

**THE JURISPRUDENCE OF DISSOLUTIONS: PRESIDENTIAL POWER
TO DISSOLVE ASSEMBLIES UNDER THE PAKISTANI
CONSTITUTION AND ITS DISCONTENTS**

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It will be seen that the declared objectives of the imposition of Martial Law are to create conditions suitable for the holding of free and fair elections in terms of the 1973 Constitution. . . . [T]he declared intention of the Chief Martial Law Administrator still remains the same, namely, that he has stepped in for a temporary period and for the limited purpose of arranging free and fair elections so as to enable the country to return to a democratic way of life.

In the presence of these unambiguous declarations, it would be highly unfair and uncharitable to attribute any other intention to the Chief Martial Law Administrator and to insinuate that he has not assumed power for the purposes stated by him, or that he does not intend to restore democratic institutions in terms of the 1973 Constitution.¹

. . . . While the Court does not consider it appropriate to issue any directions . . . as to a definite time-table for the holding of elections, the Court would like to state in clear terms that it has found it possible to validate the extra-Constitutional action of the Chief Martial Law Administrator not only for the reason that he stepped in to save the country at a time of grave national crisis and constitutional break-down, but also because of the solemn pledge given by him that the period of constitutional deviation shall be of as short a duration as possible, and that during this period all his energies shall be directed towards creating conditions conducive to the holding of free and fair elections, leading to the restoration of democratic rule in accordance with the dictates of the Constitution. The Court, therefore, expects the Chief Martial Law Administrator to redeem this pledge²

—Chief Justice S. Anwarul Haq writing the opinion of the Court in the *Nusrat Bhutto* case, which validated General Muhammad Zia-ul-Haq’s (“Zia”) imposition of martial law on July 5, 1977. Zia originally promised to hold elections within ninety days of his assuming power. In 1984, Zia held a controversial referendum to win a five-year term as President. Martial law was eventually lifted in 1985 and non-party-based elections were held in the same year. Zia, however, continued to retain both the offices of President and Chief of Army Staff until his death in 1988 in an air crash.³

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1. Begum Nusrat Bhutto v. Chief of Army Staff, 29 PLD 657, 715 (1977) (Pak.).
 2. *Id.* at 723.
 3. *See infra* Part II.

*We are of the view that the machinery of the Government at the Centre and the Provinces had completely broken down and the Constitution had been rendered unworkable. A situation arose for which the Constitution provided no solution and the Armed Forces had to intervene to save the State from further chaos, for maintenance of peace and order, economic stability, justice and good governance and to safeguard integrity and sovereignty of the country dictated by highest considerations of State necessity and welfare of the people*⁴

*[I]t has already been emphasized in the Short Order that prolonged involvement of the Army in civil affairs runs a grave risk of politicizing it, which would not be in national interest and that civilian rule in the country must be restored within the shortest possible time after achieving the declared objectives as reflected in the speeches of the Chief Executive, dated 13th and 17th October, 1999, which necessitated the military takeover.*⁵

—Chief Justice Irshad Hasan Khan writing the opinion of the Court in the *Zafar Ali Shah* case, which validated General Pervez Musharraf's imposition of martial law on October 12, 1999. In 2002, Musharraf held a controversial referendum to win a five-year term as President. Martial law was eventually lifted in 2002, and elections were held in the same year. Musharraf, however, continues to retain both the offices of President and Chief of the Army Staff.⁶

The Pakistan Supreme Court judgments quoted from above, separated as they are by twenty-three years, have an uncanny resemblance in both their logic and purpose. Both legitimize military dictators and beget cynicism and lack of faith in the ongoing democratic process in the country. Both, nevertheless, implore a quick return to civilian rule, expressing tremendous faith in the perpetrators of the coups. Such judicial pronouncements lend further credence to Pakistan's image as a failed state in the minds of some international observers, who refuse to acknowledge it as a nation-state, even several decades after its creation. These judgments also influence local commentators to describe Pakistan as a nondemocratic state with an underdeveloped political culture and a judiciary that is pliant to the will of the military-political establishment.⁷ However, Pakistan's constitutional history is arguably much more complex than such a

4. *Zafar Ali Shah v. General Pervez Musharraf*, 52 PLD 869, 1169 (2000) (Pak.).

5. *Id.* at 1207.

6. *See infra* Part IV.

7. *See* MEGHNAD DESAI & AITZAZ AHSAN, *DIVIDED BY DEMOCRACY* 111-22 (David Page ed., Roli 2005); *see also* LAWRENCE ZIRING, *PAKISTAN IN THE TWENTIETH CENTURY: A POLITICAL HISTORY* 614 (1997).

generalization would suggest, and in order to assess the future of constitutionalism and democracy in this geopolitically significant country, it is important to gauge the vibrancy of its democratic ethos and the historical attempts at entrenching such ethos. An unstable Pakistan signals negative ramifications on a scale that transcends its national boundaries, and that makes it a very important case study.

To Muhammad Ali Jinnah, the nation's founding father (fondly referred to by Pakistanis as the "Quaid-i-Azam" or the "Great Leader"), it was crystal clear that Pakistan's future lay in strong traditions of constitutional democracy, as evidenced by his several statements and speeches at the time of its birth.⁸ In a significant speech at that time, he expressed unequivocal admiration for American democracy and charted out his own nation's ideals and goals:

Though Pakistan is a new State, for well over a century now there have been many connections of trade and commerce between the people of Pakistan and the people of the United States. The relationship was strengthened and made more direct and intimate during two World Wars and more particularly and more recently during the Second World War when our two people stood shoulder to shoulder in defense of democracy. The historic fight, for self-government by your people and its achievement by them, the consistent teaching and practice of democracy in your country had for generations acted as a beacon light and had in no small measure served to give inspiration to nations who like us were striving for independence and freedom from the shackles of foreign rule.⁹

It is, therefore, no coincidence that over half a century later Pakistan and the United States are part of another alliance for democracy. Significantly, however, Pakistan is no longer led by a brilliant constitutional lawyer, statesman, and advocate for democracy, but a military ruler. How this came to pass is an important story.

8. See, e.g., ZULFIKAR KHALID MALUKA, *THE MYTH OF CONSTITUTIONALISM IN PAKISTAN* 70-75 (Oxford Univ. Press 1995); ALLEN MCGRATH, *THE DESTRUCTION OF PAKISTAN'S DEMOCRACY* 42-44 (Oxford Univ. Press 1996). See generally MOHAMMED ALI JINNAH, *JINNAH: SPEECHES AND STATEMENTS 1947-1948* (S. M. Burke ed., Oxford Univ. Press 2004) (2000).

9. Quaid-i-Azam Mohammad Ali Jinnah, *Pakistan and USA: Equal Partners in Defense of Democracy*, Reply to the Speech Made by the First Ambassador of the United States of America at the Time of Presenting his Credentials to Quaid-i-Azam (Feb. 26, 1948), in MOHAMMED ALI JINNAH, *JINNAH: SPEECHES AND STATEMENTS 1947-1948*, *supra* note 8, at 127-28.

I. INTRODUCTION

Since its emergence on August 14, 1947, Pakistan's political and constitutional evolution has been repeatedly interrupted by praetorian rule through several impositions of martial law—the most recent one imposed after General Pervez Musharraf's military coup in 1999. Musharraf's coup was legitimized by the judiciary, which has been habitually relegated to the task of validating army take-overs through questionable jurisprudence.¹⁰ Musharraf continues to hold the dual position of President of Pakistan and Chief of Army Staff, thus epitomizing the military's historically dual role in Pakistan. The primary tool employed by him for controlling the recently revived political process is the highly controversial Article 58(2)(b) of the Pakistani Constitution, which entrenches tremendous political power in his person. This provision was originally inserted into the Pakistani Constitution in 1985 by Pakistan's previous military dictator, General Muhammad Zia-ul-Haq ("Zia").¹¹ Zia had also assumed power through a military coup in 1977 and ruled Pakistan mostly through martial law until his controversial death in 1988 in a mysterious air crash.¹²

Article 58(2)(b) is arguably the most significant act of constitutional engineering in Pakistan's recent history. It provides the President of Pakistan with untrammelled discretionary powers to dissolve elected governments on a largely subjective judgment of their performance. No previous constitutional arrangement in Pakistan offers a precedent or parallel for such powers, and this has caused some commentators to describe the country's existing constitutional structure as a hybrid of a parliamentary and a presidential system of government,¹³ or, more critically, as a hybrid of constitutional democracy and executive tyranny.¹⁴

10. For the most recent such legitimization, see *Zafar Ali Shah v. General Pervez Musharraf*, 52 PLD 869, 1219-23 (2000) (Pak.); see also *infra* Part IV.A.

11. See *infra* Parts I.B-C.

12. ZIRING, *supra* note 7, at 501-02. For an analysis of the Zia era and the events leading to the introduction of Article 58(2)(b), see *infra* Parts I.B, I.D-E. On August 17, 1988, Zia's U.S.-built C-130 military transport plane crashed shortly after takeoff from Bahawalpur, a town in Southern Punjab where Zia had gone to witness the demonstration of the American M-1 tank. ZIRING, *supra* note 7, at 501-02. On board were several top-ranking Pakistani military officers as well as the American Ambassador to Pakistan, Arnold Raphel, and the U.S. Chief Military Attache, Brigadier-General Herbert Wassom. *Id.* There were no survivors. *Id.* While sabotage was widely suspected and alleged, several inquiries later, no official report has been made public that formally and convincingly explains the crash. See *id.* at 503-04.

13. See, e.g., *Ahmad Tariq Rahim v. Pakistan*, 44 PLD 646, 684 (1992) (Pak.).

14. See, e.g., THE NATIONAL ASSEMBLY OF PAKISTAN DEBATES: OFFICIAL REPORT IV, 1964-66 (1985) [hereinafter OFFICIAL REPORT IV]; see also MALUKA, *supra* note 8, at 272-73.

Advocates of Article 58(2)(b) describe it as a “safety valve” against imposition of direct martial laws that have ruled the country in the past.¹⁵ They argue that instead of the army stepping in, as it has done in the past, to ostensibly resolve a constitutional stalemate, such stalemates can now be constitutionally resolved through the invocation of Article 58(2)(b).¹⁶ They further describe it as a source of adequate balance between presidential and prime ministerial powers, and contend it brings greater political stability through a meaningful check over governmental excesses and incompetence that, according to them, led to constitutional crises in the past.¹⁷ They rely in particular on the constitutional stalemate of 1977 that led to Zia’s martial law, which will be discussed at length later in this Article.¹⁸

A strong contrary opinion is that Article 58(2)(b) has been a reason for, rather than a solution to, acute political instability for Pakistan, as four elected governments were dissolved through it in the short span of eight years after its first invocation by Zia.¹⁹ This, to Article 58(2)(b)’s critics, has had hugely negative ramifications for a nascent democratic culture.²⁰ Furthermore, these dissolutions were legally challenged and invariably judicially legitimized. It can be argued that the resultant judicial pronouncements have undermined judicial integrity, capacity, and consistency.²¹

After its repeal in 1998 while an elected government was in power, the re-emergence of Article 58(2)(b) under Musharraf portends that quite apart from its telling historical role, the provision can play an equally important part in shaping Pakistan’s future.²² Like before, the President of Pakistan, who is currently also its Chief of Army Staff, has a constitutional mechanism to get rid of an elected government in a highhanded manner. Given the continuing political instability of the country and its weak institutional culture, a government that exerts any independence and does not fully subscribe to the presidential view of things is quite likely to be shown its way out in such a manner.

This Article attempts to assess the place and significance of Article 58(2)(b) in Pakistan’s constitutional history; to gauge its capacity for providing a

15. OFFICIAL REPORT IV, *supra* note 14, at 1572-73, 1791, 1800, 2176-77; Mahmood Khan Achakzai v. Pakistan, 49 PLD 426, 446-47, 480 (1997); *see generally* HAMID KHAN, EIGHTH AMENDMENT: CONSTITUTIONAL & POLITICAL CRISIS IN PAKISTAN 111-32 (2d ed. 1995).

16. *See* sources cited *supra* note 15.

17. *See* sources cited *supra* note 15.

18. *See* discussion *infra* Parts I.B-D.

19. HAMID KHAN, CONSTITUTIONAL AND POLITICAL HISTORY OF PAKISTAN 863-64 (Oxford Univ. Press 2001). From 1988 to 1996, four elected governments were dissolved: Junejo’s government in 1988, Benazir’s government in 1990, Nawaz Sharif’s government in 1993, and the second Benazir’s government in 1996. *Id.*

20. *See* KHAN, *supra* note 15, at 133-35.

21. *See infra* Part V.

22. *See infra* Parts IV-V.

constitutional solution to Pakistan's perennial political instability; and to determine the nature and extent of its fallouts, particularly its effect on the judiciary and judicial output. Part I of this Article briefly looks at the historical context of Article 58(2)(b), introduces the divergent and at times polarized political and constitutional positions provoked by it, and lays down the framework of inquiry for this Article's analysis. Part II discusses the lessons learned from detailed archival research into Article 58(2)(b)'s legislative genesis and its complex interpretive challenges. Part III conducts a scrutiny of the jurisprudence that has emerged due to invocation of Article 58(2)(b) on four separate occasions between 1988 and 1996. Part IV analyzes the provision's re-emergence under Musharraf after its repeal in 1998. Part V offers conclusions on this controversial provision's impact on the Constitution as well as on the future of constitutionalism in Pakistan.

A. Constitutions and Martial Laws

In Pakistan's fifty-eight-year history, constitutional evolution and state formation and structuring have been largely constrained by the institutional imbalances and weak political culture that the newly emerged country inherited at the time of its independence. These processes were further impeded by the post-independence curtailment of political activity through dominance, initially by a bureaucratic military grid and later by a military junta.²³ Since the country's tumultuous first decade,²⁴ usurpation of power by praetorian rulers has come through several impositions of martial law, at times preceded by traumatic coups d'état.²⁵ Pakistan, therefore, has experienced direct military rule for more than

23. For a perceptive analysis of Pakistan's first decade and the combination of international political and economic imperatives, as well as regional and domestic factors that allowed the military-bureaucracy grid to assume a dominant role in decisionmaking within the state structure, see AYESHA JALAL, *THE STATE OF MARTIAL RULE: THE ORIGINS OF PAKISTAN'S POLITICAL ECONOMY OF DEFENCE* (C.A. Bayly et al. eds., Cambridge Univ. Press 1990); see also MOHAMMAD WASEEM, *POLITICS AND THE STATE IN PAKISTAN* (1989).

24. According to Paula R. Newberg, during this significant decade, "relationships between the executive and legislatures in Pakistan came into profound conflict; these contests became paradigmatic for politics for the next several decades." PAULA R. NEWBERG, *JUDGING THE STATE: COURTS AND CONSTITUTIONAL POLITICS IN PAKISTAN* 36-37 (1995).

25. Though I am dealing here with the four major martial laws imposed in Pakistan, there have been seven displacements of civilian governance with military rule since independence:

- (1) Martial law imposed by the federal government in Lahore in 1953 to suppress anti-Ahmadiyya agitation and the resultant disturbances (Ahmadis claim to be a sect of Islam, though that very assertion is the main point of dispute between Ahmadis and mainstream Islamic clerics);

half of its history, and for the rest, the military has played a decisive role in national affairs behind the scenes.

After Pakistan's emergence as an independent nation-state, two acts of the British Parliament governed its new political framework. The Government of India Act (1935), an imperial holdover acting as de facto provisional constitution, carried over the office and powers of the Governor-General, who represented the British Crown for purposes of the Government of the Federation.²⁶ The forward-looking Indian Independence Act (1947) created a Constituent Assembly to perform legislative functions and, more crucially, to frame the country's first constitution.²⁷ The burden of having to define both the country's legal as well as political frameworks, which created at times conflicting demands, proved onerous for the first Constituent Assembly.²⁸ The challenges of constitution-making and lawmaking constantly encroached upon each other. Effective governance is a formidable task for any new legislative body, made more difficult in Pakistan's case by increasing conflicts between the Constituent Assembly and the office of the Governor-General—two institutions drawing power from different governing laws, and distinct in their history, emphasis, and approach to governance.²⁹

This worsening relationship culminated in Governor-General Ghulam Muhammad declaring a state of emergency on October 24, 1954, effectively dissolving the Assembly—a decision that was controversially upheld by the country's highest court through a purely technical and unpersuasive interpretation of the laws laying down the respective jurisdiction and powers of the Constituent

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- (2) The 1958 martial law imposed by President Iskander Mirza and Federal Marshal Muhammad Ayub Khan;
 - (3) The 1969 martial law imposed by General Agha Muhammad Yahya Khan;
 - (4) Continuation of the 1969 martial law by Zulfikar Ali Bhutto on assuming power on December 20, 1971; Bhutto thus becoming the country's first civilian Chief Martial Law Administrator;
 - (5) Local martial law imposed in April 1977 in several cities of Pakistan, by Zulfikar Ali Bhutto's federal government under Article 245 of the 1973 Constitution;
 - (6) Martial law imposed on July 5, 1977, by General Muhammad Zia-ul-Haq to depose Prime Minister Zulfikar Ali Bhutto; and
 - (7) Martial law imposed on October 13, 1999, by General Pervez Musharraf, to depose Prime Minister Nawaz Sharif.

See Begum Nusrat Bhutto v. Chief of Army Staff, 29 PLD 657, 675 (1977) (Pak.) (with slight adaptation of language and the addition of the most recent Musharraf martial law).

26. Government of India Act, 1935, 25 Geo. V, c. 2, § 7.

27. Indian Independence Act, §§ 6, 8 (1947) (Pak.), *reprinted in* DR. SAFDAR MAHMOOD, CONSTITUTIONAL FOUNDATION OF PAKISTAN 33-35 (Lahore: Jang Publishers 1990) (1975).

28. *See generally* KHAN, *supra* note 19, at 106-33.

29. *Id.* at 130-31; *see also* MALUKA, *supra* note 8, at 137-39.

Assembly and the Governor-General.³⁰ Seven years into independence, the first constitutional debacle had emerged. Constitution-making through a transparent, popularly accepted process, as well as the sanctity of legislative bodies, received a serious blow. Pakistan never quite recovered from this setback, and three subsequent attempts at framing and sustaining a constitution in 1956, 1962, and 1973 came to premature and abrupt ends due to the martial laws of 1958, 1969, and 1977, respectively, which abrogated or put in abeyance these constitutions.³¹

Fluid political structures, governance inexperience, and power politics contributed to the inability of parliamentary democracy to govern the new country effectively. In later years, these failures served as potent exhibits in the junta's prosecution case against electoral democracy. Like characters in a tableau depicting the last days of the Mughal Empire, elected governments appeared and disappeared with a resigned, apologetic, and fatalistic rapidity. The imperatives of unconstitutional regimes seeking legal and moral legitimacy, as well as the systemic derailing and chaos caused by oscillations between civil and military rule compelled the Pakistani judiciary to play the role of both court and parliament. The legal challenges to the military coups repeatedly put the judiciary in a very difficult position, with the Supreme Court persuading itself to go to fantastical extremes in order to validate illegal takeovers, adducing support from obscure and controversial jurisprudential sources.³²

During this time, the Supreme Court introduced the controversial doctrine of revolutionary legality, based on a politicized misreading of Professor Hans Kelsen's "theory of revolutionary legality."³³ Commentators find the Supreme Court judgments from this period a "landmark in common law jurisprudence regarding the validity, legitimacy, and legislative capacity of extra-constitutional regimes."³⁴ They argue that they provide the first express transformation of Professor Hans Kelsen's theories of constitution and revolution

30. *See* *Pakistan v. Moulvi Tamizuddin Khan*, 7 PLD 240, 240-45 (Fed. App. 1955) (Pak.); *see* SYED SHARIFUDDEN PIRZADA, *DISSOLUTION OF CONSTITUENT ASSEMBLY OF PAKISTAN AND THE LEGAL BATTLES OF MOULVI TAMIZUDDIN KHAN* (1995); *see also* FAROOQ HASSAN, *THE GENESIS OF THE CONSTITUTIONAL DILEMMAS OF PAKISTAN* (Aziz Publishers 1989); MALUKA, *supra* note 8, at 139-43.

31. *See generally* KHAN, *supra* note 19; NEWBERG, *supra* note 24; IMTIAZ OMAR, *EMERGENCY POWERS AND THE COURTS IN INDIA AND PAKISTAN* (2002); ZIRING, *supra* note 7.

32. *See* Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup d' Etat & Common Law*, 27 CORNELL INT'L L.J. 49, 56-57 (Winter 1994) [hereinafter Mahmud, *Jurisprudence*]; *see also* Tayyab Mahmud, *Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan*, 1993 UTAH L. REV. 1225, 1245 [hereinafter Mahmud, *Praetorianism*] (examining judicial reactions to constitutional challenges in Pakistan).

33. *See* HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 116-19, 220-21, 368-69 (Anders Wedbeg trans., Harvard Univ. Press 1949).

34. Mahmud, *Jurisprudence*, *supra* note 32, at 56; *see* Mahmud, *Praetorianism*, *supra* note 32, at 1245.

into a judicially pronounced common law “doctrine of revolutionary legality.”³⁵ They insist that these judgments raised serious questions of political validity, cast a deep shadow on the personal integrity of the judges, and were negligently oblivious to the political implications of their sweeping holdings.³⁶ The burden placed on the judiciary was such that Justice Muhammad Munir, the first Chief Justice of Pakistan’s highest court and the architect of (and to many, the culprit behind) these controversial early rulings, described the pressures he faced as follows: “The mental anguish caused to the Judges by these cases is beyond description and I repeat that no judiciary anywhere in the world had to pass through what may be described as a judicial torture.”³⁷

B. Zia’s Martial Law and the Impact of Its Constitutional Engineering—The Eighth Amendment

The 1977 martial law gave birth to Zia’s eleven-year-long authoritarian rule over Pakistan, looked upon by many as an era that exacerbated the country’s political instability and further confused its constitutional milieu.³⁸ Most importantly, Zia assumed for himself the power of amending the Constitution. Judges of the superior courts were required to take a loyalty oath under the Provisional Constitutional Order,³⁹ which amounted to a pledge of allegiance to the new military order, to the exclusion of the earlier constitutional system.⁴⁰ At the same time, the oath was used to purge independent-minded judges, who refused the oath or were not invited to take it.⁴¹ Zulfikar Ali Bhutto’s highly controversial trial and execution, in the face of strong domestic and international protest, is perhaps the most ignominious episode from Zia’s early years.⁴² Zia’s regime curtailed fundamental rights and political activity on a day-to-day basis, as well as in deep institutional ways. A new brand of Islamic obscurantism and, to

35. Mahmud, *Jurisprudence*, *supra* note 32, at 56; *see* Mahmud, *Praetorianism*, *supra* note 32, at 1245.

36. *See* Mahmud, *Jurisprudence*, *supra* note 32, at 138-40; Mahmud, *Praetorianism*, *supra* note 32, at 1302-06.

37. NAZIR HUSSAIN CHAUDHRI, CHIEF JUSTICE MUHAMMAD MUNIR: HIS LIFE, WRITINGS AND JUDGMENTS 20 (1973).

38. For a more detailed discussion of the impact of the Zia years on Pakistan’s political history, *see* generally KHAN, *supra* note 19, at 579-667; LAWYER’S COMM. FOR HUMAN RIGHTS, ZIA’S LAW: HUMAN RIGHTS UNDER MILITARY RULE IN PAKISTAN (1985); M. DILAWAR MAHMOOD, THE JUDICIARY AND POLITICS IN PAKISTAN: A STUDY 73-154 (1992); MALUKA, *supra* note 8, at 255-76; NEWBERG, *supra* note 24, at 171-99; ZIRING, *supra* note 7, at 423-502.

39. Provisional Constitution Order, Chief Martial Law Administrator’s Order No. 1 of 1981 (Pak.), *reprinted in* 33 PLD 183, 183-91 (1981) (Pak.); *see infra* Parts II.A, IV.A.

40. *See* KHAN, *supra* note 19, at 648.

41. *Id.* at 648-51.

42. *See generally id.* at 596-628.

many, a facile, opportunistic use of religion to legitimize *realpolitik* brought about the introduction of flawed and highly controversial personal morality and blasphemy laws, the empowerment of courts to declare any law as un-Islamic, and the concurrent curtailment of courts' jurisdiction in matters concerning fundamental rights and civil liberties.⁴³ Open intimidation of judges and politicians happened as well. Zia created parallel and unaccountable military courts, as well as the Federal Shariat Court, with jurisdiction in issues involving matters of *Sharia*.⁴⁴ The Federal Shariat Court was, at times, used for pushing upstairs independent-minded judges of the high courts.⁴⁵ These steps caused jurisdictional/doctrinal confusions in many areas of law. The political debate grew further confused with the creation of a non-representative, nominated, puppet Federal Council called the *Majlis-e-Shoora*.⁴⁶ Other prominent fallouts of the Zia era include the militarization of society, the emergence of drug barons as a potent political force, and language-based politics.⁴⁷ Throughout this period, Zia received strong cold war support from the United States and the West owing to the Russian invasion of Afghanistan and the resultant jihad that made Zia a necessary ally for the West.⁴⁸

After eight years of rigid clampdown on political activity, Zia reluctantly and only ostensibly relinquished limited powers to a timid new government in 1985.⁴⁹ This government was elected on a non-party basis in a strategically depoliticized environment, where most of the country's leading politicians had been marginalized in one way or another—they were banned, constrained, or restricted, or compelled to boycott the elections because they had no faith in its freedom and fairness.⁵⁰

Zia's martial law is distinct from previous martial laws in one significant respect. While his predecessors drastically and irrevocably brought to closure short periods of constitutional rule through outright abrogation of constitutions, Zia put the only consensus-based constitution of the country—the Constitution of 1973—into cold storage, resurrecting it at a later stage, but with crucial structural changes to enhance executive power.⁵¹ To many who categorize Zia's regime as Machiavellian, one particular set of amendments to the Constitution of 1973 epitomizes his stratagems to further entrench his rule.⁵² This set of amendments

43. *See id.* at 627-28, 663-66.

44. *See id.* at 636-41.

45. *Id.* at 638, 641.

46. KHAN, *supra* note 19, at 653-54. The President chose the members of the *Majlis-e-Shoora*, assigned functions to them, and could dissolve the *Majlis-e-Shoora* at will. *Id.*

47. *See id.* at 700.

48. *See* sources cited *supra* note 38.

49. *See* NEWBERG, *supra* note 24, at 188-90.

50. *Id.*

51. *See* MALUKA, *supra* note 8, at 271-73.

52. *See generally id.* at 271-74; *see also* NEWBERG, *supra* note 24, at 190-91; KHAN, *supra* note 19, at 676-79.

has become part of the Pakistani nomenclature as the “Eighth Amendment.”⁵³ The term has come to acquire a sinister aura, so that it is now used in popular parlance as a synonym for intrigue and deception. More simplistic analyses of the country’s travails categorize the Eighth Amendment as the Pandora’s box that can be blamed for Pakistan’s contemporary woes.⁵⁴

C. Article 58(2)(b)—An Unprecedented Provision and the Primary Source of Controversy

The Eighth Amendment’s most controversial aspect was the unprecedented empowerment of the President—through the addition of Article 58(2)(b) to the Constitution—to dissolve elected assemblies on a largely subjective evaluation of their performance.⁵⁵ Article 58(2)(b)’s formulation deserves a close look.⁵⁶ The presidential power of dissolution provided under

53. Since the amendments were introduced through the Constitution (Eighth Amendment) Act, 1985.

54. MAHMOOD, *supra* note 38, at iii.

55. The Constitution (Eighth Amendment) Act, 1985, § 5 (Pak.), *available at* http://www.nrb.gov.pk/constitutional_and_legal/constitution/amendments_text.pdf.

56. Article 58 provides:

- (1) The President shall dissolve the National Assembly if so advised by the Prime Minister; and the National Assembly shall, unless sooner dissolved, stand dissolved at the expiration of forty-eight hours after the Prime Minister has so advised.

