for the appointment of judges of the Islamabad High Court.

13. The nomination of judges to be appointed by the Judicial Commission would be sent to a Parliamentary Committee comprised of eight members of the Parliament, four of them to be taken from the Senate and four from the National Assembly. The government and opposition were to be given equal representation in the committee and government members would be nominated by the leader of the house and opposition members to be nominated by the leader of the opposition.
14. The strength of the Election Commission was increased from three to five members: the Chief Election Commissioner and one member or Commissioner from each province. The CEC is to be appointed through a thorough process. The Prime Minister and the leader of the opposition would agree on three names for the post and the names would be sent to a parliamentary committee comprised of not more than twelve members, one-third of them from the Senate. The government and opposition were to have equal representation in this process.
15. A caretaker administrative setup would be installed at the federal and provincial levels if the national and provincial elections were to be held. The caretaker prime minister would be appointed by the President in consultation with the outgoing prime minister and the leader of the opposition in the National Assembly.
16. Article 140A articulated the establishment of "a local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local government." However, the role and powers of the local government were to be determined by a provincial law.
17. The share of provinces in each award of the National Finance Commission would not be "less than the share given to the provinces in the previous award." The implementation of the NFC award would be supervised by the Federal Finance Minister and Provincial Finance Minister, who reported on this matter to the houses of the Parliament and the Provincial Assemblies (Article 160-3A and 3B).
18. The original Constitution of 1973 provided two lists of legislative powers in Schedule Four: The federal list and the concurrent list. Both the Parliament and Provincial Assembly could legislate on any subject included

in the concurrent list. Nonetheless, the federal list had priority over the provincial list.

19. The changes introduced in the Legislative list required the transfer of over 22 departments and divisions from the federal government to provinces. These departments and divisions included *inter alia*, education, health, agriculture, food, climate change, women's development, rural development, youth affairs, population welfare, religious affairs, tourism and sports. This transfer was planned to take place in different phases.
20. The military takeover by Gen. Pervez Musharraf and his subsequently introduced proclamations and laws issued by the military government from time to time were declared illegal and without lawful authority under Article 270AA(1).[71]
21. Minor changes were introduced in the oaths of the Prime Minister, Chief Minister, Provincial Ministers, Speaker of the Provincial Assembly, Chief Justice and judges of the Federal Shariat Court.

This amendment was a huge and unprecedented exercise of constitutional engineering in the country. It was the credit of the parliamentary parties and particularly the Pakistan Peoples' Party's leadership that took responsibility and created the required consensus among all the major political forces in the country. In May 2010, a Commission was established comprising members of the parliament to look after the implementation of the Eighteenth Amendment. This Commission was headed by Senator Raza Rabbani. A major focus of this Commission remained on provisions related to the enhancement of provincial autonomy, transfer and devolution of various subjects and abolition of the Concurrent Lists.

9.3 NINETEENTH AMENDMENT (APPOINTMENT OF JUDGES)

Some political circles criticized the Eighteenth Constitutional Amendment on the basis that it excluded the clause regarding the regular holding of party elections. Nonetheless, the major focus of the legal fraternity and some other sections of society was on Article 175A that introduced a two-step procedure comprising the Judicial Commission and the Parliamentary Committee for the selection of judges of the superior courts. Some of the lawyers and the Bar Councils maintained the inclusion of the Federal Law Minister and Attorney General in the Judicial Commission, each with a vote equal to the vote of the judicial members, which introduced political elements in this process.

[71] Rizvi, *Pakistan Political and Constitutional Engineering,* 622-23.

Article 239(5) of the Constitution stipulated that "No amendment of the Constitution shall be called in question in any court on any ground whatsoever."[72] Clause 6 of this Article says that "there is no limitation whatsoever" on the Parliament to amend any of the provisions of the Constitution."[73] However, 25 organizations of lawyers, other groups and individuals approached the Supreme Court on the new procedure for the appointment of judges laid down in the Eighteenth Constitutional Amendment. Iftikhar Muhammad Ch., Chief Justice, established a full court bench and announced a judgment on October 21, 2010, asking the Parliament to "re-examine the matter," keeping in view the court's observations in this regard.

These observations were accommodated, under the pressure of the Supreme Court, by the Parliament through passing the Nineteenth Constitutional Amendment, which was passed by the National Assembly with 258 votes in favor and one against on December 22, 2010. It was approved by the Senate unanimously on December 30th.[74] This amendment enhanced the role of the Chief Justice and increased the number of judicial members in the Judicial Commission. Ever since the passing of the Nineteenth Constitutional Amendment, the Chief Justice and judicial members of the Judicial Commission dominated the appointment of judges of the Supreme Court and the High Courts.