Explanation. Reference in this Article to “Prime Minister” shall not be construed to include reference to a Prime Minister against whom a notice of a resolution for a vote of no-confidence has been given in the National Assembly but has not been voted upon or against whom such a resolution has been passed or who is continuing in office after his resignation or after the dissolution of the National Assembly.

- (2) Notwithstanding anything contained in clause (2) of Article 48, the President may also dissolve the National Assembly in his discretion where, in his opinion,
 - (a) a vote of no-confidence having been passed against the Prime Minister, no other member of the National Assembly is likely to command the confidence of the majority of the members of the National Assembly in accordance with the provisions of the Constitution, as ascertained in a session of the National Assembly summoned for the purpose; or
 - (b) a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.

Article 58(2)(b) is broader and more subjective than under any previous Pakistani constitutional arrangement or, for that matter, any regional constitutional arrangement.⁵⁷ A quick review of similar provisions under previous Pakistani constitutions will bear this out.

Under the 1956 Constitution, the President, who was the executive Head of State, was required to function within the confines and constraints of a parliamentary system.⁵⁸ Pakistan's early and ongoing experience with drastic use of executive power⁵⁹ seems to have dictated a constitutional arrangement whereby the President could only remove the Prime Minister from office in the scenario where the Prime Minister no longer commanded the confidence of the majority of the members of the National Assembly.⁶⁰ The President could also summon, prorogue, or dissolve the National Assembly, but only on the advice of the cabinet.⁶¹ Thus, while entrusted with important functions, the President's powers

CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN art. 58 (amended 1985), *available at* http://www.nrb.gov.pk/constitutional_and_legal/constitution/part3.ch2.html; The Constitution (Eighth Amendment) Act, 1985, § 5 (Pak.), *available at* http://www.nrb.gov.pk/constitutional_and_legal/constitution/amendments_text.pdf.

57. For example, Article 85(2) of the 1949 Constitution of India, read in conjunction with Article 74(1), tells us that the President can dissolve the House of the People (Lower House of the Indian Parliament) but only in consultation with the Council of Ministers headed by the Prime Minister, whose advice is binding on the President. *See* DURGA DAS BASU, *SHORTER CONSTITUTION OF INDIA* 489, 507-08 (13th ed. 2003). The President may require the Council of Ministers to reconsider such advice but shall act in accordance with the advice tendered after such reconsideration. *See id.*

58. CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN arts. 32, 35, 37, 39, 41-43 (1956) (abrogated 1958).

59. After Governor-General Ghulam Muhammad's dissolution of Khawaja Nazimuddin's government in 1953, five successive Prime Ministers, Muhammad Ali Bogra, Chaudhry Mohammad Ali, Hussain Shaheed Suharwardi, I.I. Chundrigar, and Malik Feroze Khan Noon fell in the pre-1958 martial-law era to the vagaries of fluid political and constitutional structures, governance inexperience, insidious power politics, and the tussle between the executive and the legislature. DESAI & AHSAN, *supra* note 7, at 102-06. *See generally* MCGRATH, *supra* note 8.

60. CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN art. 37(6)-(7) (1956) (abrogated 1958).

61. *Id.* arts. 37(7), 50. KHAN, *supra* note 19, at 175-76, points out that:

In the draft Constitution of the second Constituent Assembly there was a provision that the President might at his discretion dissolve the National Assembly if he were satisfied that it had ceased to command the confidence of the majority of the electorate. This proposal raised strong protests both inside and outside the Assembly and consequently, the Constitution provided that the dissolution should take place on the advice of the Cabinet.

were firmly reined in by the constraint of mandatory cabinet advice on various key matters.

The Constitution of 1962, which emerged during General Ayub Khan's military rule that had abrogated the Constitution of 1956, provided for a government comprised of a President and a central legislature called the National Assembly.⁶² It laid out not just a presidential form of government, but an unabashedly president-centric one.⁶³ The powers given to the President were considerable and the checks on his exercise of that power were minimal.⁶⁴ However, despite General's Ayub's predilection for a strong presidential form of government and his own not-coincidental occupation of that position, there were some important restraints on the President's power to dissolve the National Assembly. Article 23(3) precluded the possibility of the President dissolving the Assembly as a preemptive strike (i.e., he could not dissolve the Assembly if an impeachment resolution had been initiated against him).⁶⁵ Article 23(4) acted as a deterrent against the President taking the dissolution decision in a cavalier fashion, by mandating that after dissolving the Assembly, he too was to cease holding office.⁶⁶

The Constitution of 1973 was the result of the eventual emergence of popular politics, which translated into sustained legislative activity with multiple stakeholders and political ideologies successfully culminating in a consensus document. It reversed the situation and made presidential power strictly subject to prime ministerial advice, while including safeguards against prime ministerial abuse of dissolution as a preemptive tactic against a potential vote of no-confidence, or as a revenge measure, if the Prime Minister had already been unseated through such a successful vote.⁶⁷

This brief review of previous Pakistani constitutional arrangements makes clear the extent to which Article 58(2)(b) marks a dramatic expansion of presidential powers to control elected assemblies. Never before has the President been given such untrammelled discretionary power with seemingly no accountability for wrongful or erroneous exercise. To its critics, this is one of Article 58(2)(b)'s fundamental shortcomings.

62. CONSTITUTION OF THE REPUBLIC OF PAKISTAN arts. 9, 19 (1962) (abrogated 1969).

63. *Id.* arts 9, 17, 18, 19, 22, 23, 26-36, and 209.

64. See HERBERT FELDMAN, *Revolution in Pakistan: A Study of the Martial Law Administration*, in THE HERBERT FELDMAN OMNIBUS 13, 245-51 (2001). Apart from considerable empowerment of the President, the system visualized an arrangement whereby he could give or withhold assent to all legislation (or return it to the Assembly for fresh consideration), and in case of a persistent difference of opinion, he could refer it to the electoral college for a verdict. *Id.* at 246. The Assembly, however, was provided no such access to the electoral college. *Id.*

65. CONSTITUTION OF THE REPUBLIC OF PAKISTAN art. 23(3) (1962) (abrogated 1969).

66. *Id.* art. 23(4).

67. CONSTITUTION OF THE REPUBLIC OF PAKISTAN art. 58 (1973), available at http://www.nrb.gov.pk/constitutional_and_legal/constitution/part3.ch2.html.

D. The 1977 Constitutional Stalemate—The Official Raison d’Être for Article 58(2)(b)

The emergence of Zulfikar Ali Bhutto’s populist Pakistan People’s Party (PPP) on the political scene in the 1970s is a watershed event in Pakistan’s political evolution.⁶⁸ Considering the country’s tumultuous past, commentators give Bhutto credit for undertaking various measures to curb the influence of the hitherto dominant military-bureaucratic oligarchy. They emphasize the gargantuan forces that Bhutto was up against.⁶⁹ At the same time, they argue that Bhutto’s eventual demise resulted from both the legacy of “political structures . . . persistently impaired by the precedent set by previous military rule,” as well as his government’s failure “to abide by the framework of legitimate civilian rule.”⁷⁰

68. Zulfikar Ali Bhutto emerged on the political arena when he was inducted into President Iskander Mirza’s cabinet after Mirza’s imposition of martial law on October 8, 1958, in cohorts with the Commander-in-Chief of the Army, General Muhammad Ayub Khan. See KHAN, *supra* note 19, at 437 (Bhutto created an “entirely new” party with support of students and professionals; its “main plank” resembled a “socialist manifesto,” including nationalization of industries and banks). Zulfikar Ali Bhutto first came into political prominence when President Mirza made him a member of the first martial law cabinet on October 8, 1958. *Id.* at 434. Despite the ouster of Mirza on October 27, 1958, the Army Commander-in-Chief and now President, General Khan, retained Bhutto. *Id.* For events leading to the imposition of the first martial law in Pakistan, see *supra* note 59 and accompanying text. Bhutto held various positions in Ayub’s cabinet, including becoming Foreign Minister in 1963, but eventually left the cabinet as a “disillusioned young man.” KHAN, *supra* note 19, at 435. Ayub stepped down on March 25, 1969, succeeded by the Army Commander-in-Chief General Yahya, who immediately placed the country under martial law and assumed the office of President on April 1, 1969. *Id.* at 371. Under Yahya, Pakistan held general elections on December 7, 1970, for the National Assembly, and on December 17, 1970, for the Provincial Assemblies. *Id.* at 381, 383. Bhutto’s newly formed Pakistan People’s Party (PPP) emerged with a large majority in both elections. *Id.* at 381-82. A series of events led to East Pakistan, now Bangladesh, declaring independence on March 25, 1971. *Id.* at 385-404, 406. Following Pakistan’s military debacle in the region in the same year, Bhutto succeeded Yahya as President and Chief Martial Law Administrator. *Id.* at 438. Pakistan did not hold new elections for the National Assembly after the division of the country. *Id.* at 448. No elections were held under either the Interim Constitution of 1972 or the Constitution of 1973, which resulted in the same National Assembly, elected prior to the split, remaining intact until August 14, 1977. *Id.* at 509. On August 12, 1973, the National Assembly elected Bhutto as Prime Minister. *Id.* at 510. For further coverage of events leading to Pakistan’s breakup in 1971 and Bhutto’s emergence as a politician, see generally *id.* at 375-438.

69. See generally JALAL, *supra* note 23, at 310-16 (explaining that, following the military’s debacles, effecting change required maintaining support of a coalition with extremely varied ideologies and interests while working within the entrenched institutional balance of power by cooperating with the military and the civil bureaucracy).

70. OMAR NOMAN, PAKISTAN: A POLITICAL AND ECONOMIC HISTORY SINCE 1947, at 58 (rev. ed. 1990).

Other commentators squarely place the blame on Bhutto for transforming his civilian government into a highly autocratic regime, betraying his charismatic promises to bring about a progressive, participatory government, thereby paving the way for Zia's martial law.⁷¹

Bhutto's paradoxical personality seems to have characterized his politics, which was distinguished by mass populism that galvanized, for the first time in the country's history, huge disadvantaged sections of society.⁷² Controversial nationalization policies, strong-arm tactics, and political intolerance, however, characterized his later years.⁷³ While attempting to keep the military out of politics through the creation of his own civilian militia, Bhutto had the dubious distinction of further institutionalizing the use of the state's coercive arm to quell the growing unrest triggered by his policies and style of governance. This eventually led to increasingly disruptive street agitations against Bhutto, led by a coalition of nine political parties called the Pakistan National Alliance (PNA).⁷⁴ These represented, among others: the disgruntled, religiously inclined lower-middle classes, which had always found Bhutto's rhetoric disturbingly secular; the urban middle classes, which were frustrated with Bhutto's scant regard for civil liberties and inept handling of growing inflation; and regional political movements that felt oppressed by Bhutto's brutal centrist rule.⁷⁵ All these disparate oppositions cohesively rallied against Bhutto after what many believed were rigged elections in 1977, giving rise to a grave constitutional crisis.⁷⁶ However, just when it seemed that a political solution was within reach, Zia marshaled in the troops.⁷⁷

The Supreme Court, which was to legitimize Zia's martial law, acknowledged ongoing mediatory talks between the Bhutto government and the PNA and did not deny that a solution seemed forthcoming.⁷⁸ As a matter of fact, the Court admitted that the negotiations had not ended, though they were certainly becoming protracted.⁷⁹ Furthermore, there is no assertion in the Court's judgment that there was a deadlock as such for any extended period of time, let alone a constitutional breakdown.⁸⁰ Yet, nevertheless, the Court found the timing of the

71. See generally ZIRING, *supra* note 7, at 371-422.

72. NOMAN, *supra* note 70, at 101-02.

73. See, e.g., KHAN, *supra* note 19, at 522-24.

74. See *id.* at 554.

75. See NOMAN, *supra* note 70, at 67-68, 110-11.

76. See *id.*

77. See KHAN, *supra* note 19, at 541-79; see also NOMAN, *supra* note 70, at 118.

78. See *Begum Nusrat Bhutto v. Chief of Army Staff*, 29 PLD 657, 695 (1977) (Pak.).

79. See *id.*

80. See NEWBERG, *supra* note 24, at 163-64 (arguing that all the political factors on which the Court relied as justifications were speculative and exaggerated).

army takeover acceptable.⁸¹ Zia's power grab and the Court's ready support for it thus gave birth to another military regime.

It is this turbulent period prior to Zia's coup that has become a reference point for the kind of civil disturbance that subsequent power arrangements within the state—primarily that between the President and the Prime Minister—were ostensibly expected to prevent from recurring. Article 58(2)(b), according to its proponents, is the resultant panacea. They argue that by empowering the President to send prime ministerial governments packing, a highly useful check has been introduced into the constitution, ensuring that recalcitrant elected governments do not become entrenched despots.⁸² They further argue that, for the thirteen years it remained en vogue, before its repeal in 1998, Article 58(2)(b) acted as a "safety valve" against imposition of martial laws, as it provided a supposedly constitutional way out of political stalemates.⁸³

E. Zia's Attempts to Perpetuate His Rule—The Main Impetus for Article 58(2)(b) According to Its Critics

It is true that no martial law was imposed during the period between 1985 and 1998, when Article 58(2)(b) was in force, and that one was indeed imposed soon after it was repealed. However, it is equally true that during the 1985-1998 period, four governments fell in very quick succession due to the invocation of Article 58(2)(b). As a result, the nascent revival of democracy after Zia's demise was repeatedly impeded before General Musharraf delivered the coup de grâce, assuming power in 1999 through another martial law.⁸⁴

According to its critics, quite apart from its problematic genesis and arbitrary tampering with the inherently parliamentary nature of the Constitution of 1973, Article 58(2)(b) has been the source of further political instability in the country with far-reaching negative ramifications for the legislature, the judiciary, and the executive.⁸⁵ The resultant adverse impact on the judiciary has been a major subject of debate and is the main concern of this Article. Commentators point out that the displacement of political space and marginalization of representative, pluralistic, and accountable political activity caused by the multiple dissolutions created a vacuum, which ruling elites filled by regularly

81. *Begum Nusrat Bhutto*, 29 PLD at 705. How close Bhutto and the PNA were to an actual agreement is uncertain. Some commentators suggest a compromise was likely when Zia called curtains, or even that Zia actively jeopardized the potential success of the negotiations. See KHAN, *supra* note 19, at 570-72; NEWBERG, *supra* note 24, at 161, 163-64; MALUKA, *supra* note 8, at 257.

82. See sources cited *supra* note 15.

83. *Mahmood Khan Achakzai v. Pakistan*, 49 PLD 426, 446-47 (1997) (Pak.); see also *Zafar Ali Shah v. General Pervez Musharraf*, 52 PLD 869, 1218 (2000) (Pak.).

84. See *infra* Part III.E.

85. See KHAN, *supra* note 15, at 133-35; see also MALUKA, *supra* note 8, at 272-73.

dragging the judiciary into the political arena.⁸⁶ Key deliberations and debates over the country's political and constitutional ethos, structure, and mode of governance were not held in the nation's legislature but in the subtexts of the constitutional legal battles held in its courtrooms. These extraordinary challenges have arguably presented some of the most complex legal dilemmas confronted by any contemporary judicial system.⁸⁷ As appointees that lack political constituencies, judges have proven much more vulnerable to coercive pressure than the larger body politic.⁸⁸ In short, the Article 58(2)(b) dissolutions have caused the country's judiciary to regularly adjudicate upon and legitimize the *vires* and the *fides* of the presidential dissolution orders, leading to highly controversial results. That has contributed to continuing confusion about appropriate state structure and mode of governance for Pakistan more than half a century after its emergence as a sovereign nation-state.⁸⁹

To its antagonists, therefore, Article 58(2)(b) is nothing more than Zia's Parthian shot—the dictator ensuring that he was not to be taken lightly in the new political climate. Though Zia retreated from the limelight after introducing controlled democracy to the country via non-party-based elections, through Article 58(2)(b) he wielded a seemingly unassailable new power—a constitutional Sword of Damocles. In other words, according to Zia's critics, even after martial law was lifted, Zia ensured that its specter loomed large over the country's subsequent history.⁹⁰

F. Continuing Relevance of the Article 58(2)(b) Debate

This review has heightened currency in a context where the country's current ruler, General Pervez Musharraf, who is perceived as a key Western ally in the so-called global war on terror, exerts a potentially fatal hold over the recently revived political process. This is due in major part to the reintroduction of Article 58(2)(b) to the Constitution, after it was repealed on April 4, 1997, through the Constitution (Thirteenth Amendment) Act (1997),⁹¹ which was moved and passed in minutes during Prime Minister Nawaz Sharif's second stint in power.⁹²

86. *Id.*

87. See Upendra Baxi, *Constitutional Interpretation and State Formative Practices in Pakistan: A Preliminary Exploration*, in *COMPARATIVE CONSTITUTIONAL LAW* 132, 132-33 (Mahendra P. Singh ed., 1989).

88. See CHAUDHRI, *supra* note 37, at 14-25; see also KHAN, *supra* note 19, at 873-76.

89. See MALUKA, *supra* note 8, at 272-73.

90. *See id.*

91. The Constitution (Thirteenth Amendment) Act, 1997, § 2 (Pak.), available at <http://www.pakistani.org/pakistan/constitution/amendments/13amendment.html>.

92. KHAN, *supra* note 19, at 818.

Thus, Article 58(2)(b) is not a topic of mere intellectual curiosity and historical relevance. It still contains the potential for influencing Pakistan's future. Therefore, it is imperative to explore Article 58(2)(b)'s complex nuances and objectively determine its true role in Pakistan's constitutional evolution in order to assess its potential impact on the country's constitutional and political future. Furthermore, such an exercise is needed to develop further insight into Pakistan's continuing experiment with developing a democratic state, while mainstream politics remains marginalized and the judiciary ultra-active in substituting itself in the role of the displaced political sovereign.

G. Framework of Inquiry

Within this overall analytical framework, this Article endeavors to make the following related determinations:

1. To assess the place and significance of Article 58(2)(b) in Pakistan's constitutional history, in the broader context of its earlier attempts to achieve an optimal balance of power between the executive head and the government/legislature;
2. To gauge the capacity, as well as the success or lack thereof, of Article 58(2)(b) in providing a constitutional solution to Pakistan's perennial political instability, through a detailed analysis of its legislative genesis, as well as its judicial interpretation, application, and evolution; and
3. To determine, apart from the quality and consistency of the judgments delivered by the courts on Article 58(2)(b) dissolutions, the nature and extent of significant and arguably unavoidable fallouts such as: (a) the effect on the independence, both real and perceived, of the judiciary; and (b) the impact on the eventual shape of the country's constitutional framework.

II. FROM GENESIS TO REALITY

A. The Eighth Amendment to the Constitution—The Legislative Showdown

To understand the genesis of Article 58(2)(b), it is important to examine the legal framework of the times. As mentioned, upon assuming power in 1977, Zia put the Constitution of 1973 into abeyance and held the country under martial law. He ruled through ad hoc, makeshift laws such as the Laws (Continuance in

Force) Order of 1977⁹³ and various additional orders and ordinances issued in his capacity as Chief Martial Law Administrator and later as President.⁹⁴ There was the eventual reverting to some semblance of a constitutional setup through the introduction of the Provisional Constitutional Order of 1981 (“1981 PCO”).⁹⁵ The net impact, however, was not much different because the 1981 PCO allowed Zia to supersede the Constitution of 1973, though he did incorporate a number of articles from it.⁹⁶ In 1985, Zia took a significant step towards reviving the Constitution, which was necessary for installing the new government elected in 1985 under his close supervision.⁹⁷ This step was the introduction of the Revival of the Constitution Order (RCO).⁹⁸ The RCO made large-scale amendments to the Constitution. It is noteworthy that the RCO was introduced after the general elections, but prior to the formation of a civilian government and the nomination of the Prime Minister. Once the elected government assumed office and started exerting some independence, a heavily negotiated Constitution (Eighth Amendment) Act⁹⁹ was the outcome of a compromise between the all-sweeping ambit of the RCO and the growing confidence of the new politicians, who started broaching the topic of parliamentary sovereignty. Upon closer review, it becomes obvious that the RCO was designed to tweak the Constitution of 1973, with the primary underlying aim being the empowerment of the office of the President. With Zia’s rhetoric running thin after many repressive years in office, the changing political mood in the country was creating a compulsion to revive

93. Laws (Continuance in Force) Order, Chief Martial Law Administrator’s Order No. 1 of 1977 (Pak.), *reprinted in* DR. SAFDAR MAHMOOD, CONSTITUTIONAL FOUNDATION OF PAKISTAN app. D, at 1104-07 (Lahore: Jang Publishers 1990) (1975) [hereinafter 1977 Order].

94. *See* KHAN, *supra* note 19, at 698.

95. Provisional Constitution Order, Chief Martial Law Administrator’s Order No. 1 of 1981 (Pak.), *reprinted in* 33 PLD 183, 183-91 (1981) (Pak.).

96. *See id.* arts. 2, 15-16.

97. The 237-member Assembly was elected on non-party basis due to Zia’s ban on political parties. The main political parties boycotted these elections, which saw the emergence of many hitherto political nobodies. Since the elected representatives could not organize themselves along political party associations—as many did not even belong to one—they subsequently divided themselves into two groups. There were those who were openly supportive of Zia, and they essentially took on the form and role of a ruling party Treasury bench. Those opposed to Zia’s continuing rule formed the Opposition bench, which was further subdivided into two groups due to internal differences on some issues. *See* OFFICIAL REPORT IV, *supra* note 14, at 1280; *see also* WASEEM, *supra* note 23, at 409-29.

98. Revival of the Constitution of 1973 Order, 1985, The President’s Order No. 14 of 1985 (Pak.), *available at* http://www.pakistani.org/pakistan/constitution/orders/po14_1985.html.

99. *See* The Constitution (Eighth Amendment) Act, 1985 (Pak.), *available at* http://www.nrb.gov.pk/constitutional_and_legal/constitution/amendments_text.pdf.

democracy. However, Zia ensured that any revival would be highly diluted, primarily through the instrument of the Eighth Amendment to the Constitution.¹⁰⁰

A careful perusal of the voluminous legislative debates surrounding the Eighth Amendment reveals an intriguing story. What comes through is the new parliamentarians' efforts to challenge Zia's stratagems. The primary antagonists did not belong to the Treasury bench but to two independent groups: the Opposition Parliamentary Group (OPG) and the Independent Parliamentary Group (IPG).¹⁰¹ Their attempts to thwart Zia demonstrated how even a weak democratic process can quickly develop depth and vigor.¹⁰²

Much of the initial debate demonstrates acute mistrust between the Treasury and Opposition benches about their respective commitments to restoration of full democracy. In particular, there were apprehensions about the informal dialogue outside the Parliament between the various stakeholders and the hurried tactics of the government to push the Bill through, which members of the Opposition described as "bulldozing."¹⁰³ The situation was not helped by the fact

100. See MALUKA, *supra* note 8, at 272-73.

101. See *supra* text accompanying note 97.

102. OFFICIAL REPORT IV, *supra* note 14. The discussion over the Eighth Amendment continued for almost five weeks and is spread over hundreds of pages of parliamentary debate records, which is understandable given the radical agenda of the Eighth Amendment Bill, which contained eight clauses that encapsulated not just the future shape and structure of the Constitution of 1973, but eight years of lawmaking by Zia through ordinances. The Bill was presented before the National Assembly on September 8, 1985. *Id.* at 28. The debates were fierce, and the polarizations between pro-martial-law politicians, who mostly emerged on the scene during Zia's era and were members of his earlier handpicked *Majlis-e-Shoora*, and their opponents, are obvious. See, e.g., *id.* at 51-52, 78, 1593. There were many references to out-of-Parliament negotiations (not involving all the members), which were at times denied and at others acknowledged by the government, quite apart from a resonant level of discomfort with the committees formally appointed to review the Bill. See, e.g., *id.* at 309-10, 312, 1054, 1293. It is also evident that the debates were taking place in an environment of mounting pressure with the expectation that the lifting of martial law and the fate of the Assemblies hinged on the fate of the Bill, though the Treasury members constantly denied that there was a quid pro quo arrangement with Zia. See, e.g., *id.* at 57-58, 71, 78, 580-81, 589-90, 1290, 1309, 1333, 1342, 1351. The debates got off to a stuttering start as the members were not provided access to all the relevant laws that they needed to peruse the Bill in an informed manner. *Id.* at 28, 232-36, 306-08, 486-87. There were several adjournments and even protest walkouts by the Opposition members against what they considered to be attempts by the Treasury members to rush through the Bill without adequate discussion and debate, as the Parliament prepared itself physically, intellectually, and emotionally to undertake the mammoth task. *Id.* at 1427-35. In view of the informal diplomacy going on outside the Parliament, the Bill was withdrawn for revision on September 30, 1985—twenty-two days after it was introduced—without any substantive debate taking place on the actual clauses. *Id.* at 1055. A larger new version (containing twenty-two clauses) was presented and was finally approved on November 11, 1985. *Id.* at 1056, 3491-96.

103. See, e.g., *id.* at 309, 310, 312, 1291-95, 1350-51, 1356, 1428-29, 1431.

that there was acute tension between various members of the National Assembly. Ample discussion time of the Assembly was used up as they made insinuations, as well as explicit allegations about each other, as cohorts of Zia. While there were collective attempts to win back concessions from Zia, the two Opposition groups also had fissures at various levels. These were especially apparent between the ones who were appreciative of Zia's "Islamization" (i.e., the various attempts by Zia to enforce *shariah* through introduction of new laws and amendments to existing ones, as well as his creation of special courts for upholding such laws) and others who believed that Islam had been foisted around by Zia as a mere political slogan.¹⁰⁴ There was also lack of clarity about the extent of the National Assembly's sovereignty and its resultant capacity to amend the constitution, in view of the confusingly overlapping ambits of the Constitution of 1973 and the RCO.¹⁰⁵ It is remarkable how, at times, obvious impediments to substantive discussion on the Bill were ignored.¹⁰⁶ The upshot of the Treasury bench's recurrent argument was that the Constitution of 1973 was imbalanced. They persistently pointed out that it lacked the capacity to address emergency situations in the country, like the one in 1977 that, according to them, could have been prevented had the President been empowered to step into the fray.¹⁰⁷ They surmised that Article 58(2)(b) was essentially a "safety valve" to save the country from acute political crises that had, in the past, always led to martial laws.¹⁰⁸

The counterarguments criticized backdoor modification of the parliamentary system of government, as visualized and preserved in the only consensus-based constitution of the country—the Constitution of 1973. The Opposition rallied against unwarranted empowerment of an indirectly elected individual, who could potentially control the parliamentary process through abuse

104. See, e.g., *id.* at 1587-88, 1610, 1613-14, 1940-48, 1967-75, 2102, 2153.

105. See, e.g., *id.* at 1072, 1076.

106. There is enough evidence in the legislative history to lend credence to this impression. For instance, what is rather clear is the National Assembly Speaker's apparent partiality toward certain members, most notably an Opposition Member of the National Assembly (MNA), Haji Muhammad Saifullah Khan (also the petitioner in the *Haji Saifullah* case, which will be discussed in Part III.A of this Article). Khan occupied the floor for long periods of time, engaging in highly rhetorical, emotive, and repetitive anti-martial-law speeches, as well as, at times, purely technical and highly time-consuming interruptions advocating a strict adherence to oftentimes banal procedural niceties. The negative externality was that a lot of time that should have been dedicated to discussion of more substantive issues was wasted on procedural issues. This provoked certain members to comment that the said MNA was acting in collusion with the pro-martial-law forces, as he was consistently delaying substantive parliamentary debate, and thus allegedly creating more time for those who were negotiating the Bill outside the National Assembly. See, e.g., *id.* at 2241-2304.

107. See, e.g., *id.* at 1307-08, 1562, 1566, 1572-75, 1762, 1767-68, 1778, 1791, 1800-01, 3136-38.

108. OFFICIAL REPORT IV, *supra* note 14, at 1765, 2175-77.

of his vast new powers.¹⁰⁹ Some also advocated, without success, that the changes proposed were so significant that they ought to be sent first for a public referendum.¹¹⁰ During general discussion on the floor of the Assembly, many of the Opposition members conducted an exhaustive, at times emotional, analysis of Pakistan's constitutional debacles. They came up with a severe critique of Zia's reneging his promise to hold elections in time, his resultant low credibility, and what they considered to be the various failings of his regime.¹¹¹ Others stated categorically that Zia was introducing a Bill that was un-Islamic in nature, as it attempted to concentrate power in an individual.¹¹² While reviewing the debate, it is fascinating to see anti-Zia arguments stemming and converging from both secular-democratic and Islamic-democratic perspectives. Others spoke very eloquently against the extension of an indemnity to all of Zia's legal actions and, of course, the RCO, and deflated the "safety valve" argument by pointing out that even the death penalty for treason, which was mandated under the Constitution of 1973, had not deterred Zia from imposing yet another martial law.¹¹³ To them, martial laws could only be blocked by robust democracy and not through controversial tampering with the constitution.

While both general and specific clause-by-clause discussions took place on the floor of the National Assembly, separate Treasury- and Opposition-group committees reviewed the Bill and formulated suggestions in the form of reports.¹¹⁴ There were joint and separate committee sessions, as well as exclusive sessions of the parliamentary group.¹¹⁵ Various consultations were held with the Prime Minister and, quite evidently, with Zia, and joint recommendations were then

109. *See, e.g., id.* at 1760-1826, 2000, 2839-49.

110. *See, e.g., id.*

111. *See, e.g., id.* at 601-03, 1246-50, 1252-53, 1273-76, 1282-83, 1364, 2087-90, 2127-28, 2241-43, 2293, 2295-96, 2370-71, 2389, 2403-04.

112. *See, e.g., id.* at 65-66, 486-88, 1099-100.

113. The debates were interspersed with the use of strong Islamic rhetoric and references to Islamic history, to underscore that, despite Zia's claim of Islamic credentials, his rule went against the very grain of what Zia's antagonists considered to be strong and consistent Islamic postulates supporting the idea of representative and participatory government. Another recurrent argument on the part of the Opposition was that, as a House, they lacked requisite legislative jurisdiction. They pointed out that since they were elected on a non-party basis, they did not possess the support of political basis, consensus, and mandate to attempt to amend the constitution, especially since it was the product of consensus between those elected through party-based elections. Many of them warned against the naivety of extending Zia's stay as an over-powerful President and sanctifying his earlier illegal actions, predicting that it would only mean the extension of an invitation to future martial laws. *See, e.g., id.* at 1951-74, 2085-93.

114. *See, e.g.,* OFFICIAL REPORT IV, *supra* note 14, at 1292, 1295-96, 1316, 1444, 2155.

115. *See, e.g., id.* at 1299-1300, 1355-56, 1458, 1600.

brought to the Assembly for discussion.¹¹⁶ There was thus as much frenzied political activity outside the Assembly as negotiations within.

Inextricably linked to any discussion of the proposed Article 58(2)(b) was a review of the proposed amendment to Article 48 of the Constitution. Article 48 speaks of the general nature of the powers of the President under the Constitution.¹¹⁷ A scrutiny of the transformation of this Article from its original 1973 version provides a telling snapshot of the dramatically shifting balance of power between the President and the Prime Minister. The original Constitution of 1973 visualized the President as a constitutional head bound to act on the advice of the Prime Minister and actually required the President to have all orders countersigned by the Prime Minister.¹¹⁸ This latter requirement was unpopular even amongst those advocating the 1973 version of the Article. In fact, they suggested that it be removed to prevent the President from being reduced to a mere “rubber stamp” and to thus bring about a more balanced arrangement.¹¹⁹

Zia’s RCO, on the other hand, had taken radical strides in the opposite direction. It had substituted the original provisions of Article 48 with completely new language, thereby tremendously empowering the President.¹²⁰ The new “Super-President” could now potentially bypass the Prime Minister in significant ways. He was no longer bound by the advice of the Prime Minister, and his orders did not require the Prime Minister’s counter-signature.¹²¹ While taking decisions, he could meet the former constitutional requirement by consulting with the “Cabinet” or just an “appropriate Minister.”¹²² It was arguable whether he was even bound to act on such advice; the advisors had no *prima facie* recourse if they felt that their advice had been disregarded, as their communications regarding such advice were made privileged and beyond judicial review.¹²³ Moreover, the President could exercise his discretion wherever the constitution granted him such discretionary powers. However, no objective mechanism was laid down to determine whether the Constitution did indeed grant such powers. Instead, the decisions of the President in his discretion were to be final, and the validity of such discretionary exercise of power was once again put beyond judicial review.¹²⁴ Lastly, the President, who was already required to call a referendum on

116. *See, e.g., id.* at 1300, 2478-79, 2488.

117. CONSTITUTION OF THE REPUBLIC OF PAKISTAN art. 48 (1973), *available at* http://www.nrb.gov.pk/constitutional_and_legal/constitution/part3.ch1.html.

118. *Id.*

119. OFFICIAL REPORT IV, *supra* note 14, at 2280, 2628.

120. *See generally* 1977 Order, *supra* note 93; CONSTITUTION OF THE REPUBLIC OF PAKISTAN art. 48 (1973), *available at* http://www.nrb.gov.pk/constitutional_and_legal/constitution/part3.ch1.html.

121. *See generally* sources cited *supra* note 120.

122. *Id.*

123. *Id.*

124. *Id.*

the advice of the Prime Minister, could now also call one on his own if he felt that a matter of national importance needed to be referred to the public.¹²⁵

Not surprisingly, the proposed amendment of Article 48 received a lot of scrutiny in the parliamentary debates. The proponents of the Bill highlighted that they had drastically neutralized the RCO version of the Article that had transformed the President into an alleged Leviathan.¹²⁶ They pointed to the removal of the words “appropriate Minister” from the list of people with whom the President could consult to meet the constitutional requirement of seeking advice.¹²⁷ They highlighted the elimination of RCO’s Article 48, clause 3, which gave blanket cover to presidential discretion, so that as a logical consequence, one was now required to look at the wording of the Constitution to objectively gauge whether such discretion existed, rather than simply accepting the President’s own judgment call.¹²⁸ However, the opponents of the suggested amendment still warned of a gigantic President looming large over a much weakened prime ministerial parliamentary democracy. Their protests were in vain, though, as the proponents of the amendment eventually outvoted them.¹²⁹

The presidential power of dissolution under Article 58(2)(b) is what largely dominated the five weeks of parliamentary debates on the Eighth Amendment. As mentioned, the original Constitution of 1973 gave no special power whatsoever to the President in this regard—he could only dissolve the assemblies on the specific advice of the Prime Minister.¹³⁰ Zia’s RCO had completely reversed this with a president-centric formulation. While Article 58(2)(b) retained the possibility of the Prime Minister asking the President to dissolve the parliament, as under the Constitution of 1973, it added a new clause, giving the President complete discretionary powers to do so “where, in his opinion, an appeal to the electorate is necessary,” with no check whatsoever on the exercise of such discretion.¹³¹

To its credit, the Eighth Amendment Bill had somewhat diluted this all-encompassing discretion. The Bill had bifurcated and reformulated clause 2 of Article 58 of the RCO. According to subclause 1, the President could only

125. *Id.*

126. OFFICIAL REPORT IV, *supra* note 14, at 2690-91, 3418.

127. *Id.* at 2823-26.

128. The Constitution (Eighth Amendment) Act, § 2 (1985) (Pak.), available at http://www.nrb.gov.pk/constitutional_and_legal/constitution/amendments_text.pdf.

129. After the general discussion and the first reading, the records of the second reading of the Bill show a lot of apprehension about these amendments, which were characterized by the Opposition as blatantly changing the system into a presidential one. Several innovatively worded amendments and deletion motions to somehow dilute the Treasury-proposed amendment of Article 48 were, however, shot down by the Treasury. See OFFICIAL REPORT IV, *supra* note 14, at 2622-763, 2813-79.

130. CONSTITUTION OF THE REPUBLIC OF PAKISTAN art. 58 (1973), available at http://www.nrb.gov.pk/constitutional_and_legal/constitution/part3.ch2.html.

131. See generally sources cited *supra* note 120.

dissolve the Parliament if a successful vote of no-confidence had been passed against the Prime Minister.¹³² The first obvious issue was that the Bill's formulation still left a lot of discretion for the President, as it was solely left to him to determine that "*no other member of the National Assembly is likely to command the confidence of the majority of the members of the National Assembly in accordance with the provisions of the Constitution.*"¹³³

Subclause 2 retained the President's unilateral power to dissolve the Parliament under the RCO, with the added check that "*a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.*"¹³⁴ The vagueness of this formulation was the second obvious issue.

The third obvious issue was that, though the critics of the Eighth Amendment were rightly mindful that Article 58(2)(b) could not be analyzed in isolation of Article 48(2), they found in the vague and overbroad language of the new articles no guidance as to the precise nexus between them.¹³⁵ The language of Article 48(2) could potentially be used to extend blanket protection to the discretion given under Article 58(2)(b), with no possibility of judicial review. The Bill had not addressed this valid concern.

It can be safely said that while they were not successful in thwarting the amendment *en bloc*, the anti-Eighth Amendment parliamentarians were successful in addressing two of the above-enumerated lacunae. That is why the eventual formulation that was incorporated into the constitution was different on the following two important counts: (1) there was the addition of the *non-obstante* clause at the start of Article 58, in an attempt to ensure that the non-justiciability extended to presidential discretionary powers under Article 48 did not extend to his power of dissolution under Article 58(2)(b); and (2) there was the addition of the requirement that a determination be made as to whether any other member of the National Assembly was capable of commanding the confidence of the majority of the members.¹³⁶

These eventual concessions are significant given the Article's original ambit but, at the same time, modest, keeping in view the fact that to its opponents, the very idea of Article 58(2)(b) was an anathema. The pages of the parliamentary debate reverberate with warnings that the said article was a deathblow for the democratic process. Its opponents argued, *inter alia*, that in a parliamentary democracy, the inherent natures of the constitutional positions of the President and the Prime Minister were so distinct, their political base so disparate, and their roles so well understood, that giving such a power to the

132. See The Constitution (Eighth Amendment) Act, § 5(a) (1985) (Pak.).

133. *Id.* § 5(b).

134. *Id.*

135. OFFICIAL REPORT IV, *supra* note 14, at 3425-26.

136. For the final formulation of Article 58, see *supra* note 56.

President was unthinkable.¹³⁷ They pointed out that there was no precedent for such powers in any other jurisdiction, finding it drastic and unfair to impose a powerful presidential system without greater debate and deliberation at the popular as well as legislative level.¹³⁸ They understood that the independent functioning of the Prime Minister would be deeply impaired if he always had to look over his shoulder to see if the President had a finger on the red button.¹³⁹ They questioned whether it would not create a culture of favoritism and an incentive for political opportunists to politicize and prevail upon the President, thus jeopardizing his impartiality.¹⁴⁰ They highlighted Zia's track record and openly suggested that Article 58(2)(b) was meant for the perpetuation of his rule as an overlord over a weak parliamentary system.¹⁴¹ From religion to Rousseau, they found arguments against this vital amendment that, according to them, drastically tilted the balance of constitutional powers in favor of the President and created the possibility of abuse of such powers, and they openly voiced them.

Once the Opposition felt that they were fighting a losing battle, they switched gears. Given apparent quid pro quo between Zia and the Treasury bench conditioning the lifting of martial law on the passing of the Eighth Amendment, as well as the thinly disguised allegiances of some of the parliamentarians who owed their fledgling political careers to Zia's regime, it became increasingly apparent that Article 58(2)(b) was indeed going to be incorporated into the Constitution. Now the Opposition came up with some plausible suggestions to rationalize the President's inevitable new powers, requesting, for example, five-year immunity from dissolution for the incumbent Parliament, so that a precedent could be set for Parliaments completing their terms.¹⁴² They suggested that after a vote of no-confidence was passed against a Prime Minister, a fifteen-day period be allowed for other parliamentarians to try to procure the requisite votes to elect a new Prime Minister.¹⁴³ They also asked for a clearly worded right of appeal against a dissolution order.¹⁴⁴ However, these suggestions were not entertained.¹⁴⁵ Some of the parliamentarians were apprehensive that the Parliament would not survive for long once Zia had the power to dissolve it. They were of the view that eventually, in order to find a political escape route due to his role in Bhutto's

137. OFFICIAL REPORT IV, *supra* note 14, at 1319, 1788, 2099-2101, 2276-77, 2394, 2450, 3100, 3111-13, 3240-41.

138. *Id.* at 3218.

139. *Id.* at 1314-15, 1323-24, 3131, 3263.

140. *Id.*

141. *Id.* at 1817, 2360-61, 2392-93, 3102.

142. *Id.*, at 3130.

143. OFFICIAL REPORT IV, *supra* note 14, at 3116.

144. *Id.* at 3117.

145. *Id.* at 3061-65, 3218-71, 3357-442, 3464-506. The Amendment was passed with 181 votes in favor, none against, and 56 abstentions.

execution,¹⁴⁶ Zia was bound to reach a compromise with his political opponents, thus making the existing Assembly redundant for his purposes.¹⁴⁷ And, even otherwise, the vast new powers given to the President under the Eighth Amendment were not only going to solidly entrench Zia but also extend a standing invitation to future coup-makers to occupy the President's position in order to rule the country, at the cost of parliamentary democracy.¹⁴⁸ Whether this was indeed the imperative that propelled Zia to his eventual decision to dissolve the very Assembly that had given him Article 58(2)(b), is subject to debate. What is indisputable is that Zia did indeed dissolve the Assembly only a couple of years later, as predicted by these parliamentarians.

The parliamentary debates surrounding the Eighth Amendment strongly underline the following. First, once adequate political space was provided, even the Zia-controlled, non-party-based Parliament demonstrated why participatory and pluralistic political activity is highly suited for debating and resolving fundamental issues of state-structure and governance mechanisms. The intensity, rigor, and level of debate were impressive, given the Assembly's obvious shortcomings and limitations. Second, reminiscent of Pakistan's earlier history, cardinal decisions about state-structure and governance arrangements were largely made outside the ordinary political sphere and in an atmosphere of thinly disguised duress. The draconian RCO was a masterstroke. It acted as a coercive alternative, by so radically empowering the President that even Article 58(2)(b) seemed like a concession to those advocating a pure parliamentary system. There is evidence to suggest that Zia was using all the resources and guile of a veteran incumbent to gerrymander the parliamentary process. His larger-than-life presence, the compromised politics of many of the parliamentarians, and the entrenched structural imperatives of the martial law era largely determined the eventual outcome of the Eighth Amendment Bill.

B. Article 58(2)(b)—The Interpretive Aftermath

Quite apart from its radical departure from the country's constitutional tradition and its dubious legislative origins, it is Article 58(2)(b)'s vague and open-textured formulation that has tested its interpreters. For example, could it still be said that the 1973 Constitution enshrined a parliamentary system of

146. After Zia took over in 1977, Zulfikar Ali Bhutto's subsequent trial, appeal, conviction, and eventual execution created an international controversy. KHAN, *supra* note 19, at 596. Bhutto was charged with the murder of a political opponent and tried and convicted in a manner that is still widely regarded as unfair and coercive. *See id.* at 599. Despite calls for clemency from various international figures, Bhutto was executed on April 4, 1979. *Id.* at 616-17. For a detailed analysis of the trial and its political motivations and legal shortcomings, see KHAN, *supra* note 19, at 596-619.

147. *See* OFFICIAL REPORT IV, *supra* note 14, at 2092-93, 2099-102.

148. *Id.*

government with all power vesting in the Prime Minister and his cabinet? Moreover, what exactly was the ambit of these new presidential powers? The new formulation of Article 58(2)(b) was cryptic to say the least:

*[T]he President may also dissolve the National Assembly in his discretion where, in his opinion, . . . a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.*¹⁴⁹

How is such an “opinion” to be formulated and such “discretion” exercised? Is it purely subjective or are there any restraining parameters? These questions tormented the country’s highest functionaries between 1988 and 1996. The political and legal environment of these eight years was dominated by theories about, and several attempted answers to, the meaning of these enigmatic words. Now that Article 58(2)(b) has been reincorporated into the constitution by Musharraf, they may again pose a formidable challenge to the Pakistani judiciary.

III. THE ERA OF DISSOLUTIONS (1988-1996)

The judicial pronouncements of this era lie in the realm of high jurisprudence, both for the enormity and complexity of the questions that arose before the courts, and for the vast ambit of analysis and supra-constitutional theorizing employed to answer them. Repeatedly, the judiciary found itself confronted with multi-tiered and overwhelming questions that more fittingly belong to the political, legislative, and social arenas. The tone and tenor of the judgments openly display that their authors were deeply troubled about such questions remaining inadequately answered, even after many decades of experimentation. The judges were frustrated, disillusioned, and at times scathingly critical about the anti-democratic forces that they blamed for the state of affairs.¹⁵⁰ Nevertheless, they engaged in expansive and, at times, impressive analyses of Pakistan’s constitutional and political history, comparative constitutional law, and jurisprudential and political theories in order to reassess and restate the country’s ethos, its constitutional-governance mechanism of popular choice, and the ingredients of its evolving constitutional culture. At various levels, this is a formidable output, arguably without precedent in the region or other post-colonial societies.

149. CONSTITUTION OF THE REPUBLIC OF PAKISTAN art. 58(2)(b) (amended 1985) (emphasis added), available at http://www.nrb.gov.pk/constitutional_and_legal/constitution/amendments_text.pdf.

150. See, e.g., *infra* Parts III.A-B.

However, the judgments lend further weight to the view that historiography, dialectics, and political theorizing are not suited to an organ of the government that has traditionally been required to be reticent and restrained in its utterances. The wisdom behind this view comes through as one closely examines how Pakistan's "Hercules" grapples with the "Hard Cases."¹⁵¹ Though impressive in terms of sweep and rigor, these judgments also divulge disturbing fissures and polarizations at ideological and political levels. Such aspects of these judgments are difficult to reconcile with the valid notion that constitutional judgments, while inherently political on one level, ought not to be politicized. Any analysis of these judgments, quite apart from their own complexities, is made difficult by the fact that they are situated in a turbulent and eventful post-martial-law period. It was a period that saw the brief reemergence of weak democratically elected governments attempting to maintain social cohesion and national integrity in a system still influenced by Zia's coterie of loyalists and hampered by a depleted democratic institutional setup. A comprehensive analysis of this era would be invaluable in contextualizing and appreciating the multiple nuances of the judgments being examined. However, that is a separate and considerable task beyond the scope of this Article.

A narrower ambit of inquiry entails careful textual scrutiny of these judgments. Given the short span of time that separates them and the similarity of events and circumstances surrounding them, consistency becomes very relevant at various levels. This is while keeping in mind that consistency is influenced by differences in case facts, the relative diversity of opinion that is the likely outcome of judicial examination of ambiguous and complex situations, the interpretation of open-textured legal texts, and the evaluation of evidence of varying quality. I

151. Ronald Dworkin describes (and ultimately critiques at some levels) the legal positivist theory of "Hard Cases" as follows: "when a particular law-suit cannot be brought under a clear rule of law, laid down by some institution in advance, then the judge has, according to that theory, a 'discretion' to decide the case either way. His opinion is written in language that seems to assume that one or the other party had a pre-existing right to win the suit, but that idea is only a fiction. In reality he has legislated new legal rights, and then applied them retrospectively to the case at hand." RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 81 (7th ed. 1994) (1977). I have taken the term "Hard Cases" from this theory, as it can be argued that in the Pakistani cases under discussion, arguments of abstract policy and/or principle deeply permeate the legal decisions as Pakistani judges are faced with adjudicating cases that simply cannot be decided with sole recourse to clear guidelines provided by the law. Like Dworkin's imaginary super-judge, whom he dubs "Hercules," the Pakistani judges are constantly trying to "construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well." *Id.* at 116-17. However, it is questionable whether, while employing the above adjudicative technique, they engage in outright superimposition of their own political convictions, or instead restrict themselves to their judgment of what the conception of community morality is. This latter interpretation, according to Dworkin, ought to decide such cases. *See id.* at 130.

propose to gauge the quality of these judgments by examining: (1) the consistency between the opinions of individual judges adjudicating different dissolution cases (e.g., as a high court judge in one case and a Supreme Court judge in another or as a Supreme Court judge in both cases); (2) the consistency between the opinions of different judges adjudicating a particular case, i.e., the more classical comparison of majority, concurring, and dissenting opinions; and (3) the consistency between different judges adjudicating different cases, i.e., primarily a comparison of the majority opinions in different cases. To this end, I propose a framework of analysis with the following questions in mind:

1. Did the courts articulate a clear and legally sound interpretation of the scope of presidential power under Article 58(2)(b)?
2. Did the courts devise a meaningful test to gauge the limits of legally allowable and legitimate use of this power?
3. Did the courts consistently apply the same test in different cases, or did the test change across cases, and, if the latter, based on what justification?
4. Were the courts consistent in the qualitative evaluation of the facts and supporting evidence in each case, and in the application of the test to the facts and supporting evidence?
5. Were the decisions in these cases equitable?
6. Did the judgments contain any other elements that may create a perception of judicial bias or partiality, such as controversial *obiter* statements and analysis, inconsistent application of procedure, unjustifiable out-of-court statements, etc.?

With this framework of analysis in mind, I will now closely examine the relevant cases pertaining to the dissolutions.

A. The First Dissolution—The *Haji Saifullah* Case¹⁵²

The premonitions voiced during legislative debates over the Eighth Amendment by certain members of the Assembly did not take long to materialize.

152. The petitioner in this historical case was Haji Muhammad Saifullah Khan (“Haji Saifullah”)—the very same member of the National Assembly who had gained a reputation for making highly emotional and long-winded speeches against Zia on the floor of the Assembly elected in 1985. *See supra* text accompanying note 106. It is interesting to note that the ousted Prime Minister had not shown the same alacrity in approaching the courts, most probably because his erstwhile political coalition had become fragmented after the dissolution, a fact that was specifically referred to by the *Haji Saifullah* Court. *See infra* Part III.A.3.c.

Prime Minister Muhammad Khan Junejo's government was dissolved under dramatic circumstances. On May 29, 1988, the unsuspecting Prime Minister had just returned from an official trip to China, South Korea, and the Philippines, where he had been awarded the Philippines' highest civil award, the "Order of Sikatuna," "in recognition of his role for democracy, progress and well-being of the people of Pakistan."¹⁵³ As recently as May 25, 1988, Zia had called a session of the National Assembly and had not even hinted at the surprise in store.¹⁵⁴ The Prime Minister was sharing information about his successful tour with reporters at the airport when word got around that the President was holding a news conference at the President's House.¹⁵⁵ Upon rushing there, journalists were taken completely by surprise to hear the President announce his decision to dissolve the National Assembly.¹⁵⁶ Within twenty-four hours, all the provincial governors dissolved the provincial assemblies.¹⁵⁷

Such was Zia's faith in the infallibility of his verdict that his charge sheet read like a casual, hurriedly jotted-down list of accusations. The upshot of the accusations was that the National Assembly was not up to the task of adequately performing its role and had failed to safeguard the property, honor, and security of the people.¹⁵⁸ This had ostensibly led Zia to the conclusion that the government deserved to go, as it could not carry on in accordance with the provisions of the constitution, and hence an appeal to the electorate was necessary.¹⁵⁹ The very

153. *Pakistan v. Muhammad Saifullah Khan (Haji Saifullah)*, 41 PLD 166, 178 (1989) (Pak.).

154. In the Supreme Court judgment on the validity of this dissolution, Justice Nasim Hasan Shah specially emphasized this bizarre context to the dissolution. *Id.* at 178-79, 182. This was to be a recurrent trend in subsequent dissolutions as well, where dissolution orders were, at times, contradictorily preceded by strong condonation and support for the governments of the day, by incumbent Presidents.

155. *Id.* at 178-79.

156. *Id.* at 179.

157. The commonly reported and popularly understood reasons behind the falling-out between Zia and Junejo were the latter's growing independence, as well as the Ojhri Camp disaster. KHAN, *supra* note 19, at 689. The Ojhri Camp was an ammunition dump situated disturbingly close to the twin cities of Islamabad and Rawalpindi. *Id.* On the morning of April 10, 1988, it suddenly blew up, causing severe damage to life and property as missiles rained on unsuspecting civilians. *Id.* While it was officially categorized as an unfortunate accident, stories emerged that the explosion was a deliberate cover-up on the part of certain military bigwigs, who were apparently involved in pilfering arms and ammunition, including highly prized U.S. Stinger Missiles, that were meant for arming Afghan "freedom fighters." *Id.* On being intimated of a surprise inspection/audit, the hasty cover-up had apparently gone awry. *See id.* Junejo had promised a high-level inquiry in an ominously "tell-all" tone. *See id.* One also cannot easily rule out the aforementioned fear on the part of certain members of the Junejo Assembly that, eventually, Zia was going to reach out to the PPP in order to work out an exit strategy for himself, which would have necessitated his getting rid of the Junejo government. *Cf.* KHAN, *supra* note 19, at 689-93.

158. *Haji Saifullah*, 41 PLD at 179.

159. *Id.*

vagueness of these charges made them susceptible to being judicially discredited.¹⁶⁰

The resulting *Haji Saifullah* case is as significant as any case being analyzed here because it decided the fate of an elected government. It is additionally important because it was the first time the nature and ambit of Article 58(2)(b) was tested. The judiciary examined in detail the scope of the President's discretion to decide the fate of a government and went on to lay down definite guidelines for future exercise of such power. Damaging to the cause of parliamentary democracy, the dissolution was challenged only after Zia's demise two and a half months later through writ petitions to the Sindh and Lahore High Courts.¹⁶¹

1. Challenge Before the Sindh High Court

In a rather spartan judgment, Chief Justice Ajmal Mian of the Sindh High Court articulated the court's absence of sympathy for the cause of the petitioner—

160. The charges were:

- (i) The objects and purposes for which the National Assembly was elected have not been fulfilled;
- (ii) The law and order in the country have broken down to an alarming extent resulting in tragic loss of innumerable lives as well as loss of property;
- (iii) The life, property, honor and security of the citizens of Pakistan have been rendered totally unsafe and the integrity and ideology of Pakistan have been seriously endangered; and
- (iv) A situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.

Id.

161. M.P. Bhandara v. Pakistan, 6 MLD 2869, 2871 (Sindh High Ct. 1988) (Pak.); Muhammad Sharif v. Pakistan, 40 PLD 725 (Lahore High Ct. 1988), *aff'd sub nom.* Pakistan v. Muhammad Saifullah Khan (*Haji Saifullah*), 41 PLD 166 (1989) (Pak.). Under the Constitution of 1973, the highest court of the country is the Supreme Court of Pakistan. CONSTITUTION OF THE REPUBLIC OF PAKISTAN art. 175 (1973), *available at* http://www.nrb.gov.pk/constitutional_and_legal/constitution/part7.ch1.html. Furthermore, it provides for high courts for the four provinces of Punjab, Sindh, North-West Frontier Province (NWFP), and Balochistan, which are known respectively as the Lahore High Court, the Sindh High Court, the Peshawar High Court, and the Balochistan High Court. *Id.* arts. 192-203, *available at* http://www.nrb.gov.pk/constitutional_and_legal/constitution/part7.ch3.html. In addition, it provides for a Federal Shariat Court to decide whether or not any law or provision of law is repugnant to the injunctions of Islam. *Id.* arts. 203(A)-(J), *available at* http://www.nrb.gov.pk/constitutional_and_legal/constitution/part7.ch3a.html. Together these constitute the constitutional courts of the country.

a member of the dissolved National Assembly—as he had only approached the court a little more than three months after the act of dissolution, with new elections right around the corner.¹⁶² The petitioner’s counsel pleaded that even if the equitable bar of laches applied, since the order being challenged was unjust, improper, and illegal, the higher principle—that “injustice is not perpetuated with the blessings of the Court in its discretionary jurisdiction”—ought to trump any objections.¹⁶³ The court was of the opinion, however, that whether laches applied depended on the facts of each case. Given the importance of the question at stake, it found the delay unforgivable.¹⁶⁴ It further went on to conclude that the petitioner had thus not approached the court with clean hands,¹⁶⁵ though it did not convincingly substantiate this important observation. However, regardless of these reservations, the Sindh High Court was not convinced that it could even interfere in the case at all. First, the court was unsure whether the President’s power was open to judicial review.¹⁶⁶ And second, given that the constitution required an election within ninety days, the court seemed to think that the sole remedy against the President’s action was the holding of new elections.¹⁶⁷

2. Challenge Before the Lahore High Court

The Lahore High Court, on the other hand, found itself in possession of jurisdiction,¹⁶⁸ and declared the grounds for dissolution to be vague, general, or non-existent, and hence not sustainable in law.¹⁶⁹ Of significance is the court’s perception of the shifting constitutional balance of power between the President and Prime Minister in view of Pakistan’s historical experience as well as the emergence of Article 58(2)(b).