9.4 IMRAN KHAN CASE

The 18th constitutional amendment proposed the new formation of the Election Commission of Pakistan after amending the relevant articles of the constitution. The composition of ECP was increased from 3 to 5 members. The new ECP was comprised of the chief election commissioner and one member from each province. The process of selecting ECP members was changed. It resulted in the postponement of the composition of the new ECP. Meanwhile, by-elections were held at different provincial and national assembly constituencies as well. There was a total of 28 members of parliament elected in by-elections due to those casual vacancies. Imran Khan, the leader of PTI, challenged these by-elections on the pretext that the election was held in the absence of a constitutional ECP. Imran Khan also challenged the electoral rolls; he claimed that these voter lists had bogus votes.

[72] Rizvi, *Pakistan Political and Constitutional Engineering,* 630.
[73] Rizvi, *Pakistan Political and Constitutional Engineering,* 630.
[74] Rizvi, *Pakistan Political and Constitutional Engineering,* 630-32.

Chief Justice of the S Supreme Court of Pakistan, Iftikhar Muhammad Chaudhary and three other judges heard that constitutional petition and issued its verdict on 6th February 2012. The Supreme Court, after hearing the case, issued instructions to the government for the introduction of the constitutional amendment to provide legal cover to these by-elections. The court claimed that it exercised judicial restraint and provided a reasonable time to introduce a constitutional amendment. The 19th Amendment was already introduced under judicial pressure on the issue of judicial appointment.

Now, the SC was directing the parliament to introduce the 20th constitutional amendment due to legal complexities. The ECP also involved NADRA in the preparation of new electoral rolls, free of bogus entries. The SC informed by NADRA that it started preparing a new list of voters for the constituencies, where by-elections were going to be held under the instruction of the ECP. Only a few members, who were elected through by-elections, opted to defend their position.

The Supreme Court, considering the delay in the adoption of the amendment by the parliament, decided to suspend the membership of elected parliamentarians for the period of absence of the constitutional amendment. The membership would be restored after the adoption of the amendment by the parliament. Finally, the parliament adopted the amendment and conducted these by-elections, which were held during that period. The membership of 28 parliamentarians, including senators, MNAs and members of provincial assemblies, was restored. The judiciary claimed that it showed judicial restraint on that issue, while parliament perceived it as an intervention in the legislative process through judicial activism. Imran Khan perceived it as his legal victory. The Supreme Court claimed that holding free and fair elections according to the law was the responsibility of the Election Commission of Pakistan. The Supreme Court also assumed the role that the judges' oath required the protection and implementation of the Constitution. The judges assumed the role of custodians and guardians of the constitution as their legal and constitutional obligation.

9.5 TWENTIETH AMENDMENT (PROTECTING BY-ELECTIONS)

The Twentieth Amendment bill was passed by the National Assembly on February 14, 2012. It was then moved to the Senate, where it was passed on February 20, 2012, and signed by the President on February 28, 2012. The amendments were carried out in Article 48, Article 214, Article 215, Article 216, Article 218, Article 219, Article 224, Article 224A, and to the Second and Third Schedules to the Constitution. It laid down a process to install a caretaker setup and hold free and fair elections and matters related to the office of the Chief Election Commissioner and Members of EC.

The amendment reduced the number of committees in provinces for appointing caretaker chief ministers and their cabinets. It required to constitution of an eight-member committee, at the Center and the Provinces, to nominate the prime minister and the chief ministers, respectively and their cabinets. In case the constituted committees failed to evolve a consensus on a caretaker setup within three days, the matter would be referred to the ECP for appointing the caretaker Prime Minister and Chief Ministers. The Amendment now requires the Chief Justice of Pakistan to administer the oath of the new Chief Election Commissioner, who will then administer the oath to newly appointed members of the Election Commission.

The amendment required the same procedure to be followed for extension in the tenure of members of the ECP as specified for the Chief Election Commissioner. Similarly, the procedure to remove an ECP Member would be the same as the removal of the Chief Election Commissioner. Member of the ECP is now required to send their resignation to the President. Under this amendment, the provision of not holding an office of profit would now also apply to the members of the ECP, like the Chief Election Commissioner.