Writing the leading opinion of the court, Chief Justice Abdul Shakurul Salam (with whom one other judge fully agreed and three others concurred) declared that the stakes were much higher than the fate of a political government,

162. *M.P. Bhandara*, 6 MLD at 2871.

163. *Id.* at 2871. *Muhammad Sharif*, 40 PLD at 758-59.

164. *M.P. Bhandara*, 6 MLD at 2872.

165. *Id.* The court found that even though the delay in approaching the court was only a little more than three months, it was fatal to the petitioner’s cause as the Pakistani nation was mentally ready for new elections. *Id.* While deciding this, the court discounted the uncertainty and chaos that enveloped the country after Zia’s sudden demise. *Id.* It also ignored the additional factors that regardless of the delay, the petitioner had a strong case and given the country’s tumultuous political history, the fate of Junejo’s Assembly was not just an isolated issue but held strong symbolic resonance for the future of parliamentary democracy in Pakistan. The court did not convincingly explain why it found the petitioner as having unclean hands.

166. *Id.* at 2872.

167. *Id.*

168. *See Muhammad Sharif*, 40 PLD at 757-59.

169. *Id.* at 751.

since, according to him: “These petitions unfold and unveil the struggle of two principles of constitutionalism of modern times for their supremacy so that a free, liberal and democratic polity comes about in which the people can heave a sigh of relief and get on to improve their lives qualitatively.”¹⁷⁰

He wrote impassionedly of various failed attempts to graft a presidential system onto what he considered the real constitutional system of the country: the parliamentary system.¹⁷¹ Unconvinced that Article 58(2)(b) entailed a “subjective” satisfaction of the President that the government ought not to carry on, the Chief Justice was emphatic that the presidential exercise of discretion should be based on facts and circumstances—a decision that is eminently justifiable.¹⁷² In his characteristic style, he declared that Zia was to have “no Caesar-like *carte blanche*” to simply say, “[t]he cause is in my will,” but was required to demonstrate reasons “justifiable in the eyes of the people” and “supportable by law in a Court of Justice.”¹⁷³ He based this conclusion on both a harmonious reading of Articles 48 and 58(2)(b), and the conviction that any other interpretation would be an unacceptable possibility as it would make the President omnipotent.¹⁷⁴

Chief Justice Salam’s judgment is notable for its uncompromising stance against executive abuse of power, with specific emphasis on Zia. He said:

Who does not know what were the objects and purposes for which Pakistan was created? That it will be an independent free democratic country in which the majority will be Muslims and they will be enabled to lead their lives in the best traditions of Islam? Have these objects and purposes been fulfilled? Has not the country been subjugated by Martial Law or remained under its threat for a large part of its life? Have we not gone more astray from Islam than before? Can anybody in his right senses say that since object and purposes of Pakistan have not been fulfilled, let it be dissolved? It would be the perversity of the highest order.¹⁷⁵

Nevertheless, he stopped short of reviving the Assemblies (for reasons that will be discussed further in the analysis of the Supreme Court judgment),¹⁷⁶

170. *Id.* at 752.

171. *See id.* at 754. Describing the existing shape of the constitution, Chief Justice Salam said, “Per force of circumstances the Constitution of 1973 was revived in 1985 but in the process of resurrection it was padded to submerge the parliamentary form of Government with the Presidential trappings.” *Id.*

172. *Id.* at 757.

173. *Id.* at 758.

174. *Muhammad Sharif*, 40 PLD at 758-59.

175. *Id.* at 760.

176. *Infra* Part III.A.3.

instead finding that the dissolution was irreversible. Referring to the dissolved Assemblies, he made a Hamlet-like appeal: “These have died with the stroke. Dead cannot come to life and let the ghosts go and leave the people of Pakistan to choose their own representatives. . . . [T]hey must keep peace and spare the people and the country.”¹⁷⁷

It is interesting to contrast Justice Salam’s anti-Zia rhetoric with the more sympathetic view of Zia’s politics in Justice Rustom Sidhwa’s separate note. For example, Justice Sidhwa said:

I am not unmindful of the fact that the judgment follows close on the heels of the untimely death of the late President, whose great services to this country, specially in the field of molding its ideology and setting its directions on the path of Islam, and to other Islamic countries, in trying to unite them as a great Islamic Millat, have already earned for him a name in this country and in other Islamic countries and for which he shall be honored for many years to come¹⁷⁸

However, Justice Sidhwa too expressed a strong commitment to upholding the ethos of parliamentary democracy.¹⁷⁹

Justice Sidhwa’s analysis of the ambit of Article 58(2)(b) is incisive, involving a scrutiny of relevant legislative debates.¹⁸⁰ It became the basis for the interpretation that was eventually adopted by the Supreme Court when it decided the case on appeal.¹⁸¹ Justice Sidhwa observed that Article 58(2)(b) was intended by the legislators to address the kind of acute emergency that arose in 1977, and he supported the idea of a narrow test to ensure that dissolution is allowable only in such extreme situations.¹⁸² He went on to present some hypothetical scenarios demonstrating where it could be safely said that the government could not be carried on in accordance with the provisions of the constitution. His primary condition for a justifiable dissolution was the impairment of “the functional working of the National Assembly,” though in one of his scenarios, the turning of “the national mood” against an otherwise stable government could also justify dissolution.¹⁸³ Using this yardstick, he found no political issues or crisis besetting

177. *Muhammad Sharif*, 40 PLD at 761.

178. *Id.* at 785 (Sidhwa, J., concurring).

179. *Id.* at 785-86.

180. *See id.* at 771-74.

181. *See infra* Part III.A.3.

182. *Muhammad Sharif*, 40 PLD at 767-68, 778, 784 (Sidhwa, J., concurring).

183. *Id.* at 777. It is not remarkable that Justice Sidhwa found that failure by a government to effectively carry out the directions and recommendations of the President, or to operationalize any particular policy or program promised by a government in its manifesto, or to satisfactorily enforce the Objectives Resolution or the Principles of Policy, is an abstract matter on which no honest judgment can be formed. *See id.* at 777-78. It is

the country: “The political scene was stable and placid like a frozen lake, with not a ripple of disturbance on its surface.”¹⁸⁴ Justice Sidhwa concluded that instead of the President acting as a neutral and benign moderator, “[t]he dissolution order appears to have been passed in gross and reckless disregard and disrespect for the mandatory provisions of the Constitution.”¹⁸⁵ Other judgments further reveal a consensus on narrowly circumscribing the ambit of Article 58(2)(b). Justice Muhammad Afzal Lone was clear that in “democratic polities . . . the question of its dissolution would arise only in highly exceptional circumstances” as “any provision in derogation of the sovereignty of the Parliament has to be strictly construed.”¹⁸⁶

3. Challenge Before the Supreme Court

The Lahore High Court decision was taken up by the Supreme Court on appeal. An eleven-member bench of the Supreme Court found the dissolution order to be illegal, but they did not grant the relief of restoration of the Assemblies.¹⁸⁷

a. The Test

After painstakingly reviewing the parliamentary discourse preceding the adoption of the Eighth Amendment and carefully visualizing the results forthcoming from an interpretation that would vest the President with wide powers, Justice Nasim Hasan Shah (writing the leading opinion of the Court with whom nine other judges agreed) held that the President could only exercise this power under very narrowly circumscribed circumstances.¹⁸⁸ In other words, a situation had to exist where “[t]he machinery of the Government has broken down

also not remarkable that he recognized that these failures are dependent on factors which are relatively variable and which have no nexus with the functional working of the National Assembly. *See id.* What is surprising, however, is that by the same token, he did not find the “changing of the national mood” to be as abstract and nebulous a phenomenon as the above-enumerated ones, in addition to having no nexus with “the functional working of the National Assembly.” *See id.* It is apparent from his judgment that this last scenario was inspired by the emergency in 1977, where, according to him, even in spite of the change in the national mood, there were no constitutional mechanisms for the President to address the situation. *See id.* at 767-68.

184. *Id.* at 781.

185. *Id.* at 784.

186. *Id.* at 792 (Lone, J., concurring).

187. *Pakistan v. Muhammad Saifullah Khan (Haji Saifullah)*, 41 PLD 166, 190, 194-95 (1989) (Pak.).

188. *Id.* at 188.

completely, its authority eroded and the government cannot be carried on in accordance with the provisions of the Constitution.”¹⁸⁹ The Court was categorical and persuasive in qualifying the discretion conferred on the President. Justice Shah identified a two-step process to be followed by the President while exercising such discretion. First, the President had to form an objective opinion.¹⁹⁰ Second, if his objective opinion was that the government qualified to be dissolved because it met the test, it was within the President’s discretion to dissolve it.¹⁹¹ It was the objective formation of opinion by the President that had to be based on some material and factual grounds, which in turn were judicially reviewable.¹⁹² The judgment is impressive for its clear and legally sound interpretation of the nature and scope of Article 58(2)(b) and exudes enthusiasm for the restoration of democracy, openly professing faith in a parliamentary system.¹⁹³

In his separate note, Justice Shafiur Rahman (with whom one judge agreed) came up with a different but equally stringent test. He said:

The expression “cannot be carried on” sandwiched as it is between “Federal Government” and “in accordance with the provisions of the Constitution,” acquires a very potent, a very positive and a very concrete content. Nothing has been left to surmises, likes or dislikes, opinion or view. It does not concern itself with the pace of the progress, the shade of the quality or the degree of the performance or the quantum of the achievement. It concerns itself with the breakdown of the Constitutional mechanism, a stalemate, a deadlock in ensuring the observance of the provisions of the Constitution. The historical perspective in which such a provision found a place in our Constitution reinforces this interpretation.¹⁹⁴

Continuing in the Court’s pro-parliamentary democracy vein, Justice Shafiur Rahman stressed the sovereignty—as well as the distinct and separate existence—of elected assemblies. Consequently, he concluded that their utility, efficacy, representative character, and success or failure cannot be gauged by any parameters outside the ambit of the Constitution.¹⁹⁵ This was in the context of the Federation’s argument that the elected Assemblies had not been able to satisfy the President with the pace of Islamization in the country.

189. *Id.*

190. *Id.* at 189.

191. *Id.* at 189-90.

192. *Id.*

193. *Haji Saifullah*, 41 PLD at 194-95.

194. *Id.* at 212-13 (Rahman, J., concurring).

195. *Id.* at 214.

b. Evaluation of Grounds and Supporting Evidence

The Supreme Court, while analyzing the grounds in detail, essentially agreed with the Lahore High Court's rationale for rejecting them, finding them to be vague, nonspecific, or nonexistent. There was not much opportunity for coming up with parameters for admission and evaluation of supporting evidence, as the Federation could not muster much by way of documentary evidence to support Zia's vague and overbroad allegations.¹⁹⁶

c. The Outcome

Though it found Zia's act of dissolution to be illegal, the *Haji Saifullah* Court did not order the restoration of the Assemblies. By declining relief, despite its unanimous verdict that the Assemblies had been illegally dissolved, the Court created controversy that is debated to date.¹⁹⁷ The reasons for not granting relief ranged from the technical to the unabashedly political, all of them unpersuasive. While it is true, as the Court observed, that the dissolution was challenged belatedly and not by the main affectees, it is nevertheless difficult to get around the fact that the petitioners were not actually legally barred either by the statute of limitations or by the lack of *locus standi*.¹⁹⁸ It is also true, as the Court observed, that the political situation on the ground had changed since the dissolution; some members of the ruling party had joined splinter groups, and preparations were also underway for elections.¹⁹⁹ However, there is weight in the criticism that none of these factors definitively ruled out a revival of Assemblies as impractical, unjust,

196. *Id.* at 178-82 (majority opinion).

197. Some disturbing disclosures came later that further fueled the controversy. General (Retd) Mirza Aslam Baig, who was the Chief of the Army at the time of the *Haji Saifullah* decision, made a statement to the press in February 1993. ZIRING, *supra* note 7, at 541-42; Re: Contempt of Court Proceedings against General (Retd.) Mirza Aslam Baig, 45 PLD 310, 314 (1993) (Pak.). The statement was to the effect that he had actually sent a confidential message to the Supreme Court in 1988 urging that in the interest of democracy, it should not reinstate the Junejo government, as the election process had been set into motion. ZIRING, *supra* note 7, at 542. This created a huge controversy and the General was summoned and reprimanded in contempt proceedings by the Supreme Court. See Re: Contempt of Court Proceedings against General (Retd.) Mirza Aslam Baig, 45 PLD at 313-19.

198. See *Haji Saifullah*, 41 PLD at 180, 192-95. Though the majority opinion mentioned the delay in the filing of the petition, it steered clear of categorizing the delay in itself or the potential lack of *locus standi* of the petitioner as technical impediments. See *id.* Instead, the majority opinion relied on ostensible public policy reasons such as its assertion that the nation and the state's administrative machinery was all set for fresh elections and that greater "national interest" lay in allowing fresh elections rather than restoring the dissolved assembly. *Id.*

199. *Id.* at 192-94.

or undesirable. On the contrary, it can be validly argued as a matter of principle as well as policy, that it was desirable, even imperative, to restore the Assemblies, both to fully undo the wrong and to set a clear precedent that if Assemblies are wrongly dissolved, they will be brought back to life. It would also have been much more consistent with the Court's own pro-parliamentary democracy rhetoric.

The *Haji Saifullah* Court, however, did not hinge the outcome of the case on purely legal considerations, but chose the slippery slope of attempting to define "national interest." Rather ambiguously, Justice Shah stated that national interests must take precedence over individual interests and that national interest lay in the holding of elections, rather than in reviving the Assemblies.²⁰⁰ He said that there was a national consensus that regular elections were the panacea for the political malaise in the country.²⁰¹ What Justice Shah did not address was the quantum of value attached to the continuity of elected governments and the resultant positive impact on the political environment given the frequent interruptions of the political process in Pakistan. More fundamentally, he did not address whether it was appropriate for judges to engage in this amorphous balancing of alternate political values in the first place. Justice Shah openly lamented this decision in a subsequent dissolution judgment when he said: "On hindsight, I now think that after having found the action of dissolution of the National Assembly was not sustainable in law, the Court should not have denied the consequential relief and ought to have restored the National Assembly."²⁰²

Justice Shafiur Rahman, in particular, adopted a radical approach. Not only did he start with the basic premise that in parliamentary systems, dissolutions were regarded as, in essence, appeals from the legal to the political sovereign; he also found the restoration of the Assemblies unpalatable, declaring that "[p]arty-less elections are not in consonance with the Scheme of our Constitution."²⁰³ He got into murkier territory when he started judging the ousted Assemblies' quality of performance, as well as the intentions and credibility of its members—issues that were not at all germane to the case at hand.²⁰⁴

As mentioned above, the case's outcome is surprising given the sympathy in the majority view for the ousted Assemblies and the plight of the democratic process in general. For instance, while describing the dissolution of the National Assembly that in turn triggered the dissolution of the provincial assemblies, Justice Nasim Hasan Shah commented: "Thus within a space of few hours the newly-erected edifice of democratic institutions, raised with painstaking care consuming years of toil and labor stood dismantled and demolished."²⁰⁵

200. *Id.* at 194-95.

201. *Id.* at 195.

202. *See* Muhammad Nawaz Sharif v. President of Pak., 45 PLD 473, 565 (1993) (Pak.).

203. *Haji Saifullah*, 41 PLD at 220 (Rahman, J., concurring).

204. *Id.* at 220-22.

205. *Id.* at 179 (majority opinion).

However, when the petitioners urged that the duty of the courts was simply to ascertain the legal position, declare it, and allow the law to take its course, pleading passionately: “*Fiat justitia, ruat coelum*,”²⁰⁶ the rather sarcastic response from Justice Nasim Hasan Shah was, “We would prefer to take the first part of the maxim ‘*Fiat justitia*’ (let justice be done) and discard the rest namely ‘*ruat coelum*’ (though the heavens should fall) because justice should be done, in such a manner that the heavens should not fall.”²⁰⁷

d. Conclusion

Though the actual outcome of the case is highly debatable, the Court’s interpretation of Article 58(2)(b) is praiseworthy for faithfully resonating the lawmakers’ intent, and for its commitment to upholding the parliamentary character of the Constitution. The Court showed little appreciation for Zia’s vague and unsubstantiated grounds for dissolution, finding them to be unconvincing. It gave a stringent and clear test for the justifiable exercise of the presidential dissolution power—one that could conceivably deter its erroneous use or abuse. This raised legitimate expectations that this power was only rarely going to be invoked in the future, and only in circumstances of acute constitutional crisis. Given this precedent, the next dissolution came shockingly soon.

B. The Second Dissolution—The *Tariq Rahim* Case

The second dissolution through the invocation of Article 58(2)(b) came against the backdrop of the revival of Bhutto’s Pakistan People’s Party (PPP) in the late 1980s. One major contributory reason for this was the return of Benazir Bhutto (“Benazir”)—Bhutto’s daughter and heir-apparent—who led her party to electoral victory in the 1988 elections even though she failed to win an absolute majority.²⁰⁸ Benazir’s short stint was fraught with difficulties. There was much

206. This maxim comes from a story in Seneca (Dialogues, III, 18) and is translated as “Let justice be done, though heavens should fall.” *Id.* at 194.

207. *Id.*

208. KHAN, *supra* note 19, at 711. After the 1988 elections, the Pakistan People’s Party was the largest single party in the National Assembly, winning 93 out of 207 general seats (with an additional 20 seats reserved for women and 10 seats reserved for minorities), 11 short of the number needed for a majority. *Id.* at 711, 736 n.1. The Islami Jamhoori Ittehad (IJI)—a coalition of various factions of the traditional right-of-center Muslim League (the party that had historically led the movement for the creation of Pakistan), various religious parties, and remnants of Zia’s era—was the next largest party, winning 55 seats. *Id.* at 705, 711. Still recovering from a long drought of elections and the de-

bad blood between the PPP and the Islami Jamhoori Ittehad (IJI), as the former regarded various members of the latter to be cohorts of Zia, for whom Benazir had mistrust, as she looked upon them to be her father's executioners. For political and personal reasons, the Treasury and Opposition never managed to reach a harmonious understanding.²⁰⁹ At the same time, the Independents played their cards in order to be wooed by both sides, as they attempted to consolidate party positions in the Assembly.²¹⁰ Benazir's other challenge was that IJI had managed to form governments in two of the country's four provinces, including the largest and most influential Punjab Province. Meanwhile, the Upper House (the Senate), elected during Zia's time, still had many members of the old guard.²¹¹ The sectarian violence in Sindh—the complex causal factors for which could be traced back to Zia's politics of language in the province during the 1980s²¹²—also took on new dimensions as Benazir Bhutto's appeasement strategies failed. Benazir Bhutto had her work cut out and she both saw and imagined Judases in every corner. Eventually, on August 6, 1990, President Ghulam Ishaq Khan invoked Article 58(2)(b) for the second time in the country's history and dissolved the National Assembly.²¹³ This action was followed, in usual fashion, by the respective chief ministers and governors dissolving the provincial assemblies.²¹⁴

Thus, barely two years after having to sit in judgment over the fate of a dissolved Assembly, the Pakistani courts found themselves adjudicating the legality and legitimacy of another dissolution—this time involving a government that had come to power through the first party-based elections in many years. Here was a nascent elected government being targeted for dissolution by a seasoned politician, through detailed and specific allegations, against a backdrop of complex politicking and personality conflicts between the two highest functionaries in the country. In contrast to Zia's list of allegations, the grounds of

politicization brought about by the 1985 party-less elections, 27 independent candidates were also elected to the National Assembly. *Id.* at 711.

209. *See also* ZIRING, *supra* note 7, at 510-14; *cf.* KHAN, *supra* note 19, at 724-25.

210. *Cf.* KHAN, *supra* note 19, at 715-16.

211. *Id.*

212. For a discussion of the nature and reasons for the violence in Sindh and the alleged failure of Benazir Bhutto's government in stemming it, see Ahmad Tariq Rahim v. Pakistan, 44 PLD 646, 701-02, 718-19 (1992) (Pak.). For a discussion of the emergence of language and sect-based politics in Sindh, see ZIRING, *supra* note 7, at 485, 487-88, 494-97.

213. MALUKA, *supra* note 8, at 280. Ghulam Ishaq Khan's career presents a fascinating study. He rose meteorically from the lower ranks of bureaucracy to hold some of the prime portfolios throughout the Ayub, Bhutto, and Zia eras—eventually becoming Chairman of Senate under Zia. *See* ZIRING, *supra* note 7, at 505-06. His credentials as a very influential member of Zia's inner cabinet were common knowledge. Benazir Bhutto was understandably wary of letting him continue as President, given his strong links with the civil and military establishment, but she had to eventually give in. Their relationship was tense and strained throughout Benazir's first term in office. *See generally* MALUKA, *supra* note 8, at 277-82, 321-22.

214. *See* KHAN *supra* note 19, at 724.

Ghulam Ishaq Khan's order of dissolution were precise, varied, and supported by documentary evidence in the form of governmental documents and correspondence, newspaper clippings, and affidavits.²¹⁵ At the same time, the courts had the benefit of precise and narrow parameters for the exercise of presidential power that had been laid out in the previous dissolution judgment after an exhaustive interpretive exercise. This time, the legal challenges to the dissolution came much sooner.

215. A summarized version of the grounds in the dissolution order is as follows:

- (a) Insufficient legislative work on the part of, and internal dissensions and friction within, the National Assembly. Persistent and scandalous "horse-trading" for political gain and furtherance of personal interests, corrupt practices and inducement, in contravention of the Constitution.
- (b) Willful undermining and impairment of the working of constitutional arrangements and usurpation of the authority of the provinces and of such institutions, by the federal government, resulting in discord, confrontation, and deadlock. Specifically the following acts of the federal government:
 - i. The Council for Common Interest not allowed to function;
 - ii. The National Finance Commission never called to meet;
 - iii. Constitutional powers and functions of the provinces deliberately frustrated; and
 - iv. The Senate ridiculed and its constitutional role eroded.
- (c) Corruption and nepotism in the federal government.
- (d) Failure to protect the Province of Sindh against internal disturbances, resulting in heavy loss of life and property.
- (e) Violation of the Constitution in the following instances:
 - i. Public ridicule of the superior judiciary, attack on its integrity, and attempts made to impair its independence;
 - ii. Misuse of government resources for political ends and personal gains;
 - iii. The undermining of the Civil Services of Pakistan; and
 - iv. Exercise of powers under Article 45 without the President's prior approval.

For details, see *Tariq Rahim*, 44 PLD at 652-54.

1. Challenge Before the Lahore High Court

A five-member bench of the Lahore High Court upheld the order of dissolution.²¹⁶ Chief Justice Muhammad Rafiq Tarar (with whom two judges agreed) surmised the task at hand, commenting:

This Court has to concentrate on the material placed before it, which was taken into consideration by the President for forming honest opinion that the Government of Federation could not be carried on in accordance with the provisions of the Constitution. As to the reasons given in the Order, whether they disclose direct nexus with the preconditions, prescribed in Article 58 of the Constitution, this Court is not to sit in appeal over the impugned Order of the President nor to substitute its own findings for the Order of the President.²¹⁷

This was quite a hands-off approach—highly surprising, as the *Haji Saifullah* judgment had, by narrowly circumscribing the exercise of Article 58(2)(b) powers, necessitated a much more intensive judicial review to ensure that such exercise was not violative of the test. This shift in emphasis from a pro-parliamentary democratic perspective to a presidential-power-centric one is significant.

Justice Tarar showed marked reluctance to evaluate the possible insufficiency and unreliability of evidence,²¹⁸ which is also surprising considering the potential misuse of the dissolution power, which the *Haji Saifullah* Court was clearly attempting to prevent in the future. While the situation in the previous case was more straightforward, as the grounds for dissolution were broad, vague, and unsupported by any documentary evidence, one could readily visualize situations where a President could present more specific and diverse grounds, supported by documents to comply with the legal test. Yet, theoretically, the dissolution could still be held invalid on application of the strict *Haji Saifullah* test due to persuasive counter-evidence and affidavits, as well as the inherent difficulty of proving broad allegations dealing with nebulous social and political problems, and the possibility of presidential partiality in exaggerating the crisis of government. Surely, a much closer evaluation of evidence and counter-evidence would be necessary in such scenarios. Yet the Chief Justice opined: “The President applied his mind to the facts and accompanying events and recorded reasons in the self-contained Order. The sufficiency and adequacy of the reasons

216. Ahmad Tariq Rahim v. Pakistan, 43 PLD 78, 116 (Lahore High Ct. 1991) (Pak.), *aff’d*, 44 PLD 646 (1992) (Pak.).

217. *Id.* at 103.

218. *Id.* at 103-05, 110-15.

are not justiciable”²¹⁹ The actual existence of the theoretical scenarios enumerated above makes the Lahore High Court judgment unsatisfactory. The Federation’s supporting evidence essentially consisted of newspaper clippings and inter-departmental communications of debatable credibility.²²⁰ Furthermore, a clear distinction needed to be drawn between the constraints and failings of an immature fledgling democracy and an actual constitutional deadlock. At the same time, it was important for the court to remain cognizant of the fact that even in mature democracies, highly controversial government policies are not necessarily illegal or unconstitutional. However, the Lahore High Court conducted a rather sparse and, at times, politically partial review of the grounds and accepted all the Federation’s evidence on a more or less prima facie basis.²²¹

2. Challenge Before the Sindh High Court

The Sindh High Court reached the same conclusion as the Lahore High Court.²²² Writing the opinion of the court, Acting Chief Justice Saeeduzzaman Siddiqi declared that:

The Courts . . . while exercising these powers of judicial review in such cases cannot assume the role of an appellate Court or an authority superior to President. The Court . . . will confine itself to the consideration that the grounds stated by the President . . . bore reasonable nexus to the pre-conditions prescribed under Article 58(2)(b) . . . and that there is some material to support the grounds stated by the President in his order²²³

219. *Id.* at 110.

220. *Id.* at 105.

221. *Id.* at 110-16. Very controversially, the Chief Justice conducted an evaluation of the legislative performance of the National Assembly, finding it inadequate, while disregarding the hostile Senate factor. *Id.* at 110-11. The analysis in the other opinions is also sketchy and unpersuasive, and there is use of strong but obscure Islamic rhetoric where a clear and precise analysis would have been more beneficial. *See id.* at 149-51, 162 (Ahmad, J., concurring). At times, the tone of certain opinions is very anti-Bhutto. One presidential allegation pertained to the ridicule of judiciary through a conference arranged by the government to discuss the legal decision that led to the conviction and ultimate execution of Zulfikar Ali Bhutto. *Id.* at 94 (majority opinion), 162-63 (Ahmad, J., concurring). This raised important free speech issues, which went largely unnoticed. There is much dilation on this ground, despite a promise by certain judges not to dilate, and the comments become personalized. *Id.* at 162-63 (Ahmad, J., concurring).