9.6 TWENTY-FIRST AMENDMENT (MILITARY COURTS)

The amendment established military speedy trial courts for terrorist offenses, waging war against Pakistan, and acts threatening the security of the country. The duration of these courts was to be two years. The decision to amend the constitution came after the 2014 Peshawar school massacre. **The** Twenty-first Amendment to the Constitution of Pakistan was passed by both the National Assembly and the Senate on January 6, 2015, and received the assent of the President on January 7, 2015. The Bill amended the Article 175 and the First Schedule of the Constitution. It included a self-contained sunset clause, which caused the amendments to expire on January 7, 2017.[75]

9.7 DISTRICT BAR ASSOCIATION RAWALPINDI CASE

The District Bar Association Rawalpindi Case came to the Supreme Court of Pakistan on the consolidated petitions that challenged the 18th and 21st Amendments to the Constitution of the Islamic Republic of Pakistan, 1973.

A majority of the Court answered the question in the affirmative, whether the judiciary can review the substance of constitutional amendments. Never before had the majority of the apex court affirmed the existence of a power to sit in judgment over deciding the substance of constitutional amendments. This ruling was one of

[75] Rizvi, *Pakistan Political and Constitutional Engineering,* 696-697.

the most important constitutional law decisions in the history of the country. It decided who has the final say and what counts as a substantively valid constitutional amendment while also revealing the apex court's treatment of the two amendments that seriously impacted the judiciary—these are the new appointment mechanism for superior judiciary through the inclusion of Article 175-A under the Eighteenth Amendment and the trial of a specified class of civilians before military courts under the Twenty-First Amendment.

The decision is very important because it reveals different conceptions of democracy that are part and parcel of the legal system. Just like the public on social media, the Supreme Court judges strongly disagreed on the extent of the Parliament's power to amend the Constitution. A significant majority, that is, thirteen out of the seventeen Judges, ruled that the Court "can strike down a constitutional amendment if it repeals, alters or abrogates the 'salient features' of that document".[76] Four Judges ruled that "the Court has no power to examine the validity of constitutional amendments" and hence they dismissed the petitions.[77] Eight other Judges joined these four in dismissing petitions, but these eight Judges ruled that while the power to strike down constitutional amendments exists, it is not being exercised in the current cases.

9.8 TWENTY-SECOND AMENDMENT (CHIEF ELECTION COMMISSIONER POWERS)

This amendment focused on the Election Commission of Pakistan (ECP). The national assembly passed it unanimously on May 19, 2016, and the Senate approved it on June 2. It received presidential assent on June 8. The amendment changed the recruitment criteria of the CEC and the members of the Commission. Before this change, only judges of the Supreme Court and high courts could be appointed as CEC and members. This amendment laid out that CEC could be a person who had been judge of the supreme court or a senior ex-civil servant with twenty years of professional standing and he retired in Grade 22 or above or a technocrat who had at least 16 years of education in an academic institution recognized by the Higher Education, with twenty years of experience, including a record of achievements at the national or international levels.

9.9 TWENTY-THIRD AMENDMENT (EXTENSION OF MILITARY COURTS)

The military courts, which were established through the 21st amendment, which expired after completing their term of two years in January 2017. The PMLN

[76] Rizvi, *Pakistan Political and Constitutional Engineering*.
[77] Rizvi, *Pakistan Political and Constitutional Engineering*.

government was interested in extending the term for another two to three years, but some political parties, especially the Pakistan People's Party, JUI and PKMAP, raised objections. The military establishment and intelligence agencies briefed the parliamentarians regarding the prevailing situations and the performance of the military courts and requested an extension for another two or three years. The tough negotiations between the government and opposition parties and the military establishment ultimately resulted in an evolving consensus to introduce the twenty-third amendment in the constitution for an extension of the military courts for two years. The bill was introduced in the National Assembly on March 21 and 255 members of the assembly voted in favor of the constitutional amendment. The members of PKMAP and one independent member voted against the bill. The JUI-F decided to abstain from the voting. Imran Khan also skipped the voting process as the party extended support. Later, the bill was presented in the Senate of Pakistan on March 28. It was approved by 78 members of the Senate of Pakistan. The JUI-F senators stayed away from the voting process. The president of Pakistan approved the bill on March 31 and after his approval, it became the law of the land through an amendment in the Pakistan Army Act 1952. After completing its two-year- term, the military courts' term expired on March 30, 2019. The PTI government was in power under the leadership of Imran Khan. The government wanted to extend the military courts' term for another two years, but it lacked the required numerical strength in the assembly.