222. *Khalid Malik v. Pakistan*, 43 PLD 1, 64-66 (Sindh High Ct. 1991) (Pak.).

223. *Id.* at 34. This, however, still raises the questions: (1) What if the material is controversial and dubious, and even if the President’s opinion is honest, is it based on questionable foundations? (2) Should counter-evidence not be given a lot of importance, given the stakes? (3) In addition, how reliable are newspaper clippings, etc.?

This essentially meant that even when the court could see that the supporting material provided was inadequate, it was persuading itself to look for the bare minimum—a “reasonable nexus.” Admitting that there is no clear measure to determine when a constitutional breakdown has occurred, the court advocated a case-by-case approach but showed reluctance to lay down any parameters in this regard, “as it may amount to encroachment upon, and whittling down of the discretion of the President vested under Article 58(2)(b).”²²⁴ Despite all the emphasis in the *Haji Saifullah* case on the need to curtail the use of this strong presidential power, the court was strangely apprehensive of inadvertently whittling down that power, deferring instead to the President’s point of view: “The above statement of facts by the President is a judgment on political issues by the highest executive Authority of the country and cannot properly form the subject of judicial review before the Courts.”²²⁵ With Justice Saeeduzzaman Siddiqui opining, “I am of the view that existence of any other remedy either under the Constitution or under the law of the land could not fetter the discretionary power of President under Article 58(2)(b) of the Constitution, if exercise of such power was available in the circumstances of the case,” the judgment undid the fettering of presidential discretion in the *Haji Saifullah* judgment.²²⁶ In addition, once again, the issue of political undertones made an appearance.²²⁷

3. Challenge Before the Supreme Court

A twelve-member bench of the Supreme Court also upheld the dissolution order. Although two judges dissented with the majority’s verdict on its merits, they agreed with the Court’s declining the relief of reviving the dissolved Assemblies.²²⁸

a. The Test

Justice Shafiur Rahman (with whom eight other judges agreed) wrote the leading opinion. Given that the Supreme Court had devoted a lot of attention in the *Haji Saifullah* case in coming up with a clear and sound interpretation of

224. *Id.* at 48.

225. *Id.* at 52.

226. *Id.* at 61.

227. *See id.* at 140-55 (Rehman, J., concurring). For instance, Justice Syed Abdul Rehman adopted a pronounced negative tone when he remarked on Benazir’s lack of democratic etiquette and want of respect and concern for the judiciary. *See id.* At times, portions of his judgment read like the dictation of a charge sheet of crimes rather than an evaluation of allegations. *See id.*

228. Ahmad Tariq Rahim v. Pakistan, 44 PLD 646, 646 (1992) (Pak.).

Article 58(2)(b) and a fairly categorical test for gauging its legitimate use, the leading opinion dedicated a lot of space and attention to these ostensibly exhausted themes. Justice Rahman reiterated many of the previously visited arguments pertaining to interpretation of Article 58(2)(b), himself acknowledging that in the *Haji Saifullah* case, it “ha[d] received full attention and its meaning and scope authoritatively explained and determined.”²²⁹

Then came a big surprise! Without any preliminary justifications or analysis, Justice Rahman stated a brand-new test. According to Justice Rahman:

[Dissolution] is an extreme power to be exercised where there is an actual or imminent breakdown of the constitutional machinery, as distinguished from a failure to observe a particular provision of the Constitution. There may be occasion for the exercise of this power where there takes place extensive, continued and pervasive failure to observe not one but numerous provisions of the Constitution, creating the impression that the country is governed not so much by the Constitution but by methods extra-Constitutional.²³⁰

Justice Rahman did not explain why he had departed from the previous test, which was based on precedent and consensus, and with which he was in full agreement in his previous dissolution judgment. In an earlier part of the opinion, he actually quoted both the test laid down in the majority opinion in the *Haji Saifullah* case, as well as his slightly different formulation of the test in that case, without any critique or mention of any intention of departing from the same.²³¹ The test adopted by the majority in the *Haji Saifullah* case used the words “the machinery of the Government has broken down completely.”²³² Though Justice Rahman had not used the word “completely” in his separate note, he had also

229. *Id.* at 664.

230. *Id.* at 664-65.

231. *Id.* at 657. This judgment has received strong criticism. For instance, Justice Dorab Patel—an eminent retired judge—finds Justice Rahman’s view in the *Tariq Rahim* case to be inconsistent with his earlier view in the *Haji Saifullah* case. Talking specifically of the ground of “horse-trading,” which Justice Rahman heavily relied upon, Justice Patel says that it could not be reasonably contended that the defection of a few members of the Assembly constituted a constitutional-breakdown. See DORAB PATEL, TESTAMENT OF A LIBERAL 184-85 (Oxford Univ. Press 2004) (2000); see also *infra* note 255 for discussion of “horse-trading.” Justice Patel also objects to Justice Rahman’s acceptance of the President’s claim in one sentence, referring to non-functioning of the Council of Common Interests, and also Justice Rahman’s very liberal interpretation of Article 58(2)(b). PATEL, *supra* at 186-88.

232. *Pakistan v. Muhammad Saifullah Khan (Haji Saifullah)*, 41 PLD 166, 188 (1989) (Pak.).

visualized an equally drastic “breakdown of the constitutional mechanism” as requisite justification for dissolution.²³³

The new test, introduced by Justice Rahman, was much broader because it legitimized the invocation of Article 58(2)(b) as not just a curative action, but also a preventive one. No justification was offered for deviating from the previous test and increasing the ambit of the President’s powers, given all that had been said in the previous judgment about curtailing it. Justice Rahman had clearly warned in his note in the *Haji Saifullah* case that the key formulation of Article 58(2)(b), i.e., “the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution,” in his opinion, “does not concern itself with the pace of the progress, the shade of the quality or the degree of the performance or the quantum of the achievement,” but rather it “concerns itself with the breakdown of the Constitutional mechanism, a stalemate, a deadlock in ensuring the observance of the provisions of the Constitution.”²³⁴ Yet, by including the words “actual or imminent breakdown of the constitutional machinery” in his new formulation of the test, Justice Rahman made the President’s judgment call much more amenable to relying upon a more subjective evaluation of the state of affairs in the country.²³⁵ “Actual breakdown” is hard enough to define. What precisely would be “imminent breakdown”? Justice Rahman did not elaborate and thus ended up presenting a much less precise test than the one in the previous case.

Justice Rustam Sidhwa, in his concurring opinion, also revisited the ambit of the Article. He attempted to come up with helpful hypothetical situations (as he did in his high court judgment on the previous dissolution) that could be regarded as constitutional breakdowns. He went on to assert that it would be improper to lay down parameters or tests to determine the circumstances under which the Court should accept a given scenario as a constitutional breakdown, and he clearly adopted a case-by-case approach, while denying doing so.²³⁶ A case-by-case approach may arguably be a more pragmatic stance, even though: (1) it is a clear departure from the test laid down in the *Haji Saifullah* case, which was expected to act as a deterrent against misuse of Article 58(2)(b) powers; and (2) it creates a much harder task for the judiciary, as well as greater scope for subjective and potentially controversial legal decisions.

At the same time, Justice Sidhwa implored that, given the nascent state of the democratic process, the country’s traumatic experience with martial laws, questionable dismissals of government, subversion of the Constitution, constitutional experimentation, rigged and politically influenced elections, and the illiteracy of the electorate, the presidential power ought not to be invoked in a

233. *Id.* at 212-13 (Rahman, J. concurring).

234. *Id.*

235. *Tariq Rahim*, 44 PLD at 664-65.

236. *Id.* at 687 (Sidhwa, J., concurring).

sweeping manner so as to avoid a “constitutional autocracy.”²³⁷ At a different point in his opinion, he also supported the view that the test of validity should be curative as well as preventive and provided not much more guidance than Justice Rahman as to when the “preventive” dimension of the test would come into play, simply saying: “What is required is that the breakdown is imminent, as partial dislocation has begun, or the breakdown has actually taken place and as a last resort interference is required to ultimately restore representative Government.”²³⁸ Justice Sidhwa, however, exhorted that the presidential power ought to be used only as a last resort, within the norms of established parliamentary process, and showed sympathy for the constraints, errors (even catastrophic ones), and failures to which all political governments are prone.²³⁹ Therefore, he opined, “the functional ability of a ruling party does not merely fail if some provision of the Constitution is violated or not performed or ill performed.”²⁴⁰ He acknowledged how difficult it may be for politically divided parliaments to make even simple decisions and drew a distinction between scenarios presenting complete deadlock or breakdown, and others, which are more general and could only be used as supportive factors.²⁴¹

Justice Abdul Shakurul Salam’s pronounced ire for the Eighth Amendment, which found vent in his high court judgment in the previous dissolution case, culminated in his strong dissent in this case. Expressing frustration and disappointment, Justice Salam, in his flamboyant style, traced what he described as the betrayal of Pakistan in its original commitment to a democratic, parliamentary system of government.²⁴² He candidly declared that the Junejo Assembly only accepted the Eighth Amendment because it had no other option to ensure resumption of democratic rule.²⁴³ Justice Salam then argued that, with Zia’s death, the Eighth Amendment had actually become invalid. He argued that: (1) Article 58(2)(b) concentrates tremendous power in an individual, namely the President, who is not a chosen “representative[] of the people,” and it is only to chosen representatives of the people (i.e., the elected Parliament and Prime Minister) that the Constitution entrusts the exclusive exercise of the power and authority of the state, and hence, such an aberration goes against the spirit of the Constitution;²⁴⁴ (2) both Islamic scripture and Article 48 of the Constitution mandate the President to consult and take advice, which is of a binding nature;²⁴⁵ and (3) Article 58(2)(b) was accepted by the Junejo Assembly in the context that

237. *Id.* at 688.

238. *Id.* at 690.

239. *Id.* at 690-91.

240. *Id.*

241. *Tariq Rahim*, 44 PLD at 690-92 (Sidhwa, J., concurring).

242. *Id.* at 667-70 (Salam, J., dissenting).

243. *Id.* at 670, 673.

244. *Id.* at 672-73.

245. *Id.* at 672-76, 678. Article 48 mandates the advice of the cabinet and the Prime Minister for presidential actions.

Zia linked it to the lifting of the martial law.²⁴⁶ In sum, Article 58(2)(b) gave Zia powers for which there is no precedent. Other similar amendments introduced by Zia were unique in nature and specific to his continuation in office and to his person.²⁴⁷ Hence, they lapsed with his demise. This is a novel line of argument with a strong “framers’ intent” emphasis.²⁴⁸

Justice Salam’s lack of enthusiasm for experimentations with the presidential system was also obvious. He found Article 58(2)(b)’s constitutional balancing drastic because short of sending the Assembly home, the President had not been equipped with less disastrous ways of persuading the Parliament.²⁴⁹ He also pointed out the potential embarrassment of a dissolved Assembly coming back to power and then impeaching the President.²⁵⁰ Then, assuming that the Article 58(2)(b) power remained intact after Zia, Justice Salam found the provision unacceptable for many additional independent reasons.²⁵¹ His complete lack of enthusiasm for an un-elected President possessing such untrammelled powers was poignantly reflected in his comment that the President dissolving the Assemblies was like “[a] creature condemning the creator,” as these very Assemblies had not long ago elected Ghulam Ishaq Khan as President.²⁵² However, once again, since the judgment took some time coming and elections had already been announced, Justice Salam ruled out restoration as relief.²⁵³

246. *Id.* at 670, 673.

247. *Tariq Rahim*, 44 PLD at 673-74 (Salam, J., dissenting). The amendments to the Constitution that Justice Salam referred to were the incorporation of Article 41(7), which stated that Zia would be the President of Pakistan (uniquely for constitutional language, the Article actually named him) in consequence of the result of the referendum held on December 19, 1984, for a period of five years, notwithstanding Article 43, which lays down, *inter alia*, that the President shall not hold any other position carrying the right to remuneration for the rendering of services. The notwithstanding clause in Article 41(7) precluded the Article 43 limitation, allowing Zia to remain Chief of Army Staff while holding the office of President. *Id.*

248. *Id.* at 673-74 (Salam, J., dissenting).

249. *Id.* at 674-75.

250. *Id.* at 675.

251. *Id.* at 675-79. Justice Salam made many persuasive arguments that include, *inter alia*: compliance with the Constitution was the joint responsibility of the President and the Prime Minister and the latter could not be made the sole scapegoat; a nascent democratic government had to be extended a lot of leeway; the problem categorized as “a complete breakdown” could have been resolved in various ways short of a dissolution; if the federal government had faulted, that did not make provincial governments culpable, and similarly if the cabinet and President could not carry on together, the National Assembly ought not to suffer; the ruling government had successfully survived a no-confidence motion; and finally, the appointment of opposition members in the caretaker setup begat *mala fides* on the part of the President. *Id.*

252. *Id.* at 679.

253. *Tariq Rahim*, 44 PLD at 679-80 (Salam, J., dissenting).

It is important to reiterate here that regardless of their individual merit or lack thereof, the tests laid down in both the majority and concurring opinions, as well as the interpretation adopted by Justice Salam's dissenting opinion, are a clear departure from the test laid down only a couple of years before in the exhaustive *Haji Saifullah* judgment. The only judge who strictly subscribed to the test of validity as laid down in the *Haji Saifullah* case was the author of the second dissenting opinion, Justice Sajjad Ali Shah.

Justice Sajjad Ali Shah, like Justice Salam, also found the dissolution illegal and unsustainable. However, Justice Shah's verdict was based on his finding the grounds for dissolution unconvincing, rather than on the view, like Justice Salam, that Article 58(2)(b) was no longer an operative part of the Constitution. In other ways, however, he agreed with Justice Salam's line of reasoning and main conclusions.²⁵⁴ As to the grounds for dissolution, Justice Shah was not at all convinced by the "horse-trading" allegations²⁵⁵ nor, for that matter, by any of the other grounds. Justice Shah found that the applicable law on the issue, i.e., the Political Parties Act of 1962, clearly defined "defection" and the mechanism to deal with it, and concluded that the members who had allegedly committed "floor-crossing"²⁵⁶ did not come within its mischief, as they had not legally defected or withdrawn from their parties but had only voted or abstained from voting contrary to directions of their parliamentary parties.²⁵⁷ Justice Shah's first patently political statement, starting an unfortunate trend that continued in subsequent cases, appeared in this judgment when he said: "If horse-trading was not caught within the mischief of law before dissolution order was passed and was

254. Justice Shah, however, abstained from commenting on the Eighth Amendment vis-à-vis the parliamentary system debate, saying that he felt constrained to do so, as a legal challenge to the Eighth Amendment was *sub judice*, and an appeal was pending before the Supreme Court. *Id.* at 711-12 (Shah, J., dissenting).

255. "Horse-trading" is a term coined in this era to denote the pressuring and/or bribing of parliamentarians to abandon party or independent affiliations and defect to another party. It is important to note that the mere act of switching party affiliations did not entail violation of any applicable law and hence was not an illegality. Justice Rahman relied, instead, on normative, ethical, and public policy justifications for condemning the practice, while omitting to discuss even the factual commission or lack of such acts in the context of the case. *Id.* at 666 (majority opinion).

256. "Floor-crossing" is a term coined to describe renegade parliamentarians who did not formally resign from their political parties or formally join another political party. Instead, having been elected on party tickets, they switched loyalties and consistently ignored party discipline and directives in terms of voting in parliament, motivated by ideological or less than moral imperatives.

257. *Tariq Rahim*, 44 PLD at 720 (Shah, J., dissenting). Problematically, Justice Shah engaged in a patently political analysis to highlight the political impediments and constraints faced by the PPP. The nebulous nature of certain grounds notwithstanding, in accepting the petitioner's view of the matter, Justice Shah conducted a more or less similar *prima facie* review, as did his fellow judges, while accepting the Federation's arguments and supporting evidence. *Id.* at 707-21.

considered morally wrong, then judicial notice can be taken to the effect that some horse-trading continues now but is being officially ignored.”²⁵⁸

Justice Shah’s strongly worded opinions, in this and subsequent dissolution cases, were to provide the most obvious insight into the mushrooming political polarizations and pressures that had invaded the chambers of the Supreme Court. Commenting on the possibility of *mala fides* on the part of the President, he opined:

It is apparent from what is stated . . . and impression is unavoidable that object behind order of dissolution was not only that Government of that time be toppled but there was also motivation with calculated moves to tarnish image of Pakistan Peoples Party in the eyes of the people so that it should be routed in the election and not returned to power again.²⁵⁹

b. Evaluation of Grounds and Supporting Evidence

The other major shortfall of the majority opinion is that while Justice Rahman dedicated a lot of space to reiterating the order of dissolution, the arguments of the respective counsels, the findings of the high court, and the legal interpretation questions pertaining to Article 58(2)(b),²⁶⁰ he dedicated barely a few paragraphs to gauging and evaluating the substantive content and merit of the actual grounds for dissolution.²⁶¹ After a repetition of the analysis of the grounds given by the Lahore High Court and a denunciation of the practice of “horse trading,”²⁶² he accepted all the presidential grounds in a more or less wholesale manner.²⁶³ Though he did add that while some of the grounds may be independently insufficient, they can still be invoked in support of the more potent ones, and he deemed the evidence adduced by the Federation in support of its contention sufficient.²⁶⁴

258. *Id.* at 714. Justice Shah found it paradoxical for the Leader of the Opposition to be appointed as the caretaker Prime Minister if people had ostensibly lost confidence in the Assembly in its entirety. *Id.* at 715.

259. *Id.* at 721.

260. Almost fifteen pages are dedicated to these topics. *See id.* at 651-66 (majority opinion).

261. This seems very inconsistent when contrasted with Justice Rahman’s exhaustive evaluation of the merits of the grounds in the next dissolution case. Furthermore, while grounds (a) and (b) were accepted after a very summary discussion of the evidence and the counsels’ arguments to support or negate it; grounds (c), e(ii), and e(iii) were declared independently insufficient; and grounds d, e(i), and e(iv) were not discussed at all.

262. *See supra* note 255 and accompanying text for an explanation of “horse-trading.”

263. *Tariq Rahim*, 44 PLD at 665-67.

264. *Id.* at 666-67.

Justice Sidhwa's concurring opinion contains a much more detailed evaluation of the actual grounds for dissolution than the leading opinion.²⁶⁵ His opinion is also significant because he openly engaged in describing and defining Pakistan's state structure. Tracing the evolution of Pakistan's parliamentary system and its various amendments over the years, he concluded: "The basic character of the Constitution is now a mix. It is not Presidential; it was never meant to be. It is not totally Parliamentary; as it was intended."²⁶⁶ His apparent dissatisfaction with this new hybrid came through poignantly when he invited an "enlightened Parliament" to determine whether this hybrid system is "inherently defective or intrinsically sound and can be allowed to work."²⁶⁷

Having made a concerted attempt to come up with some definitive guidelines, Justice Sidhwa was deeply dissatisfied with the political state of affairs, the difficulty of the task presented to the courts, and the limited timeframe in which to perform it when, invariably, elections had already taken place.²⁶⁸ His concluding comments showed him to be distraught at the status quo. Referring to the Eighth Amendment, which during the same period had been independently legally challenged, he invited the new elected government to "strike down all such amendments it considers as violating the Parliamentary character of the Constitution"²⁶⁹ and resignedly concluded, "We leave behind no decisive judgment, but one dismissing the petition *in limine* and more confusion to confound everyone."²⁷⁰ This is a most telling confession on the part of a judge who seemed harassed by the pressure put on the judiciary to be a constant pathfinder out of recurrent constitutional crises.

c. The Outcome

Having found the dissolution to be valid, the majority upheld it with the exception of the two dissenting judges.²⁷¹

265. *Id.* at 694 (Sidhwa, J., concurring).

266. *Id.* at 684. Importantly, he did recognize that the Eighth Amendment was an imposition on the Parliament, which had no choice but to accept the lifting of the martial law and consequent restoration of democracy, on whatever terms that were offered or could be extracted. Nevertheless, he was of the view that it had to be accepted that because of the Eighth Amendment, the President had ceased to be a titular head and had become almost as effective, if not equal in power, as the Prime Minister, should he decide to use his otherwise dormant powers. *Id.* at 683.

267. *Id.* at 685.

268. *Id.* at 705-07.

269. *Tariq Rahim*, 44 PLD at 706 (Sidhwa, J., concurring).

270. *Id.* at 707.

271. *Id.* at 666-67 (majority opinion).

d. Conclusion

By broadening the test laid down in the previous dissolution case, the *Tariq Rahim* judgment managed to open up possibilities for valid dissolutions in situations that were not so drastic as to constitute “a complete breakdown of the constitutional machinery.” This was a disturbing development considering that the presidential power had already been exercised twice within a span of barely two years. It was already becoming clear that when the judiciary was entrusted with the task of mediating between confrontational political forces, it was unavoidable for the judiciary to come out looking tarnished. At the same time, the justifications for moving away from the narrow test laid down in the previous case were at worst nonexistent and at best highly unconvincing.

C. The Third Dissolution—The Nawaz Sharif Case

The November 1990 elections turned the earlier status quo on its head as the Leader of the Opposition, Mian Muhammad Nawaz Sharif, emerged as the new Prime Minister. Sharif won a clear majority in the Center and the Punjab—the largest province—which Benazir’s ousted government had failed to do.²⁷² He then embarked on an ambitious policy of privatization and deregulation of state enterprises.²⁷³ Being an industrialist himself, as well as a religiously conservative man, he had strong support in the business and commercial sectors in addition to the more conservative strata of society.²⁷⁴ Since his party was ruling the provinces, it was relatively smooth sailing for the federal government. A political novice, Sharif was a protégé of Zia’s era during the time that Zia pursued a policy creating a new political constituency in order to marginalize the old political guard.²⁷⁵ Sharif was believed to have close links with the “establishment,” which was epitomized in the person of President Ghulam Ishaq Khan—a veteran and a Zia-era icon.²⁷⁶ However, it soon became obvious that Ghulam Ishaq Khan was perhaps finding his erstwhile political ward too much of a political upstart, and the young Prime Minister was discovering his mentor to be overbearing and intrusive.²⁷⁷ It would be simplistic and misleading, however, to overemphasize these personality conflicts. The structural constraints of the state ensured that any meaningful independence in approaching the challenges of governance remained a formidable goal for any new incumbent of the office of Prime Minister.²⁷⁸ The popular press regularly reported some new dimension of this worsening

272. KHAN, *supra* note 19, at 738-39.

273. *Id.* at 741-46.

274. See ZIRING, *supra* note 7, at 528-29.

275. See KHAN, *supra* note 19, at 763-64.

276. See MALUKA, *supra* note 8, at 282-83; see also KHAN, *supra* note 19, at 765.

277. See ZIRING, *supra* note 7, at 540-41; cf. KHAN, *supra* note 19, at 752, 765-66.

278. See NEWBERG, *supra* note 24, at 217-220.

relationship, describing it as heading towards a showdown.²⁷⁹ It was also widely covered in the press how certain members of the opposition, as well as the independently elected candidates from the Junejo era, were attempting to persuade the President to get rid of Sharif.²⁸⁰ Allegations of “horse-trading” started cropping up again, and the President became more openly critical of Sharif’s policies, while Sharif became more openly critical of the presidency as a haven for political dissidents.²⁸¹ Thus, the new government’s seemingly air-tight majority and strong coalition ties started revealing cracks.²⁸²

Then came the unprecedented and highly volatile television speeches. Suspecting a possible dissolution of his government, Sharif attempted to conduct a preemptive strike, which proved to be his eventual undoing. He chose to address the nation on April 17, 1993, by making a robust and thinly disguised attack on the allegedly politically partisan and conspiratorial role being played by the President against his government.²⁸³ While highlighting his government’s achievements, he announced defiantly, “I will not resign. I will not be coerced into dissolving the Assemblies. I will not take dictation from anyone.”²⁸⁴ Sharif then called an Assembly session for the following day, but the presidential response was quick and fatal.²⁸⁵ The next evening, the nation once again looked on aghast, listening this time to the President’s rebuttal in which he openly criticized both Sharif’s speech as well as his government’s performance.²⁸⁶ He

279. *See* Muhammad Nawaz Sharif v. President of Pak., 45 PLD 473, 692-95 (1993) (Pak.) (Mian, J., concurring.).

280. *Id.*

281. *Id.* at 583-86, 587-88 (translated from Urdu by the author).

282. The exact causes for the falling-out continue to remain a subject of inquiry. It was reported that Sharif’s government was seriously contemplating repealing the Eighth Amendment, which would have reduced the President to his benign status under the original Constitution of 1973. *See id.* at 582-83 (majority opinion), 692 (Mian, J., concurring). There were also rumors of the ruling party priming a substitute candidate for President for the next elections. *Id.* at 692-93 (Mian, J., concurring). To add further to the confusion, there were additional rumors of imminent impeachment of the President as well as the impending exercise of the Presidential power of dissolution. *See id.* at 582-83 (majority opinion). Some of these additional developments were actually discussed by Justice Ajmal Mian in his separate note. *See id.* at 692-95 (Mian, J., concurring). Sharif was increasingly asserting his political credentials as being his own man, which he was arguably doing within legal confines, but the mode and manner was apparently not to the President’s liking. There were reconciliation attempts, including the Sharif government’s widely publicized bid to support Ghulam Ishaq Khan for another term in office, but they were to no avail, as both parties became increasingly mistrustful of each other and started positioning themselves to strike. *Cf. id.* at 693.

283. *Id.* at 587-88 (majority opinion) (translated from Urdu by the author).

284. *Id.*

285. *Nawaz Sharif*, 45 PLD at 585-86.

286. *Id.* at 589-91.

then announced that he had decided to invoke Article 58(2)(b) to dissolve the Assemblies.²⁸⁷

287. The grounds this time were:

- (a) Mass resignation of members of the Opposition as well as a considerable number from the Treasury bench, showing loss of confidence in the government;
- (b) False and malicious accusations in Sharif's speech, amounting to a call for agitation and subversion of the Constitution;
- (c) Failure of the government to uphold provincial autonomy, and its disregard for: (i) Council for Common Interest; (ii) National Finance Commission; (iii) constitutional powers and functions of the provinces.
- (d) Maladministration, corruption and nepotism. Lack of transparency in the privatization process.
- (e) Persecution of political opponents.
- (f) Instances of constitutional violation: (i) Cabinet not taken into confidence during promulgation of ordinances and policymaking; (ii) Federal Ministers instructed not to meet the President; (iii) Misuse of government resources and agencies for personal gains; (iv) Massive waste of public funds; (v) Disregard of the governing law pertaining to the civil services.
- (g) Allegations made by the widow of the expired Chief of Army Staff about the suspicious circumstances of his demise, and instances of subversion of the armed forces and the Constitution.
- (h) Inability of the government to safeguard security and integrity of the country, and the grave prevalent economic situation.

See id. at 572-75.

It is interesting to note that quite a few of these grounds are very similar to the ones that formed the basis for the previous dissolution by the same President, even though they were scrutinized and discarded by the Supreme Court (some were regarded, however, as having persuasive value by Justice Rahman, i.e., grounds (d), f(iii), (iv), and (v)). Also, the main ground in the previous dissolution that had found great favor with the judges—"horse-trading"—was missing here, and, instead, it was the "TV Speech" and "mass resignations" that formed the edifice supporting the dissolution. Of the two, the former was arguably of a personal nature and divulges the personality issues between the two highest functionaries of the state. Hence, it cast a shadow over the "objective formation of opinion" leading to the dissolution, and the neutrality of the President. An additional important factor was that Sharif enjoyed a greater House majority, governmental stability, and economic initiative (for which it could quote independent evaluations such as that of the World Bank) than Benazir Bhutto; and much greater cooperation from the provinces. *See generally id.* at 591-93; *see also* KHAN, *supra* note 19, at 763.

Challenge Before the Supreme Court

In a 340-page magnum opus of a judgment, by a majority of ten to one, the Supreme Court found the presidential order of dissolution illegal and restored the Assemblies.²⁸⁸

a. Direct Hearings in the Supreme Court

It is important to briefly examine some preliminary aspects of the *Nawaz Sharif* judgment, which have been the source of considerable controversy. Invoking its *original* jurisdiction under the Constitution, the Supreme Court took cognizance of the matter to get around the ninety-day time limit for elections, which had proved to be too short a timeframe for final adjudication of previous dissolution challenges.²⁸⁹ The Supreme Court managed this by interpreting the fundamental right enshrined in Article 17 of the Constitution (which safeguards freedom of association) to be inclusive of not just “the right to form and become member of a political party,” but also the right of a political party, winning majority, to form a government and implement its mandate.²⁹⁰ This was an expansive interpretation and was publicly perceived as a special concession to the petitioners.²⁹¹

b. Additional Controversies

Another problematic aspect of the case was that during the course of the court proceedings, Chief Justice Nasim Hasan Shah made certain statements to the effect that the Court would reach a result that would be appreciated by the

288. *Nawaz Sharif*, 45 PLD at 570.

289. Cognizance was taken under Article 184(3) of the Constitution, which gives original jurisdiction to the Supreme Court where a question of public importance with reference to the enforcement of any of the fundamental rights under the Constitution is at stake. *See id.* at 555.

290. *Id.* at 555-60.

291. The notable exception was Justice Saad Saud Jan (though he joined the majority in allowing the petition), who had been actively involved with the drafting of the 1973 Constitution, as revealed to this author in an interview in 1997, and also mentioned in his judgment. He stressed the original intent limited scope of Article 17(2), with its ambit strictly restricted to the formation and membership of political parties so that it was not a complete charter of political rights or a check against all violations of any such right. *See id.* at 643-44 (Jan, J., concurring). The majority approach, on the other hand, was typified in the following quote from Justice Ajmal Mian: “[There] is a lot of scope for improving upon and expanding the same through legislation and the judicial creativity.” *Id.* at 666 (Mian, J., concurring). He prescribed a “dynamic, progressive and liberal” approach for the definition, expansion, and enforcement of fundamental rights. *Id.* at 666, 674.

public.²⁹² He was also reported to have said, “We will not behave like Justice Munir,” which was widely perceived to mean that the dissolution order would be overturned—Justice Munir was notorious for upholding dubious dissolution orders in Pakistan’s early constitutional cases.²⁹³

c. The Test

Justice Shafiur Rahman once again wrote the opinion of the Court, and it is perhaps the single most irreconcilable judicial opinion in all the dissolution cases. For reasons unexplained, Justice Rahman considered the case at hand as posing a “new” judicial problem and prescribed the following cryptic approach:

To resolve such problems we must have recourse to the deeper recesses of the mind. The facts define the problem. Neither they nor logic can solve it. Imagination furnishes an answer. The answer must be reconcilable with the facts and defensible in logic, but the test of its relevance and adequacy is neither the facts nor logic but purposes and value.²⁹⁴

After penning these enigmatic words, he then side-stepped his own holding in the *Tariq Rahim* case, not even mentioning the “test” laid down there as to the ambit of Article 58(2)(b),²⁹⁵ and reverted to the narrow formulation of Article 58(2)(b) as laid down in the *Haji Saifullah* case. He said: “Article 58(2)(b) of the Constitution empowers the executive head to destroy the legislature and to remove the chosen representatives. It is an exceptional power provided for an exceptional situation and must receive as it has in [*Haji Saifullah*] the narrowest interpretation.”²⁹⁶

292. See KHAN, *supra* note 15, at 66 n.78.

293. In his dissenting note, Justice Sajjad Ali Shah specifically referred to these statements by the Chief Justice. *Nawaz Sharif*, 45 PLD at 787. It was not clear whether the Chief Justice was merely courting publicity or public approval, or announcing a pre-determined result through such statements, or attempting to influence other judges through public responses that appeared in national newspapers in support of his remarks—a question that is still hotly debated. Hamid Khan criticizes another instance where, while addressing a dinner hosted by the Lahore High Court Bar Association in June 1993, the Chief Justice praised the *Nawaz Sharif* judgment, which, according to him, was not received well by lawyers and the press. KHAN, *supra* note 15, at 66 n.78. Khan describes the incident as unbecoming of a seasoned and very senior member of the judiciary and against the established practice of judges not publicly discussing their judgments. *Id.*

294. *Nawaz Sharif*, 45 PLD at 602.

295. This is important to point out as it logically raised the question as to whether the omission was deliberate. It is otherwise quite unusual to completely overlook a recent and weighty precedent, especially if the person ignoring it was the judgment’s primary author.

296. *Nawaz Sharif*, 45 PLD at 579.

d. Evaluation of Grounds and Supporting Evidence

Moving on to a review of the grounds, Justice Rahman conducted a much more exhaustive analysis than he conducted in the *Tariq Rahim* case. He rejected the main ground of “mass resignations” by finding that the resignations were technically flawed due to non-observance of the procedure laid out for tendering resignations.²⁹⁷ He also pointed out that the manner in which they were tendered supported the petitioner’s allegation of *mala fide* intentions on the part of those who were resigning, as well as the President who was harboring them.²⁹⁸ He declared that resignations are not negotiable instruments, and if they are put to such use, it amounts to a gross violation of the Constitution and a defection from the party.²⁹⁹ Similar views were also expressed by other judges while evaluating this ground, but it is interesting to note the contrast here with the earlier emphasis by the judges on “the functional incapacity of the National Assembly” as the fundamental indicator of constitutional breakdown within the meaning of Article 58(2)(b). It would be legitimate to ask whether such large-scale resignations were not a clear indicator of the existence of such “functional incapacity.” Justice Rahman further declared that the only valid way to gauge whether the Prime Minister does or does not command the confidence of the majority of the National Assembly is by requiring him to obtain a vote of confidence.³⁰⁰ This is paradoxical, as such a badge of legitimacy was apparently found to be insufficient for Benazir Bhutto in the previous case. Benazir Bhutto had actually survived a vote of no-confidence soon before her government was dissolved. In addition, if the justification was that Benazir was alleged to have engaged in “horse-trading,” there were similar allegations against Sharif, though perhaps, importantly, they were not presented as a formal ground for dissolution.³⁰¹

Rather strangely, there was a lot of emotion in Justice Rahman’s opinion when he tackled the next ground pertaining to Sharif’s “television address,” which the President had described in his own speech as “treasonous.”³⁰² Justice Rahman found this comment very offensive and equated its usage to a violation of Article 14 of the Constitution, which safeguards the “Dignity of Man.”³⁰³ Similarly, he also took strong exception to the use of the word “dismiss” by the President and

297. *Id.* at 604-05, 615.

298. *Id.* at 615. There were, in all, eighty-eight resignations. *Id.* at 649 (Jan, J., concurring). There was a lot of credence in the allegation that the President had played a strong role in flaming discontent with Sharif’s government and adducing resignations. The President, in the post-dissolution caretaker setup, appointed as ministers some of those from the Treasury bench who had resigned. *See MALUKA, supra* note 8, at 282-84, 291-96; *see also KHAN, supra* note 19, at 758-59.

299. *Nawaz Sharif*, 45 PLD at 615.

300. *Id.* at 616-17.

301. *See id.* at 616.

302. *Id.* at 589-91.

303. *See id.* at 639.

condemned such usage at length. He described it at various places as “unnecessary,” “hurtful,” “out of place,” “uncalled for,” and “creating an impression of master and servant.”³⁰⁴ Considering that both speeches were volatile and there were much bigger issues at stake, one finds this fixation on his part rather strange. Having demolished the two main allegations made by the President, Justice Rahman found the rest of the grounds unpersuasive and/or unsubstantiated, and categorized the dissolution order as containing too many subjective elements that were not recognized by the Constitution for exercise of presidential power of dissolution.³⁰⁵

The main thrust of the separate note by Chief Justice Nasim Hasan Shah was towards bringing the case within the confines of Article 184(3),³⁰⁶ as he advocated a more progressive interpretation of fundamental rights. As to an analysis of the grounds, he relied mainly on Justice Rahman’s judgment. He critiqued the view that Sharif’s speech had created a deadlock between the two highest functionaries of the state, describing it as based on an incorrect appreciation of the constitutional role of the President, which, he enunciated, is advisory in an essentially parliamentary system of government.³⁰⁷ Responding to the argument that the Eighth Amendment had changed the role of the President, he maintained that in a parliamentary system, the Prime Minister is “neither answerable to the President nor in any way subordinate to him.”³⁰⁸ Thus, a breakdown of their relationship cannot necessitate dissolution.³⁰⁹ The Chief Justice found himself convinced that the President had ceased to be neutral and was actually complicit in the efforts by political dissidents to destabilize Sharif’s government, thus finding Sharif’s speech to be the justifiable lament of a traumatized soul.³¹⁰

What is notable is that, in this and many of the other concurring opinions, one can detect a renewed fervor for parliamentary democracy and much less enthusiasm for the President and his powers, which does not enmesh comfortably with the tone and tenor of the Court on these issues in the previous dissolution judgment. There is great emphasis on whittling down the significance and role of Article 58(2)(b) in contrast to the *Tariq Rahim* judgment, which had empowered the status of President.

Ultimately, the President’s widely reported association with dissident elements proved to be his undoing, and the judges came down hard on this aspect of the case, as well as on his lack of exercise of any other constitutional measures before invoking Article 58(2)(b) and his publicly professed satisfaction with the

304. *Id.* at 631.

305. *Nawaz Sharif*, 45 PLD at 630.

306. *See id.* at 555-60.

307. *See id.* at 567-69.

308. *Id.* at 567.

309. *Id.*

310. The Chief Justice quoted an Urdu adage, which he himself translated as, “When the mighty strikes you are not permitted to protest.” *Id.* at 569.

government in the immediate period preceding the dissolution. However, these factors were equally relevant in the *Tariq Rahim* case. The Court was also much less generous towards the Federation's reliance on newspaper clippings and correspondence for proving the basis for the President's decision—yet another departure from its previous approach.³¹¹

e. Inconsistent Approaches and Political Diatribes

Quite apart from the issues pointed out in the leading opinion and also in the opinion of the Chief Justice, some of the separate concurring notes raised additional questions and cast doubts about judicial consistency and independence—essentially due to discordant stances adopted by certain judges that are irreconcilable with their earlier stances in similar situations. One novel and, on close scrutiny, flawed and self-contradictory interpretation of Article 58(2)(b) came from Justice Muhammad Rafiq Tarar, who admitted that his output did not tally with the test adopted by the majority in the previous judgments as well as the current one.³¹² Justice Tarar performed a remarkable vanishing trick to cause the judicially established presidential power of dissolution under Article 58(2)(b) to simply disappear. He declared:

The upshot of the whole discussion is that the President has no power to dismiss a Prime Minister, directly or indirectly, howsoever illegal, unconstitutional or against public interest his actions might look to him. But if the person holding the office of President pleases to remove a Prime Minister, who enjoys the confidence of the National Assembly, under the cloak of the powers contained in Article 58(2)(b) by dissolving the National Assembly, he may be accused of subverting the Constitution within the meaning of Article 6 of the Constitution³¹³

Justice Tarar seemed to be postulating that a President, faced with a government whose actions may be illegal, unconstitutional, and contrary to public interest has no option but that of informing the National Assembly of the situation or resigning from office.³¹⁴ Having offered no legal reasoning or justification for the leap of faith, Justice Tarar then went many strides further to hold dissolution

311. *See Nawaz Sharif*, 45 PLD at 720 (Mian, J., concurring), 818 (Akhtar, J., concurring).

312. *See id.* at 793 (Tarar, J., concurring).

313. *Id.* at 796-97. Commentators cast further doubts on Justice Tarar's judgment, as after retirement he went on to first become a Senator and was then President during Sharif's second term. *See KHAN, supra* note 19, at 832-34.

314. *See Nawaz Sharif*, 45 PLD at 794 (Tarar, J., concurring)

of an elected government as tantamount to subversion of the Constitution.³¹⁵ It is very hard to imagine how Justice Tarar could reconcile this view with his faithful following of the established interpretation of Article 58(2)(b), while adjudicating the previous dissolution as Chief Justice of the Lahore High Court.

On the other hand, the sole dissenting judgment in this case, given by Justice Sajjad Ali Shah, is conspicuous, as much for highlighting some major contradictions in the Court's approach to similar issues in the *Tariq Rahim* and *Nawaz Sharif* cases, as it is for its political jibes and innuendos.³¹⁶ Repeatedly, and at times persuasively, Justice Shah described the nature and substance of the grounds in both the *Tariq Rahim* and the *Nawaz Sharif* cases, finding the grounds and supporting evidence justifying dissolution to be weightier in the latter case.³¹⁷ Justice Shah then launched an unveiled attack on his fellow judges:

Maybe I am wrong and imagining things unnecessarily and I hope that I am wrong but from what it appears to me that there is no difference in the case of Khawaja Ahmad Tariq Rahim and the present case . . . seemingly it so appears that two Prime Ministers from Sindh were sacrificed at the altar of Article 58(2)(b) of the Constitution but when the turn of a Prime Minister from Punjab came, the tables were turned. Indisputably, right at the very outset of the proceedings indications were given that the decision of the Court would be such, which would please the nation. It remains to be seen whether what would please the nation, would be strictly according to law or not. In my humble opinion the decision of the Court should be strictly according to the law and not to please the nation.³¹⁸

315. *See id.* at 796-97.

316. *See generally id.* at 760-87 (Shah, J., dissenting).

317. *See id.* at 783-86.

318. *See id.* at 787. At another place in his opinion, he pointed out that seven of the eleven present judges of the Supreme Court were also on the bench of the Supreme Court that decided the previous dissolution case, where six of them had upheld the dissolution by the same President. Furthermore, three of the current Supreme Court bench members had upheld the previous dissolution as judges of the High Court—so in all, according to Justice Shah, nine of the judges on the current bench had upheld the previous dissolution. *Id.* at 783-85. It is obvious that he was highlighting what he considered to be contradictory stances adopted by the judges in the two dissolution cases. To categorize nine Supreme Court judges as being biased along provincial lines is a very grave accusation to make, and bizarre, as three of the judges on the bench were from Sindh, and there were other non-Punjabi judges on the bench as well. Like Justice Tarar's subsequent choice for President by Nawaz Sharif, what is equally discomfiting is Justice Sajjad Ali Shah's subsequent appointment as the Chief Justice of Pakistan during Benazir Bhutto's second term, superceding four more senior judges.

His own analysis of the grounds, however, was sketchy and rather unconvincing, with a face-value acceptance of the Federation's version of events. Oftentimes, it seems that Justice Sajjad Ali Shah's opinion was primarily focused on criticizing the *Tariq Rahim* judgment, rather than on adjudicating the case at hand. He disregarded all the objections about the *vires* and *fides* of the resignations and the doubts raised about their intrinsic value.³¹⁹ Instead, he found them persuasive material in support of the ground that the Assembly members had lost faith in the government, analogizing it with the "horse-trading" allegation in the previous case.³²⁰ As to the ground pertaining to the "television speeches," Justice Shah speculated that Sharif called for an Assembly session after his speech, possibly to move for impeachment.³²¹ Even if that were true, though, how does it justify dissolution? For a dissolution brought about to preempt impeachment would patently be an unjustifiable act of self-preservation. Justice Sajjad Ali Shah also said that the strained relations between the President and the Prime Minister showed a clear deadlock,³²² though he did not address whether all such deadlocks should always lead to dissolutions. He also remained completely quiet on the subject of the President's much-discussed conspiratorial role. Several of Justice Shah's comments were essentially accusations that the Supreme Court was deciding two very similar cases in unjustifiably different ways.³²³ At the same time, it seems that he was not convinced of his own decision in the *Nawaz Sharif* case, but was simply propounding it in order to make a point against what he thought had been a commission of injustice in the *Tariq Rahim* case.

f. The Outcome

With the dissolution order struck down, the Court, contrary to its approach in the *Haji Saifullah* case, restored the Assemblies.³²⁴ Interestingly, the Chief Justice expressed regret for not having restored the Junejo Assembly, having found the dissolution order to be unsustainable in law.³²⁵ The jury is out on whether this was an honest afterthought or an attempt to make the Sharif decision look less novel and unprecedented.

319. *Id.* at 771.

320. *See Nawaz Sharif*, 45 PLD at 771-72 (Shah, J., dissenting).

321. *Id.* at 775.

322. *See id.* at 775-76.

323. *See generally id.* at 770-87.

324. *See id.* at 570 (majority opinion).

325. *Id.* at 565.

g. Conclusion

The outcome of the *Nawaz Sharif* case is arguably satisfactory. President Ghulam Ishaq Khan's unbecoming, conspiratorial role had been exposed; his reliance on the "television speeches" did belie malice and rancor; and it was also a case of "twice bitten" due to two dissolutions in a row at his hands. Refreshingly, the judiciary had finally revived an elected government. And, very importantly, the judgment seemed to have delivered a deathblow to the notion of an over-powerful President who could get away with being trigger-happy.

The *Nawaz Sharif* judgment does not look so good, however, when compared with the judgment in the *Tariq Rahim* case. If anything, President Khan had many more personal gripes with Benazir Bhutto than he had with Sharif, and there was a far greater likelihood of his personal bias playing a big role in the previous dissolution. The judges in the *Tariq Rahim* case, however, had ignored this aspect, though it was highlighted by the petitioner. Additionally, in spite of similar time constraints, the Supreme Court had not exercised its original jurisdiction to take immediate cognizance in the previous case. Furthermore, the tests, both for invocation of Article 58(2)(b), as well as for admission of evidence in support of presidential grounds, were much broader in the *Tariq Rahim* case. Both tests were inexplicably narrowed in the *Nawaz Sharif* case, which greatly benefited the petitioner. Also, instead of a more or less prima facie acceptance of grounds, as in the *Tariq Rahim* case, the presidential grounds were extended much more exacting scrutiny in the *Nawaz Sharif* case.

Individual opinions, such as those of Justices Tarar and Sajjad Ali Shah, show deep political polarizations within the judiciary, while other justices also gave more subtle, though noticeable, indications of personal political preferences. It has to be noted that certain serious allegations against Sharif received very little attention, while Bhutto got more than her fair share of reprimands for lesser crimes.³²⁶ Finally, Chief Justice Nasim Hassan Shah's out-of-court statements pose an independent set of issues.

326. Retired Justice Dorab Patel comments that while in the *Tariq Rahim* case, most of the allegations against Benazir Bhutto were based on newspaper and intelligence reports, some of the allegations against Sharif were actually supported by independent evidence. PATEL, *supra* note 231, at 192. The majority view in the *Nawaz Sharif* case as to admission of evidence, however, was based on the principle that "the President had to prove his allegations against the deposed Prime Minister." *Id.* The principle was correct, but Justice Patel finds it unfortunate that the Supreme Court in the *Tariq Rahim* case had not taken the same position. *Id.* He also opines that in the *Tariq Rahim* case, the majority view "had given a blank cheque to the President to dissolve the National Assembly if there was evidence of defections." *Id.* at 193. He is firmly of the view that given this backdrop, the majority in the *Nawaz Sharif* case had only two choices: (1) They could either follow the *Tariq Rahim* decision and dismiss Sharif's writ petition, or (2) they could overrule *Tariq Rahim*. *Id.* However, as it turned out, they did neither. They chose, instead, to not overrule the *Tariq Rahim* case, and yet allowed Sharif's petition. *Id.* Justice Patel finds

Proof of sorts that the deadlock had actually existed came in a highly ironic way. The revived Sharif Assembly only lasted from May 26 to July 18, 1993. Persistent tensions between the President and the Prime Minister led to both men resigning under alleged military pressure.

D. The Fourth Dissolution—The Benazir Bhutto Case

In another reversal of fortune, Benazir Bhutto, who was reelected to power in 1993, managed to put together a coalition government in Punjab. Things looked much more favorable for her this time, with party veteran Farooq Leghari occupying the office of President and a historically sympathetic Chief Justice, Sajjad Ali Shah, presiding over the Supreme Court. Poor economic performance, growing charges of corruption, mounting ethnic conflict in Sindh, and Benazir Bhutto's progressively strained relationships with the President and the Chief Justice, however, ultimately led to yet another downfall from a seemingly strong position.³²⁷ As the President tried to assert his constitutional role, albeit timidly, Benazir Bhutto seemed to start ignoring his advice. At the height of their strained relationship, in a veiled attack, Benazir accused him and the military intelligence of involvement in the murder of her brother—Mir Murtaza—who was gunned down in front of his house in mysterious circumstances on September 20, 1996.³²⁸ Meanwhile, the marginalized President started filing Court References against the government's position regarding the role of presidential advice in matters such as the appointment of judges, and the relationship eventually became openly adversarial.³²⁹

The trouble with the Chief Justice started with a disagreement over a judicial appointment and became progressively worse as the Chief Justice pronounced unfavorably against several Benazir appointments in a significant

that Justice Sajjad Ali Shah was right in pointing out that the majority judges had used one yardstick for upholding the previous presidential order of dissolution and dismissing Benazir Bhutto's government, and a different yardstick for setting aside the Presidential Order for dismissing Sharif's government. *Id.* To him, the result of not overruling the previous judgment was clearly that two irreconcilable decisions held the field. Justice Patel feels that this was going to make it difficult for Presidents in the future to know when they can validly dissolve the Assembly, as the courts had left the situation confused. *Id.*

327. See Arif Hasan, *Hijacking the Process*, HERALD, Nov. 1996, at 48 (Pak.).

328. *Benazir Bhutto v. President of Pak.*, 50 PLD 388, 482 (1998) (Pak.).

329. See *Al-Jehad Trust v. Pakistan*, 49 PLD 84 (1997) (Pak.) (discussing Reference No. 2 of 1996 under Article 186 of the Constitution); see also Zaffar Abbas, *Where Do We Go from Here?*, HERALD, Nov. 1996, at 22 (Pak.). It was also reported that Sharif had met with Leghari to offer his party's support if he decided to invoke Article 58(2)(b). See Ahmed Rashid, *What's the Big Deal?*, HERALD, Dec. 1996, at 30, 31 (Pak.). This was very reminiscent of the dubious nexus that had developed between Ghulam Ishaq Khan and certain politicians during Sharif's first stint in power.

judgment that came to be known as the “Appointment of Judges” case.³³⁰ Benazir Bhutto deliberately delayed implementation of the verdict and publicly criticized the Court,³³¹ and then tabled a controversial bill for the accountability of judges (the “Accountability Bill”).³³² The actual ouster came on November 4, 1996, as troops took over key installations and arrested the Prime Minister and her cabinet. The order of dissolution came the next day.³³³

330. See *Al-Jehad Trust v. Pakistan*, 48 PLD 324 (1996) (Pak.).

331. See KHAN, *supra* note 19, at 785-90, 794.

332. See The Constitution (Fifteenth Amendment) Act, 1998 (Pak.), reprinted in KHAN, *supra* note 19, at 927-29. Section 15 of the Bill allowed the members of the National Assembly (the requirement was at least fifteen percent) to move a motion alleging misconduct against a judge of the high courts or the Supreme Court. While the allegation in the motion was investigated, the accused judge was to be sent on immediate leave until the final disposal of the motion. The Bill visualized the appointment of a special committee and a special prosecutor for investigating the charge of misconduct, and, if they found prima facie guilt, the special committee was to refer back the matter to the National Assembly, which could pass a vote of no-confidence and thereby impeach the judge. Benazir Bhutto did not have the requisite majority in Parliament to successfully push the Bill through, and, given the raging controversy surrounding Benazir Bhutto’s judicial appointments and her tussle with the Chief Justice, the Bill was seen by many as a mischievous attempt to embarrass and harass the judiciary. See KHAN, *supra* note 19, at 794-95. For a review and analysis of the events of that time, see Editorial, *Ominous Interventionism*, FRIDAY TIMES (Pak.), June 6, 1996, at 1; Muhammad Shan Gul, *Judicial Activism: Good or Bad?*, FRIDAY TIMES (Pak.), June 27, 1996, at 5; Editorial, *Time and Tide Wait for No Man*, FRIDAY TIMES (Pak.), July 4, 1996, at 1; Editorial, *Benazir Bhutto’s Fatal Flaw*, FRIDAY TIMES (Pak.), July 11, 1996, at 1; Muhammad Shah Gul, *CJ-SC Cannot Be Removed, Say Jurists*, FRIDAY TIMES (Pak.), July 18, 1996, at 2. See also *Al-Jehad Trust*, (1996) 48 PLD 324; Idress Bakhtiar, *Scoring Points*, HERALD, Sept. 1996, at 16 (Pak.); Zahid Hussain, *Benazir Bhutto: Fall from Grace*, NEWSLINE, Nov. 1996, at 24 (Pak.). For a detailed discussion of the “Appointment of Judges” case, see FAROOQ HASSAN, *PAKISTAN: CONSTITUTIONALISM RESTORED?* (1997).

333. See KHAN, *supra* note 19, at 793. The grounds for dissolution were as follows:

- (a) Extra-judicial killings and mayhem in Karachi. Federal government ineffective and involved in unwarranted postings, transfers, and appointments of law-enforcing agency members.
- (b) Mir Murtaza’s murder and Benazir Bhutto’s blaming it on the President. Also, that the widow and friends of the deceased had actually blamed the government.
- (c) Delay in implementation of the “Appointment of Judges” case judgment in violation of Article 190. Benazir Bhutto’s televised ridicule of the judgment and the delayed implementation and that too, only on the President’s insistence. Violation of independence of the judiciary as enshrined in the Constitution.
- (d) Sustained assault on the judiciary. The controversial Bill for Prevention of Corrupt Practices, presented and approved by cabinet. President not informed as required by Article 46(c) of the

Benazir Bhutto's second term was unpopular, evidenced when fresh elections brought back Sharif with resonant success in the Center and Provinces, with Sharif and his party encroaching many traditionally strong PPP areas. It can be fairly suggested that Benazir had antagonistically pushed the judiciary into a corner through her political statements. She also had allegedly victimized the Chief Justice's family, and there was widespread news coverage of a government-sponsored police raid on the house of the Chief Justice's daughter, with the motive to involve his son-in-law in a corruption case.³³⁴ Benazir introduced the infamous Accountability Bill, though it was never passed as she did not have the requisite majority in Parliament. Though the Bill was meant more to embarrass the judiciary, it had managed to create great controversy and ill-will. Finally, she delayed implementation of the "Appointment of Judges" case. At some level, Chief Justice Shah was rightly resentful and proved to be not above showing it in his judgment. The unfortunate outcome was that, though it had seemed that the *Nawaz Sharif* case had made any future dissolution highly unlikely, the *Benazir Bhutto* judgment made the ambit of dissolution much wider, as shall be discussed shortly.

Constitution. Since Benazir Bhutto did not have requisite majority to pass the Bill, it was only designed to embarrass and humiliate the judiciary. Violation of independence of judiciary as enshrined in the Constitution.

- (e) Judiciary still not separated from executive, as required by Article 175(3) of the Constitution, and the expiry of deadline set by the Supreme Court.
- (f) Article 14—Fundamental Right of Privacy—violated through phone tapping of judges, leaders of political parties, and high-ranking civil and military officers.
- (g) Corruption, nepotism, and violation of rules of administration, endangering orderly functioning of government and national security.
- (h) Induction of a minister into cabinet, against whom criminal cases were pending. Interior Minister had not withdrawn these cases and had earlier threatened to resign if the said person was inducted as minister.
- (i) Questionable sale of public sector oil and gas shares worth billions. President asked that matter be put before cabinet for consideration of decision by EEC. Violation of Articles 46 and 48 of the Constitution, as lapse of four months in following this advice.