During its functioning, military courts dealt with a total of 717 cases in the four-yearterm. The courts awarded 284 criminals death sentences, 192 prisoners were sentenced to different periods of imprisonment, two persons were acquitted, and 54 cases were dropped due to the lack of evidence. After the expiry of the term, there were 185 cases pending in the courts, which were transferred to the regular civilian courts for their trial. The military court trials were challenged in the high courts and the supreme courts. The Peshawar High Court declared the convictions of 200 and 196 by the military court as invalid in June and July 2020 in two petitions. The Peshawar High Court's decision was challenged in the Supreme Court, a three-member bench, which suspended the order of the PHC and the case was pending that case till the hearings of the appeal on the case.

9.10 TWENTY-FOURTH CONSTITUTIONAL AMENDMENT

After a long delay of almost two decades, Pakistan finally held a population census, and its results were announced in 2017. After the provisional results, the reallocation of National Assembly seats according to provincial share was required. The elections were due in the mid of 2018 after the expiration of the constitutional term of the Assemblies. The ECP was required to complete the process of delimitations of the new constituencies after the adoption of the constitutional

amendment. The proposed amendment was first introduced in the National Assembly and the Senate also passed it in December 2017. After receiving the Presidential assent, it became operational. Due to shifting demographic dynamics, the share of Baluchistan has increased from 14 general seats to 16 seats and one additional seat for women. KP also received four additional general seats and one reserved seat. The share of the KP provinces reached 48 from 43 seats. The federal capital also received its third seat after the amendment. The shares of the Punjab have reduced from 148 general seats to 141 seats. The province also lost its two women's reserved seats. The total share of the Punjab province was reduced from 183 seats to 174 seats. The share of Sindh and FATA remained the same. The amendment provided representation to the federating units according to their respective demographic strength.

25th Constitutional Amendment

The 25th constitutional amendment was introduced as a reform package for FATA. The seven tribal agencies and six frontier regions, which were previously managed by the federal government, after that amendment, were merged into KP province. The process of mainstreaming of these tribal areas, which were historically deprived of that opportunity during the British era. It also abolished the notorious FCR (Frontier Crimes Regulation), which was introduced by the British to manage the security of the region. There was a concept of collective punishment for individual acts. These reforms were generally welcomed by the Political parties with a few exceptions, like JUI-F, which opposed the move. Some tribal elders also opposed it due to their concerns about the local culture and traditions of tribes and their independent style of living.

The constitutional amendment was introduced in the National Assembly on May 24th, 2018. After its passage from the Assembly, the Senate of Pakistan also approved the amendment on May 25th, 2018. The KP provincial assembly adopted the amendment within a couple of days. The President of Pakistan gave his assent on May 31st. The amendment introduced changes in the following articles of the Constitution of Pakistan, i.e., 51, 59, 62, 106, 155 and 245. The amendment redefined the structure and composition of the state, federations and parliament as well. The amendment abolished the separate representation of FATA in the Senate, and the eight seats reserved for the region were abolished. The amendment reduced the strength of the Senate from 104 to 96 members. There were twelve reserved seats in the National Assembly for FATA before the merger. After the merger, the districts were allocated six seats as a share of KP in the National Assembly. That share was determined based on the population of the region.

After the merger, the people of the area received representation in the Provincial Assembly as well. The strength of the provincial assembly was increased from 124 seats to 145 seats in total. There were a total of 21 seats, out of which 16 were general seats, four were women reserved, and one seat was reserved for non-Muslims. The people of ex-FATA first elected their representative for the KP Provincial Assembly on July 20th, 2019. The political parties actively participated in the elections. The 2.8 million voters were registered, among them 27.6 % voters exercised their right to vote. The amendment also replaced the FCR, which was replaced by the "Rewaj" regulation suggested by a committee headed by Sartaj Aziz. The amendment also extended the jurisdiction of the Supreme Court and provincial high courts and the lower judiciary. The state of Pakistan had a dynamic constitution with the potential to respond to the challenges. The federal nature of the state required a rigid constitution, so the constitutional amendments were adopted through national consensus or at least with the support of a two-thirds majority of both houses of the parliament.

Self-Assessment Questions

1. How did the eighteenth constitutional amendment restore the Constitution of Pakistan 1973?

2. What series of political events was given birth to by the nineteenth constitutional amendment?

3. The establishment of military courts had been a controversial matter *ab initio*. Comment.

4. How did the Twenty-Second Amendment expand the powers of the Chief Election Commissioner?

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