For details, see *Benazir Bhutto v. President of Pak.*, 50 PLD 388, 434-38 (1998) (Pak.).

334. See KHAN, *supra* note 19, at 787, 799 n.33.

1. The Eighth Amendment Case

Meanwhile, the Eighth Amendment had been challenged in the Supreme Court.³³⁵ The timing was interesting, as the case was decided a day before the start of hearings of the challenge to the fourth dissolution.³³⁶ Understandably, all eyes were on the outcome of this case as the mood in the country had visibly changed after the *Nawaz Sharif* case, and the credibility of Article 58(2)(b) was at an all-time low. Given the stakes, it was a highly contested legal battle. The petitioners argued that the Eighth Amendment destroyed the inherent structure of the 1973 Constitution; that it had dubious ethos, as being introduced in lieu of lifting martial law; that it had caused tremendous instability by creating an over-powerful President; and that it had legally ceased to exist after the revival of the 1973 Constitution and party-based elections.³³⁷ The hearings were avidly followed by the public, and the atmosphere was rife with speculation. Chief Justice Sajjad Ali Shah, on occasion, openly condemned the Amendment. He lamented that the Supreme Court had given Zia the powers to amend the Constitution, instead of requiring him to hold elections.³³⁸ He also questioned Zia's inherent legal capacity to amend the Constitution.³³⁹ The Federation's lawyers essentially advocated the "institutional balance" argument in support of Article 58(2)(b).³⁴⁰ An additional point of focus for the judges was whether the non-party-based 1985 Assembly could amend a Constitution framed by a consensus of all the political parties in 1973.

The unanimous decision to retain the Eighth Amendment (three judges fully concurred with the majority opinion, while three attached separate notes but agreed with the outcome) came as a surprise. Not only did the Court confirm that the Eighth Amendment was a valid component of the Constitution,³⁴¹ it essentially left its fate to the legislature. The Court opined that the Parliament had had opportunity in the past to decide the Amendment's future and still had opportunity to address this vital issue in the political forum.³⁴² The Court concluded that as far

335. *Mahmood Khan Achakzai v. Pakistan*, 49 PLD 426 (1997) (Pak.). The case is popularly referred to as the "Eighth Amendment Case."

336. *Benazir Bhutto v. President of Pak.*, 50 PLD 388, 432 (1998) (Pak.). The same seven-member bench, which went on to hear the legal challenge to the fourth dissolution, conducted the hearings. *Id.* at 433. Similar petitions had also been filed in 1990 and 1996, and relief was denied in some while others still pended decision. *Mahmood Khan Achakzai*, 49 PLD at 444.

337. *Mahmood Khan Achakzai*, 49 PLD at 524-25 (Afrasiab Khan, J., concurring).

338. *SC Should Not Have Given Powers to Zia*, NATION (Pak.), Jan. 9, 1997, at 1.

339. *Id.* at 7.

340. This was essentially the traditional pro-Article 58(2)(b) argument that underlined its importance in ensuring additional checks over potential misuse of prime ministerial powers through the creation of a more empowered President.

341. *Mahmood Khan Achakzai*, 49 PLD at 512.

342. *Id.* at 480-81.

as it was concerned, since previous assemblies had not touched the Eighth Amendment, such inaction showed acquiescence, which amounted to “ratification by implication.”³⁴³ While this may be a pragmatic approach to adopt, the even more surprising aspect of the judgment was that the Supreme Court did not just point the petitioners to a legislative solution but felt it necessary, quite against the anti-Eighth Amendment tone and tenor it had adopted during the proceedings, to extol the virtues of the Eighth Amendment in general, and of Article 58(2)(b) in particular. Justice Shah actually claimed, “this provision has only brought about balance between the powers of the President and the Prime Minister in a Parliamentary Form of Government as is contemplated under Parliamentary Democracy. . . . In fact Article 58(2)(b) has shut the door on Martial Law for ever, which has not visited us after 1977.”³⁴⁴ The decision paved the way for the hearings of the challenge to the latest dissolution.

2. Challenge Before the Supreme Court

President Leghari had announced a date in early February 1997 for elections, and hence there was a sense of urgency as to the adjudication of the latest dissolution case.³⁴⁵ Following the precedent set in the *Nawaz Sharif* case, the Supreme Court took direct cognizance of the matter.³⁴⁶ On January 29, 1997, a few days before the elections and during a time of great anticipation, by a majority of six to one, the Supreme Court upheld the dissolution of the Benazir Bhutto Assembly through a short order, with the eventual judgment spreading over 395 pages.³⁴⁷

a. Additional Controversies

Before any analysis of the judgment, it is important to note several incidents before and soon after the filing of the petitions, which demonstrated that the hearing of the case was being delayed.³⁴⁸ Some commentators suggested this was meant as a punishment for Benazir for her allegedly high-handed attitude towards the judiciary, especially the Chief Justice.³⁴⁹ Benazir Bhutto’s petition

343. *Id.* at 446. This, however, discounts whether any of these Assemblies had the time, space, and liberty to contemplate a repeal of the said Amendment, given the political turmoil and the constant presence of an over-powerful President.

344. *Id.* at 480.

345. *Benazir Bhutto v. President of Pak.*, 50 PLD 388, 434 (1998) (Pak.).

346. *Id.* at 433.

347. *Id.* at 427, 431. The Supreme Court accepted all grounds except that of Mir Murtaza’s murder because of that matter being *sub judice*. *Id.* at 429-31, 565.

348. *See KHAN, supra* note 19, at 809-10.

349. *Id.* at 809-10.

was rejected twice by the Supreme Court “on flimsy procedural grounds.”³⁵⁰ Her request for an early hearing was declined as the Supreme Court first took up less urgent petitions.³⁵¹ Then the Court took up Eighth Amendment cases for hearing and did not cut short its winter break in spite of the prevailing political crisis.³⁵² Eventually, a full month after it was filed, Benazir’s petition was finally combined with the Speaker’s petition and taken up for hearing, as she had been requesting all along. The press and public opinion largely saw these as unnecessary procedural hurdles to frustrate Benazir.³⁵³

Chief Justice Sajjad Ali Shah also continued his objectionable practice of identifying Prime Ministers by their regional background.³⁵⁴ While answering a newsman at a conference, prior to commencement of hearings of Bhutto’s challenge to the dissolution, he commented: “The case of the Larkana Prime Minister will be decided on merit but let the petition be taken up for hearing first.”³⁵⁵ In another departure from past practice in similar cases, Chief Justice Shah constituted a seven-member bench of the Supreme Court. There had been an eleven- or twelve-member bench in all the earlier dissolution cases due to their paramount importance.³⁵⁶

350. *Id.* at 809.

351. *Id.*

352. *Id.*

353. *Cf. id.* at 809-10.

354. Justice Sajjad Ali Shah had earlier referred to Benazir Bhutto and Muhammad Khan Junejo as Sindhi Prime Ministers and Nawaz Sharif as a Punjabi Prime Minister in the *Nawaz Sharif* judgment. *See supra* note 318 and accompanying text. Quite apart from this being objectionable on the ground that national leaders were being categorized by their regional identities, it was particularly uncalled for as Justice Shah was insinuating that his brother judges had regional biases. Furthermore, he was making such statements in a context where Pakistan’s national polity is increasingly under pressure due to divisive regional politics.

355. *Case of ‘Larkana PM’ To Be Decided on Merit: Sajjad*, NATION (Pak.), Jan. 11, 1997, at 1. Benazir Bhutto had now been relegated from the earlier title given to her by Chief Justice Sajjad Ali Shah of “the Sindhi Prime Minister” to that of a mere town in that province—an unambiguously belittling comment, considering Benazir had been Prime Minister of Pakistan twice. Her family hailed from Larkana, and this comment was doubly offensive, as it was also the very term her political opponents were using against her to indicate that her popularity had been diminished to her hometown.

356. *See KHAN, supra* note 19, at 809-10. The petitioner requested that a larger bench be constituted, owing to the existence of clear precedence and in view of the principle of consistency. The Chief Justice, in whose prerogative lays the decision as to constitution of benches, however, rejected this request.

b. The Test

In the course of substantive arguments, the petitioner urged that only a “complete constitutional breakdown” could trigger invocation of dissolution,³⁵⁷ and that was indeed the test finally agreed upon in the *Nawaz Sharif* case. However, moving away once again from the consensus in that case, the test laid down by Justice Sajjad Ali Shah, who wrote the leading opinion of the Court, was: “There may be occasion for the exercise of such power where there takes place extensive, continued and pervasive failure to observe not one but numerous provisions of the Constitution. . . . The theory of total breakdown of Constitutional machinery . . . has been rejected in the case of Muhammad Nawaz Sharif v. President of Pakistan.”³⁵⁸

Chief Justice Shah made an unpersuasive attempt to reconcile the “strict” and “milder” tests laid out in earlier opinions. He said:

In Saifullah’s case a very strict view has been taken that this provision can be invoked only when there is complete breakdown of Constitutional machinery, while in Tariq Rahim’s case somewhat milder view is taken that this provision can be invoked when there is actual or imminent breakdown of Constitutional machinery or there is a failure to observe numerous provisions of the Constitution creating an impression that the country is governed not so much by Constitution but by methods extra-Constitutional. . . . The correct interpretation will be that which is made keeping in view the findings in both cases.³⁵⁹

Other judges also veered in favor of a more encompassing test to gauge valid exercise of Article 58(2)(b). Justice Saleem Akhtar’s detailed analysis of previous dicta on this point led him eventually to adopt Justice Shafiur Rahman’s test in the *Tariq Rahim* case, though he was also tempted to explore the hypothetical scenarios laid out in Justice Sidhwa’s opinion in that case.³⁶⁰ Despite attempts by part of the majority to persuade potential critics that there had actually been no deviation from the *ratio* in the *Nawaz Sharif* case, and that the new test was reconcilable with both the earlier dissolution judgments, the fact of the matter was that the test laid down was clearly different and broader than the one the Court had agreed upon in the *Nawaz Sharif* judgment.

A strong, solitary dissent came from Justice Zia Mahmood Mirza, who found the previous authorities leading unequivocally to nothing but a strict test as

357. *Benazir Bhutto v. President of Pak.*, 50 PLD 388, 429 (1998) (Pak.).

358. *Id.* at 430.

359. *Id.* at 562-64.

360. *See id.* at 575-85.

laid out in the *Haji Saifullah* case and reaffirmed in the *Nawaz Sharif* case.³⁶¹ Not only was he concerned about the further adverse impact of a broad test on the parliamentary form of government, he found the original test as laid out in the *Haji Saifullah* case to be more consistent with the language of the constitutional provision, the objects and purpose of the amendment, and the basic scheme of the Constitution that provided for a parliamentary system.³⁶² Justice Mirza conducted detailed analysis of the legislative history of Article 58(2)(b) and concluded that a situation like that of the 1977 emergency had to exist for its valid invocation. He found that based on the declared grounds, no breakdown had taken place.³⁶³ To him, the respondent's case at best was the identification and highlighting of the petitioner's disregard and violation of law in certain areas.³⁶⁴ This was the third successive time that the Supreme Court, while adjudicating upon the validity of dissolution, had departed from the test it had laid down in the immediately preceding case.

c. Evaluation of Grounds and Supporting Evidence

The petitioner's counsel further argued that the charge sheet did not identify any faults with the "functioning of the Government" as such, and the dissolution demonstrated that the real reason behind it was the worsening relationship between the President and the Prime Minister. Borrowing support from the *Nawaz Sharif* case, the counsel argued that the Assembly could not be dissolved because of private likes and dislikes. Counsel also argued that if the allegations made by the President were credible, then the President shared the blame by being an active and historically critical part of the very government that he had toppled (reminiscent of Justice Abdul Shakurul Salam's argument in the *Tariq Rahim* case).³⁶⁵ The petitioner's counsel strongly opposed the admissibility of the evidence presented by respondents, validly arguing that most of the presented evidence was not before the President when he made the actual decision, quite apart from various additional issues of credibility and admissibility.³⁶⁶

However, once again relaxing the test as to the admissibility of evidence in support of presidential opinion formation, the Court held that it was not necessary for all the material produced in support of the dissolution to be available to the President in its totality or for it to be scrutinized by him in detail.³⁶⁷ In

361. *Id.* at 761 (Mirza, J., dissenting).

362. *Id.* at 764.

363. *Benazir Bhutto*, 50 PLD at 767-69 (Mirza, J., dissenting).

364. *Id.* at 769, 780-81.

365. *See id.* at 438-39 (majority opinion), 476-77, 643-49, 757-58 (Mirza, J., dissenting), 770-73.

366. *Id.* at 480-81 (majority opinion), 542-43, 608.

367. *Id.* at 481-82.

other words, it was sufficient for such material to have a nexus with the prerequisites of Article 58(2)(b), and there was nothing wrong with the production of corroborative and confirmatory material after the date of the order of dissolution (as it only confirmed the facts, which were already known to the President). In a spirited dissent, Justice Mirza critiqued the Court's acceptance of corroborative materials collected *ex-post facto*. He considered it neither safe nor proper to place reliance on press clippings when a drastic issue, such as the fate of the Assemblies, was at stake and witnesses were available for testimony on various matters.³⁶⁸

In his analysis of the grounds, Chief Justice Sajjad Ali Shah held that extra-judicial killings (a term used to describe the suspicious deaths of accused in policy custody as well as the killing of accused or criminals in fake/staged police encounters) showed inefficiency on the part of both the Provincial and Federal Governments, "tantamount[] to total failure of the Constitutional machinery."³⁶⁹ Importantly, while deciding with comparative alacrity that sufficient material had been produced to support other grounds, the Court gave maximum attention to grounds relating to the government's allegedly hostile attitude towards the judiciary, which lent an element of personal rancor to the analysis.³⁷⁰ The other grievously damaging allegation for Bhutto's government was that of phone-tapping of judges and politicians.³⁷¹ While the Federation's evidence was far from air-tight, so too were the petitioner's explanatory justifications.

Observers had rather ominously predicted that Benazir Bhutto's marked adversarial stance towards the judiciary had sealed the fate of the case. However, the way the arguments had developed in the proceedings, it seemed that Benazir might get out of jail. After all, there had been a lot of negative press for Article 58(2)(b), and the public mood was palpably against it. The presidential charges were weak. They were weakly argued in Court in an environment where the *Nawaz Sharif* case had seemingly curtailed the ambit of dissolution to a point of no return. The problem with any analysis of the *Benazir Bhutto* judgment, however, is that the acute polarization between Benazir Bhutto and Chief Justice Sajjad makes it very difficult to divorce any analysis from its politicized antecedents and confrontational backdrop.

368. *Id.* at 782-84 (Mirza, J., dissenting).

369. *Benazir Bhutto*, 50 PLD at 469-70, 478.

370. *See id.* at 483-535.

371. *Id.* at 502-03. The petitioners found it very hard to repel allegations that authorization for bugging the phones of opposition leaders, judges, and high functionaries of the state had come from Benazir Bhutto herself. *See id.* This was principally because some key officials of the intelligence agency—allegedly involved in this eavesdropping exercise—had made some very incriminating disclosures. *Id.* In addition, Benazir's defense that Benazir herself was wary of the intelligence agencies and feared that they were conducting surveillance over her in cohorts with the army establishment, in spite of her being Prime Minister, fell foul with the judges and made her look like an ineffective leader. *Id.*

The dissenting Justice Mirza, though he had concluded that the grounds had no nexus with the requirements of the Article, still offered to judge their merits and proceeded to do so. He enunciated how the past conduct of the President demonstrated that he had been not only consistently appreciative of the government's performance, but also actively associated and engaged with government policies.³⁷² He was also very critical of his colleagues' punitive approach to the Benazir Bhutto government on account of the grounds related to her alleged treatment of the judiciary. Justice Mirza declared that an entire Assembly could not be sent off for reasons such as a single offensive speech, the delayed implementation of a judgment, the moving of an undesirable bill in Parliament, or for grounds which were either supported by unreliable press clippings or material collected after the event.³⁷³ Justice Mirza was also openly critical of Chief Justice Shah's opinion, which he found inconsistent with Justice Shah's earlier opinion in the *Nawaz Sharif* case. Justice Mirza quoted from Justice Sajjad Ali Shah's dissenting note in the *Nawaz Sharif* case, to deduce that Justice Shah had himself said that the majority in that case had narrowed down the scope of Article 58(2)(b) to almost zero, which amounted to declaring that no President would ever be able to dissolve the National Assembly.³⁷⁴ The reason was that even if the President had substantial supportive material in possession, the Court would unlikely be satisfied with the intrinsic value of such material.³⁷⁵

d. The Outcome

Eventually the inability to control violence in Sindh, the judiciary-related grounds, and the phone-tapping allegation proved to be persuasive with the judiciary. The order of dissolution was upheld as valid, and the country prepared itself again for new elections.³⁷⁶

e. Conclusion

A more lenient test and generous admission of evidence on the part of the majority flowed seamlessly into a rather benign acceptance of the presidential grounds for dissolution. The political tone of the judgment as well as its

372. *Id.* at 787-89 (Mirza, J., dissenting), 793-94.

373. *Id.* at 783, 799, 804-05.

374. *Id.* at 773.

375. *Benazir Bhutto*, 50 PLD at 773 (Mirza, J., dissenting). Though it has to be pointed out that Justice Shah was actually being critical of the majority's view, rather than condoning it, but, on the other hand, it still showed that Justice Shah clearly recognized what the majority had held, and hence knew that in the *Nawaz Sharif* case, the standards for admission of evidence had been severely tightened and the applicable test narrowed.

376. *Id.* at 567 (majority opinion).

backdrop, and the clear departure from the tests of validity and admission of evidence that were laid down in the *Nawaz Sharif* case, make this a less than impressive verdict.

Upon review of all four dissolution judgments at this stage, several issues need to be pointed out. First, the test, as laid out in the *Haji Saifullah* case, came closest to the framers' intentions and was the most restrictive in terms of limiting the presidential power of dissolution. The pro-democracy judicial rhetoric that surrounded it showed a pronounced sympathy for the struggling democratic process and little tolerance for Pakistan's long history of executive excesses. The switch in the *Tariq Rahim* case to a more liberal test, allowing greater leeway for Presidents to dissolve parliaments, is untenable for various reasons. Quite apart from being pro-executive and anti-parliamentary democracy, it lacks merit, as very little time had elapsed since the previous case. Hence, there were really no changes in the ground realities and other relevant factors to justify departure from such recent precedence—i.e., the precedent created by the unanimous decision in the *Haji Saifullah* case, which had exhaustively reviewed and analyzed the entire issue. If anything, compared to the Junejo Assembly, the first Benazir Assembly had come to power through a freer, more participatory process and hence deserved greater nurturing and leeway.

The situation is not helped by the fact that the *Tariq Rahim* judgment sheds no light on the justifications for such departure. As if this was not problematic enough, in the next case of *Nawaz Sharif*, the Supreme Court reverted to the narrow *Haji Saifullah* test, without overruling or distinguishing the *Tariq Rahim* case. That left all those concerned with two discordant judicial views on the extent of the presidential powers. This confusion then manifested itself in the *Benazir Bhutto* case, where the majority, while ostensibly trying to reconcile the previous two conflicting judgments, essentially upheld the more liberal *Tariq Rahim* test. The minority, however, read the past rulings very differently and came to the conclusion that the majority in the *Nawaz Sharif* case had actually crystallized and consolidated the narrow *Haji Saifullah* test. It needs to be emphasized that all these reversals took place in a brief span of eight years—a mere trifle in the realm of constitutional law where weighty pronouncements such as these exhaustive dissolution judgments are expected to hold the field for considerably longer periods of time to promote certainty and stability. But then again, few, if any, jurisdictions have faced such constitutional crises on such a recurring basis as Pakistan.

E. Towards Another Martial Law

Electoral victories for both Sharif and Benazir had culminated in rather quick exits. An important contributing factor was the acute insecurity of office, as shown by the fate of their first governments, which propelled these politicians to try to overcome the actual structural constraints of governance as well as

perceived threats to their autonomy. The office of the President was also becoming increasingly politicized as the personality conflicts of Ghulam Ishaq Khan and Farooq Leghari, with their counterpart Prime Ministers seemingly influencing their exercise of the Article 58(2)(b) power, lent weight to perceptions of partisanship on the part of these empowered Presidents.³⁷⁷

Coming to power for the second time in 1997, Nawaz Sharif once again had the advantage of an absolute majority in Parliament.³⁷⁸ One of his major achievements was to bring closure to the Eighth Amendment.³⁷⁹ After spelling doomsday for four successive governments, the entire set of amendments, including Article 58(2)(b), was swiftly repealed on April 4, 1997, through the Constitution (Thirteenth Amendment) Act.³⁸⁰ However, while endeavoring to entrench his power base, he successively developed differences with the President, the Chief of Army Staff, and the Chief Justice.³⁸¹

The crisis of the judiciary deepened as both Nawaz Sharif and Justice Sajjad Ali Shah openly took up cudgels and used every opportunity to discredit each other.³⁸² The confrontation culminated in high drama and an unprecedented impasse that saw the judiciary deeply polarized, with rival benches being simultaneously constituted and parallel cause lists being issued. Under the rules and norms of the Supreme Court, the Chief Justice is solely authorized to issue cause lists (the list of cases that are to be taken up for hearing by the Court on any given day) as well as to determine which judges will hear which cases.³⁸³ The rebelling judges flouted this rule by issuing parallel cause lists and forming their own benches for hearing cases, and thus contributed to the creation of an unprecedented situation. The Chief Justice attempted to trump Sharif by summarily suspending the Thirteenth Amendment through a lean three-member bench (to bring Article 58(2)(b) back to life).³⁸⁴ Such was his reduced popularity and support in the Supreme Court, which had a total strength of seventeen judges (the majority of these judges were in the rebel's camp). The rival benches attempted to block it. Under mounting pressure and with no help forthcoming from the army, the President resigned, and then, in an embarrassing chapter, the

377. See generally *supra* Part III.

378. KHAN, *supra* note 19, at 817.

379. See *id.* at 817-18.

380. The Constitution (Thirteenth Amendment) Act, 1997, § 2 (Pak.), available at <http://www.pakistani.org/pakistan/constitution/amendments/13amendment.html>.

381. KHAN, *supra* note 19, at 932. One significant episode of this period was Pakistan's misadventure in Kargil on the Indian border, leading to a military and diplomatic fiasco. *Id.* This episode augured very badly for Sharif's peace initiatives with India, raising the tensions on the borders and showing Sharif to either be so inept as to not know what was transpiring under his nose, or duplicitous. *Cf. id.* at 932-33.

382. *Id.* at 820-23.

383. PAK. SUP. CT. R., PART I, ORDER III(9)-(10) & ORDER XI (1980) (amended up to 2003), available at http://www.supremecourt.gov.pk/table_of_contents.htm.

384. See AJMAL MIAN, A JUDGE SPEAKS OUT 235-36, 248-50, 288-89 (2004).

dissident judges more or less tried the Chief Justice and had him de-notified through the federal government.³⁸⁵

What comes across through an analysis of these troubled times is that: (1) Justice Sajjad Ali Shah increasingly veered away from strict adherence to the expectation attached to his status as Chief Justice, which required him to act as “*primus inter pares*” or “first among equals” and not as an autocratic superior. For a whole host of personality and political reasons, his relationship worsened with his brother judges, alienating and embittering them.³⁸⁶ (2) There was definitely “something rotten in the state of Denmark,” as certain elements in the judiciary openly factionalized and geared up to oust him. This era marks some of the most disturbing and divisive events in the history of the Pakistani judiciary. A series of politically partisan actions and reactions led to a gaping chasm. Subsequently, in a disturbing new trend, the retired judges started telling political tales in highly controversial autobiographies,³⁸⁷ instead of adhering to the time-trusted maxim that “judges should only speak through their judgments.”

Having taken on the Chief Justice and the President, Sharif also took on the Chief of Army Staff, even though the latter had publicly refused to get involved in the fray and had reportedly declined to support their idea of reintroduction of Article 58(2)(b), which was being promoted by certain quarters at the alleged behest of the Chief Justice and the President.³⁸⁸ In fact, in a move unprecedented for an army chief, instead of using the situation to further entrench the army’s role in politics, Chief of Army Staff General Jehangir Karamat resigned over growing differences with Sharif.³⁸⁹ Sharif then handpicked General Pervez Musharraf for the slot in a manner hauntingly reminiscent of Bhutto’s choice of Zia, by superceding other senior generals.³⁹⁰ This was another unhappy marriage, as the new appointee turned out to be more of a maverick than Sharif had bargained for.³⁹¹ Sharif then tried to develop allies within the army and attempted to remove Musharraf while Musharraf was en route from Sri Lanka to Pakistan.³⁹² However, he completely miscalculated Musharraf’s clout in the army

385. For a detailed discussion of these events, see KHAN, *supra* note 19, at 817-32.

386. *Id.* at 822-23.

387. See generally SAJJAD ALI SHAH, *LAW COURTS IN A GLASS HOUSE: AN AUTOBIOGRAPHY* (2001); MIAN, *supra* note 384.

388. See ABDUS SATTAR GHAZALI, *ISLAMIC PAKISTAN: ILLUSIONS & REALITY*, ch. 10, http://www.ghazali.net/book1/Chapter10a/body_page_2.html; see also F.R. Khan, *The Gentleman Must Go*, Nov. 3, 1998, http://www.chowk.com/show_article.cgi?aid=00000397&channel=civic%20center.

389. See KHAN, *supra* note 19, at 931.

390. *Id.*

391. Though beyond the scope of this paper, this is the period that is characterized by: (1) Pakistan’s dramatic nuclear tests; (2) as mentioned before, the Kargil war for which both Sharif and Musharraf blamed each other; and (3) reemergence of the many structural and factional issues of Pakistani politics. See *id.* at 817-45.

392. *Id.* at 933.

top brass, as well as his preparations for outfoxing such a potential move on the part of Sharif. Instead of ousting Musharraf, Sharif became the ousted.³⁹³

With Musharraf's plane making a safe landing on October 12, 1999, the army yet again dismissed an elected government.³⁹⁴ Accused of politicizing and destabilizing the armed forces and trying to create dissension within its ranks, the deposed Prime Minister was put under house arrest and eventually stowed out of the country illegally and under some clandestine arrangement that traded non-prosecution for the above charges for a so-called voluntary exile.³⁹⁵ A traditional martial law, however, was not imposed, and the military leadership decided upon a more inventive setup. On October 14, 1999, General Pervez Musharraf proclaimed emergency through the Proclamation of Emergency of October 14, 1999, and declared himself the Chief Executive of Pakistan.³⁹⁶ The Provisional Constitution Order of 1999 (PCO) was promulgated on the same date.³⁹⁷ The PCO provided that the Constitution would be held in abeyance.³⁹⁸ The Senate, the National Assembly, and the provincial assemblies were suspended along with their presiding officers. The President of Pakistan was allowed to continue in office; however, the PCO provided that he would act on the advice of the Chief Executive.³⁹⁹ It further provided that the country, subject to the PCO and other laws made by the Chief Executive, would be governed, as nearly as possible, in accordance with the Constitution of 1973.⁴⁰⁰ The judiciary continued to function, but it was prohibited from making any order against the Chief Executive or any person exercising power under his authority.⁴⁰¹ Fundamental rights were to continue in existence but only as long as they were not in conflict with the PCO.⁴⁰² For all practical purposes, it was martial law all over again—but with a deliberately softer image.

393. *See id.*

394. *Id.*

395. *See* Preetam Bora, *The Mysterious Nawaz Sharif Exile Deal*, SAPRA (Pak.), Dec. 23, 2000, <http://www.subcontinent.com/sapra/research/regional/regional20001223a.html>.

396. KHAN, *supra* note 19, at 933.

397. Provisional Constitution Order No. 1 of 1999 (Pak.), *available at* http://www.pakistani.org/pakistan/constitution/post_12oct99/pco1_1999.html.

398. *Id.*

399. *Id.* art. 3(1).

400. *Id.* art. 2(1).

401. *Id.* art. 2(2).

402. *Id.* art. 2(3).

IV. THE MUSHARRAF MARTIAL LAW

A. Legitimization of the Martial Law—The Zafar Ali Shah Case

Subject to strict restraints on jurisdiction regarding admissibility of any legal challenges against the Chief Executive and persons acting under his authority, the judiciary was initially allowed to perform its functions. This situation changed, however, when the Supreme Court entertained petitions challenging the army takeover. The hearing was fixed on January 31, 2000. The Government, to ensure that the petitions were not accepted, promulgated the Oath of Office (Judges) Order of 2000.⁴⁰³ All the judges of the superior courts were required to take oath to the effect that they would discharge their duties in accordance with the Proclamation of Emergency of October 14, 1999, and the PCO. In the tradition of Zia's utilization of such oaths to purge the judiciary of independent-minded judges, it was ordained that if a judge would not take the oath or would not be given the oath, he would cease to hold office. Six judges of the Supreme Court, including the Chief Justice, refused to take the oath. Of the seven judges who took the oath, the senior-most judge, Justice Irshad Hassan Khan, was appointed as the new Chief Justice. Three judges of the Sindh High Court, two judges of the Lahore High Court, and two judges of the Peshawar High Court were not invited to take the oath.⁴⁰⁴

The petitions were heard by a bench of twelve judges headed by the Chief Justice of the Supreme Court.⁴⁰⁵ The judgment was announced on May 12, 2000. In a unanimous 314-page judgment, the Supreme Court extended legitimacy to the army takeover, pointing out that since no constitutional solution

403. Oath of Office (Judges) Order No. 1 of 2000 (Pak.), reprinted in ZAIN SHEIKH, *THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN*, 1973, at 220-23 (2d ed. 2004).

404. The Supreme Court refused to take cognizance of the event, taking refuge under what it described very unsatisfactorily as the doctrine of past and closed transactions. Without elaborating upon the source, ambit and applicability of this doctrine, the Court merely observed that the practical consequence of the said doctrine was the extension of validation to the action of the Chief Executive in refusing oath to these judges. The Court acknowledged that the only valid manner in which judges of the high courts and the Supreme Court could be removed from office was provided under Article 209 of the Constitution, and that in that respect the denial of oath to the judges was a potentially invalid action. However, the Court went on to state that since the removed judges had not taken any remedial steps and had accepted pensions and the right to practice law, they had acquiesced to their removal. The Court then unconvincingly declared that the appropriate course of action was to declare the law so as to avoid the recurrence of such an event in the future, but not to upset earlier actions or decisions taken by the Chief Executive, those being "past and closed transactions." It then concluded that it was a well-settled principle that the courts could refuse relief in individual cases even though the action challenged was flawed; the courts' decisions depended upon the facts and circumstances of each case. *See Zafar Ali Shah v. General Pervez Musharraf*, 52 PLD 869, 1211-12, 1222 (2000) (Pak.).

405. *Id.* at 869.

existed for the present situation, and “Nawaz Sharif’s constitutional and moral authority stood completely eroded,”⁴⁰⁶ the extra-constitutional military takeover was inevitable and justifiable under the “doctrine of state necessity” and the principle of “*salus populi suprema lex*.”⁴⁰⁷ The petitioners made valid distinctions between the circumstances that had led to Zia’s martial law and the situation in the country under Sharif. They described the situation as calm, stable, and under control before and after the coup, thus negating the existence of any necessity.⁴⁰⁸ However, the Court, after reviewing a wide variety of materials (newspaper clippings, writings, television interview transcripts, etc.), found weight in all of Musharraf’s allegations, vague as they were.⁴⁰⁹ The petitioners also made a strong case to show that the “doctrine of necessity” had no credible international precedent, but the Court responded:

[T]he precedents from foreign jurisdictions, though entitled to reverence and respect but are not *ipso facto* applicable to the facts and circumstances prevailing on 12th October, 1999. In such matters of extra constitutional nature, in order to save and maintain the integrity, sovereignty and stability of the country and having regard to the welfare of the people which is of paramount consideration for the Judiciary . . . we have to make every attempt to save “what institutional values remained to be saved”⁴¹⁰

At a later stage, while rebutting an argument that all the quoted precedents showed that the “doctrine of necessity” was restricted to the area of criminal prosecution alone, the Court explained: “[T]he invocation of the doctrine of State necessity depends upon the peculiar and extraordinary facts and circumstances of a particular situation. It is for the Superior Courts alone to decide whether any given peculiar and extraordinary circumstances warrant the application of the above doctrine. . . .”⁴¹¹ This is in stark contrast to the alacrity the judiciary had shown in earlier cases, to consult international jurisprudence to find precedents and support for the “doctrine of necessity.” Here, the Court showed disinclination towards foreign jurisprudence, which had been treated like

406. *Id.* at 1218.

407. *Id.* at 1219. “The welfare of the people is the supreme law.” This adage has been regularly used by the Pakistani judiciary while invoking, developing, elaborating upon, and applying the “doctrine of necessity.” For an interesting description of the invocation of the “doctrine of necessity” and the “doctrine of revolutionary legality” in a few less-than-inspiring jurisdictions other than Pakistan, see LESLIE WOLF-PHILIPS, *CONSTITUTIONAL LEGITIMACY: A STUDY OF THE DOCTRINE OF NECESSITY* (1980).

408. *Zafar Ali Shah*, 52 PLD at 921, 932.

409. *Id.* at 1207, 1219-20.

410. *Id.* at 1169-70.

411. *Id.* at 1203.

scripture by some earlier courts. It was quite content instead to declare that since the Court saw things a certain way, so they must be. Since the Court described the military intervention as “an imperative and inevitable necessity,” it refused to see any valid justification for refusing validation, on the basis of what it trivialized as “the technical distinction between ‘doctrine of necessity’ and the ‘doctrine of state necessity.’”⁴¹²

Attempting to disentangle itself from the accusation that taking the new oath bound the judges to the PCO, the Chief Justice made proclamations of independence, rhetorically quoting *Marbury v. Madison*, Montesquieu, and the *Federalist Papers* to try and assuage critics of the Court, who were expressing skepticism that the Court’s powers of judicial review under the Constitution of 1973 were fully intact.⁴¹³ The Court insisted that the martial law was a temporary constitutional deviation and, at the same time, demonstrated very little sympathy for Pakistan’s democratic experience post-Zia’s martial law:

It is, thus, to be seen that simply by casting periodic ballots, people do not get a democratic society. Instead, they may well create, what is the case in Pakistan, particularly since 1985, a terrible form of fascism of a group of powerful people. This form of Government, although superficially elected, actually creates an “oligarchy.”⁴¹⁴

This is quite in contrast to the pro-parliamentary democracy rhetoric of previous Supreme Court judgments. And, most disturbingly, the Court actually lamented the repeal of Article 58(2)(b) by saying:

Probably, the situation could have been avoided if Article 58(2)(b) of the Constitution had been in the field, which maintained parliamentary form of Government and had provided checks and balances between the powers of the President and the Prime Minister to let the system run without any let or hindrance to forestall the situation in which Martial Law can be imposed. With the repeal of Article 58(2)(b) of the Constitution, there was no remedy provided in the Constitution to meet the situation like the present one with which the country was confronted. . . .⁴¹⁵

The *Zafar Ali Shah* judgment, in its unanimous approval of martial law, is a source of despondence for many who regard it as one of the most

412. *Id.* at 1172.

413. *Id.* at 1117-18, 1122-24.

414. *Zafar Ali Shah*, 52 PLD at 1151.

415. *Id.* at 1218.

retrogressive judicial decisions in Pakistan's history.⁴¹⁶ Whatever independence and commitment to constitutional ethos had been displayed by the Court in some of the early dissolution judgments seems like ancient, forgotten history. This is as meek and malleable an acceptance of a military intervention as any in Pakistan's early years. Actually, this is probably worse, because at least there were dissenting judges in those landmark cases.

The Musharraf government was allowed a period of three years to accomplish its proclaimed agenda,⁴¹⁷ as declared in the speech of General Musharraf on October 17, 1999.⁴¹⁸ Musharraf was also allowed to go ahead with his controversial accountability process.⁴¹⁹ Most importantly, the Supreme Court allowed the Chief Executive to amend the Constitution. This was very much *carte blanche*, as the legal limitations imposed on the power to amend were remarkably vague and ineffectual. The Chief Executive was allowed to introduce amendments to the Constitution as long as such steps were dictated by imperatives of promotion of public good, the requirements of ordinary and orderly running of the state, and also for the fulfillment of certain broad declared objectives.⁴²⁰ The Court declared that the basic features of the Constitution, which it elaborated as "the independence of *Judiciary*, federalism, parliamentary form of Government blended with Islamic provisions,"⁴²¹ could not be altered even by the Parliament. The Court also made a token statement that the fundamental rights under the Constitution were also to continue in existence.⁴²² In actuality, the Court went on to allow the state to make laws or take executive actions in deviation of several fundamental rights.⁴²³

416. See KHAN, *supra* note 19, at 936-39.

417. The Court bought the government's argument that electoral rolls needed to be updated, which task and the requisite subsequent delimitation of constituencies and disposal of objections was expected to take two or more years. *Zafar Ali Shah*, 52 PLD at 1213.

418. Pervez Musharraf, Chief Executive of Pak., Address to the Nation (Oct. 17, 1999), http://www.fas.org/news/pakistan/1999/991017-mushraf_speech.htm. Musharraf's broad, ambitious, and patently political "seven-point agenda" included: rebuilding of national confidence and morale; strengthening of the federation, removal of inter-provincial disharmony, and restoration of national cohesion; revival of economy and restoration of investors' confidence; ensuring law and order and dispensing speedy justice; de-politicization of state institutions; devolution of power to the grassroots level; and ensuring swift and across-the-board accountability. *Id.* If one were asked to reduce to one paragraph the military's role in state-formation in Pakistan, this is that paragraph!

419. *Zafar Ali Shah*, 52 PLD at 1222.

420. *Id.* at 1220-21.

421. *Id.* at 1221.

422. *Id.*

423. *Id.* Essentially, Articles 15, 16, 17, 18, 19 and 24 of the Constitution (pertaining to freedoms of movement; assembly; association; trade, business or profession; speech; and protection of property rights, respectively) allow Musharraf the possibility of invoking Article 233(1) of the Constitution (power of state to suspend fundamental rights during an

B. Legal Framework Order—Revival of the Constitution and Reintroduction of Article 58(2)(b)

General Musharraf eventually took over the office of the President of Pakistan on June 20, 2001, by rather unceremoniously sending the incumbent, Justice (Retired) Tarar, packing. With immediate effect, he dissolved the Senate, the National Assembly, and the provincial assemblies, which had been suspended in October of 1999.⁴²⁴ Repeating history to the dot, he followed Zia's recipe for gaining legitimacy and longevity and held a dubious, low-turnout referendum on April 30, 2002. All the main political parties vociferously boycotted this referendum, as did the public, but it allowed Musharraf to orchestrate an overwhelming condonation of his rule.⁴²⁵

Musharraf's next major step was to invoke the judgment of the Supreme Court and introduce drastic changes in the Constitution by promulgating the Legal Framework Order 2002 (LFO) on August 22, 2002.⁴²⁶ Of the various amendments made, the revival of Article 58(2)(b) and the creation of the National Security Council (NSC) were the most contentious ones. The former gave General Musharraf the power to dissolve the National Assembly; the latter gave a constitutional role to the armed forces in state-formation, as all the Service Chiefs were included as members of the NSC.⁴²⁷ The LFO further provided that after the elections that had been announced for October 10, 2002, Musharraf would relinquish the office of Chief Executive, but it was silent on whether Musharraf would also give up the office of Commander in Chief of the Pakistan Army.⁴²⁸

emergency period). *See id.* The only caveat added by the Court was that this could only be done by keeping in view the language of Articles 10, 23 and 25 of the Constitution (safeguards as to arrest and detention, provision as to property, and equality of citizens). *Id.*

424. *See* Story of Pakistan: A Multimedia Journey, *Pervez Musharraf Becomes President [June 2001]*, <http://www.storyofpakistan.com/articletext.asp?artid=A101>.

425. *See* MOHAMMAD WASEEM, *DEMOCRATIZATION IN PAKISTAN—A STUDY OF THE 2002 ELECTIONS* 24-25, 56, 74-86 (2006).

426. *See* Press Release, Hum. Rts. Watch, *Bush Should Urge Democratic Reforms in Pakistan* (Sep. 12, 2002), http://hrw.org/english/docs/2002/09/12/pakist4277_txt.htm. The concentration of power in the hands of the President, through the reintroduction of Article 58(2)(b) and the creation of the National Security Council (NSC), was severely criticized by the Alliance for Restoration of Democracy (ARD), a fifteen-party alliance, including the Pakistan People's Party (PPP) and the Pakistan Muslim League–Nawaz Group (PML(N)). The Pakistan Muslim League–Quaid-i-Azam Group (PML(Q)), comprising dissident elements from the mainstream political parties that had been wooed by the military, and commonly considered to be the "King's Party," predictably advocated these amendments. *See* S.M. ZAFAR, *DIALOGUE ON THE POLITICAL CHESS BOARD* 31-33, 35 (2004).

427. ZAIN SHEIKH, *THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN*, 1973, at 28, 243 (2d ed. 2004); Legal Framework Order, Chief Executive's Order No. 24 of 2002, art. 58 (Pak.), *reprinted in id.* at 252.

428. *See* SHEIKH, *supra* note 427, at 17-18; *see also* ZAFAR, *supra* note 426, at 78-108.

This issue remained a huge cause of disagreement in the months to come and was the primary reason behind the disruption of many a session of the newly elected Assemblies, attracting wide-scale public criticism for both Musharraf and, to a lesser, extent his antagonists.⁴²⁹

As Zia's RCO had laid the ground for eventual elections, so too did Musharraf's LFO. The elections to the National Assembly and the provincial assemblies, held on October 10, 2002, were regarded by many as stage-managed to bring to power the state-sponsored Pakistan Muslim League–Quaid-i-Azam Group (PML(Q)), though none of the contesting parties got a clear majority.⁴³⁰ The National Assembly formally came into existence on November 16, 2002.⁴³¹ On March 12, 2003, the newly elected members of the Senate also took oath.⁴³² The event marked the final formal step in the process that had culminated following the October general elections. The Constitution, with the exception of certain provisions, was also revived.⁴³³ The next year or so saw highly divisive politics, reminiscent of the period after Zia's controlled revival of democracy in the 1980s. Over this period, the legal status of the LFO divided the Assemblies as it did popular debate.⁴³⁴ The PML(Q) government maintained that it was now part of the Constitution and did not need validation by the Parliament. The Opposition retorted that it had no popular or legal backing and needed to be put before the Parliament.⁴³⁵ The eventual compromise with certain sections of the Opposition finally paved the way for Musharraf to table a Constitution Amendment Bill before the Parliament.⁴³⁶ Interestingly, the Bill did not expressly address all the

429. See ZAFAR, *supra* note 426, at 66-71.

430. The PML(Q) got seventy-six seats; the PPP, sixty-two; the Muttahida Majlis-e-Amal (MMA), fifty-one; the PML(N), fourteen. The PML(Q) managed to form a coalition government under the leadership of Mir Zaffarullah Khan Jamali, with the help of the Mohajir Qaumi Movement (MQM)—a political party drawing strength from language-based politics in Sindh,—a number of independent members, and ten members of the PPP who had defected. The PPP, the PML(N), and the MMA emerged as the main Opposition parties. It is important to note that both Nawaz Sharif and Benazir Bhutto were out of the country on forced exile.

431. See ZAFAR, *supra* note 426, at 38.

432. *Id.* at 41.

433. *Id.* at 38.

434. See THE NATIONAL ASSEMBLY OF PAKISTAN DEBATES: OFFICIAL REPORT XI, 36-37, 60 (2003) [hereinafter OFFICIAL REPORT XI].

435. See ZAFAR, *supra* note 426, at 62-63, 78-108.

436. The whole situation took an interesting turn when the ultra-conservative MMA (brought into power, primarily in the North-West Frontier Province (NWFP), partially due to dissatisfaction with the governance of the previous PPP and ANP government and, to many, primarily because of a strong local reaction to the U.S. invasion of Iraq) and the government made a deal on the LFO. Among other things, their agreement stated that Musharraf would shed his uniform by December 31, 2004; he would give up or restrict some of his powers, particularly the one regarding the dissolution of the National Assembly; the government would present the LFO in the Parliament for approval; the

provisions contained in the LFO and left untouched as many as twenty-one amendments that it had made to the Constitution. Though the Muttahida Majlis-e-Amal (MMA) accused the government of deviating from certain provisions of the agreement, it did not withdraw its support, and the government had no difficulty in getting the Bill passed by the Parliament on December 30, 2003.⁴³⁷

Among other things, the Constitution (Seventeenth Amendment) Act of 2003 granted indemnity to all the actions of General Musharraf since October 12, 1999.⁴³⁸ In the letter and spirit of all earlier post-martial-law legal validations, it validated all the laws promulgated by Musharraf and the amendments made to the Constitution. Most importantly, it reintroduced Article 58(2)(b) to the Constitution.⁴³⁹ After the approval of the Seventeenth Amendment, General Musharraf went on to get a vote of confidence from the Parliament and the provincial assemblies on January 1, 2004—a vote that was boycotted by the Opposition and from which even MMA abstained. “Go Musharraf Go” remained a popular chant in subsequent Assembly sessions.⁴⁴⁰

On October 8, 2004, the government, contrary to its commitment to the MMA, introduced a bill in the National Assembly that aimed at allowing General Musharraf to retain the office of the Chief of Army Staff until the completion of his tenure as President. The bill was passed through the support of Musharraf loyalists in the PML(Q).⁴⁴¹

National Security Council would not be made a supra-constitutional organization; and the MMA would support the government in all respects to facilitate its functioning. The PPP, the PML(N), and other Opposition groups felt this to be a tremendous betrayal on the part of the MMA, but it meant that Musharraf could finally call upon enough votes to provide a constitutional cover for the LFO. *See* OFFICIAL REPORT XI, *supra* note 434, at 77-80, 185-90; *see also* ZAFAR, *supra* note 426, at 142-45, 198-200, 255.

437. The Constitution (Seventeenth Amendment) Act, 2003, § 2 (Pak.), *available at* <http://www.pakistani.org/pakistan/constitution/amendments/17amendment.html>.

438. *Id.* § 10.

439. The only change has been the addition of a third clause that reads:

Article 58(3). The President in case of dissolution of the National Assembly under paragraph (b) of clause (2) shall, within fifteen days of the dissolution, refer the matter to the Supreme Court and the Supreme Court shall decide the reference within thirty days whose decision shall be final.

Id. § 3.

440. *See* ZAFAR, *supra* note 426, at 224-46.

441. *Text of President to Hold Another Office Bill 2004*, NEWS (Pak.), Oct. 15, 2004.

V. CONCLUSION: TO BE OR NOT TO BE—THE PAST AND FUTURE OF ARTICLE 58(2)(B)

Reverting to the suggested parameters laid down at the start of Part III, to gauge the consistency and quality of the dissolution judgments, there emerges a wide array of disproportionalities. It transpires that the judiciary did come up with a clear and legally sound interpretation of Article 58(2)(b) that not only faithfully resonated the intention of the lawmakers but also reflected strong adherence to the historically parliamentary character of the Constitution. It also laid out a stringent and clear test to gauge the limits of legally allowable and legitimate use of the presidential power—one that could conceivably preclude all future attempts at its abuse. However, it also transpires that the judiciary was highly inconsistent in applying this test to different cases. In fact, the test kept metamorphosing into new forms and then reverting to its original shape, with either no explanation whatsoever, or unpersuasive justifications. Given that, and barring the first dissolution, the circumstances and backdrop, the grounds for dissolution, the structural and institutional constraints, and the nature and quality of supporting evidence for dissolution were quite similar in the next three dissolutions; however, the tests applied, and logically, the consequent outcomes, are very divergent. The following comparative table underlines this point.

A. Tests Employed by the Supreme Court to Gauge the Validity of Dissolutions Under Article 58(2)(b)

Table 1

Tests Employed by the Supreme Court to Gauge the Validity of Dissolutions

CASE	TEST	OUTCOME
Haji Saifullah	The machinery of the government has broken down completely, its authority eroded, and “the Government cannot be carried on in accordance with the provisions of the Constitution.” ⁴⁴²	Dissolution held invalid but Junejo’s government not restored.
Tariq Rahim	It is an extreme power to be exercised when there is an actual or imminent breakdown of the constitutional machinery, as distinguished from a failure to observe a particular provision of the Constitution. ⁴⁴³	Dissolution upheld as valid and Benazir Bhutto’s government not restored.

442. Pakistan v. Muhammad Saifullah Khan (*Haji Saifullah*), 41 PLD 166, 188 (1989) (Pak.).

443. Ahmad Tariq Rahim v. Pakistan, 44 PLD 646, 664 (1992) (Pak.).

CASE	TEST	OUTCOME
Nawaz Sharif	It is an exceptional power provided for an exceptional situation and must receive as it has in <i>Federation of Pakistan v. Muhammad Saifullah Khan and others</i> the narrowest interpretation. ⁴⁴⁴	Dissolution held invalid and Nawaz Sharif's government restored.
Benazir Bhutto	"There may be occasion for the exercise of such power where there takes place extensive, continued and pervasive failure to observe not one but numerous provisions of the Constitution, creating the impression that the country is governed not so much by the Constitution but methods extra-constitutional." ⁴⁴⁵	Dissolution upheld as valid and Benazir Bhutto's government not restored.

Individual scrutiny of different judgments reveals a fuzzier and even more contradictory picture. If one compares the tests adopted by individual judges in different cases in order to gauge consistency, little, if any, consistency comes through. Admittedly, the application of the same test by a judge to different facts may produce different outcomes, but the reconfiguration of a test over such short periods of time requires a lot of explaining. In addition, while some judges may have found the challenge overwhelming and vacillated between different formulations of the test, with most of them frequently reaching conclusions that are different from their own recent outputs, the overall matrix is vexing. I have categorized the different interpretations of Article 58(2)(b) and the different "tests" that were developed in these cases, as follows:

- (a) A radical reading of Article 58(2)(b), which essentially says that this power could not be invoked under any circumstances (*Deathblow Interpretation*);
- (b) A narrow reading of Article 58(2)(b), which only allows its invocation upon "a complete breakdown of constitutional machinery" (*Narrow Interpretation*);
- (c) A broad reading of Article 58(2)(b), which allows its invocation upon both "an actual" as well as "an imminent breakdown of the constitutional machinery" (*Broad Interpretation*); and

444. Muhammad Nawaz Sharif v. President of Pak., 45 PLD 473, 579 (1993) (Pak.) (citation omitted).

445. Benazir Bhutto v. President of Pak., 50 PLD 388, 430 (1998) (Pak.).

(d) An even broader and more flexible reading of Article 58(2)(b), which gives illustrations of various kinds of constitutional breakdowns that may provide justification for a valid dissolution, essentially advocating no restrictive test at all but a case-by-case scrutiny of the facts and circumstances of individual cases (*Case-by-Case Interpretation*).

Thus, the spectrum ranges from essentially no legally valid possibility of invocation of Article 58(2)(b), to multiple potential scenarios where its valid invocation could take place. This wide spectrum can also be seen in another way. While interpretation (a) requires absolutely no judicial review, as the possibility of valid dissolutions has been completely ruled out, interpretation (d) requires maximum judicial scrutiny and review of facts, circumstances, and evidence, as well as heightened judicial interface with political and policy dimensions—thus raising exponentially the possibility of legal errors and, of course, the negative externalities related to such errors.

I will now endeavor to categorize all the individual Supreme Court opinions in the four dissolution cases, as well as all the high court opinions on dissolution where the authors of such opinions had also later adjudicated upon dissolution as Supreme Court judges, under the aforementioned categories.

1. *Haji Saifullah* Case—The First Dissolution

In the *Haji Saifullah* case, Justice Nasim Hasan Shah wrote the leading opinion, with which nine other judges agreed. The leading opinion advocated a *Narrow Interpretation* of Article 58(2)(b), thus only allowing its invocation upon “a complete breakdown of constitutional machinery.”⁴⁴⁶ Justice Shafiur Rahman wrote a separate note with which one judge agreed, which had a different formulation of the test, but one that was very similar to the test put forward in the majority opinion. Essentially, he also ruled in favor of a *Narrow Interpretation*.⁴⁴⁷

Thus, the judges who adjudicated the *Haji Saifullah* case were unanimously laying down a *Narrow Interpretation*, with all twelve of them on the bench in agreement.

2. *Tariq Rahim* Case—The Second Dissolution

In the *Tariq Rahim* case, Justice Shafiur Rahman wrote the leading opinion, with which eight other judges agreed. They now propounded a *Broad*

446. *Haji Saifullah*, 41 PLD at 188.

447. *Id.* at 212-13 (Rahman, J., concurring).

Interpretation that allowed for both “an actual or imminent breakdown of the constitutional machinery.”⁴⁴⁸

It is interesting to note that of the nine judges who propounded and agreed with a *Broad Interpretation* this time, five, namely, Justice Shafiur Rahman himself, Justice Nasim Hasan Shah, Justice Muhammad Afzal Zullah, Justice Saad Saud Jan, and Justice Naimuddin, had propounded a *Narrow Interpretation* in the *Haji Saifullah* case.

Of the other judges who agreed this time with a *Broad Interpretation*, Justice Ajmal Mian had in the past (while adjudicating the dissolution of the Haji Saifullah Assembly as the Chief Justice of the Sindh High Court) been unconvinced whether the courts could question the legality of a dissolution at all. He was unsure whether the President’s power was open to judicial review. Also, the requirement of an election within ninety days seemed to suggest to him that the remedy against the President’s action was solely the holding of new elections.⁴⁴⁹

In similar vein, another exponent of a *Broad Interpretation* this time was Justice Muhammad Afzal Lone, who had propounded a *Narrow Interpretation*, while adjudicating the dissolution of the Haji Saifullah Assembly as a judge of the Lahore High Court.⁴⁵⁰

Apart from the nine judges advocating a *Broad Interpretation* in the *Tariq Rahim* case, the remaining three took different stances. Justice Abdul Shakurul Salam gave a *Deathblow Interpretation*⁴⁵¹ (he had earlier put forward a *Narrow Interpretation*, while adjudicating the dissolution of the Junejo Assembly as the Chief Justice of the Lahore High Court).⁴⁵²

Justice Sajjad Ali Shah aligned himself with a *Narrow Interpretation*.⁴⁵³

Justice Rustam Sidhwa advocated a *Case-by-Case Approach*.⁴⁵⁴ In his earlier judgment on the bench of the Lahore High Court while adjudicating the Junejo dissolution, though there was an inclination on his part towards adopting a *Case-by-Case Approach*, he finally seemed to have sided with a *Narrow Interpretation*,⁴⁵⁵ as propounded in the *Haji Saifullah* case.

448. *Tariq Rahim*, 44 PLD at 664.

449. M.P. Bhandara v. Pakistan, 6 MLD 2869, 2872 (Sindh High Ct. 1988) (Pak.).

450. Muhammad Sharif v. Pakistan, 40 PLD 725, 792 (Lahore High Ct. 1988) (Pak.) (Lone, J., concurring).

451. *Tariq Rahim*, 44 PLD at 674.

452. *Muhammad Sharif*, 40 PLD at 759. This stance is actually reconcilable as Justice Salam was of the opinion that Article 58(2)(b) was specific to Zia and lost efficacy with his demise. In the earlier case, though Zia was no more when the case was decided, Justice Salam was actually adjudicating upon the fate of an Assembly dissolved by Zia and hence recognized the existence of Article 58(2)(b) for purposes of that case.

453. *Tariq Rahim*, 44 PLD at 708, 720.

454. *Id.* at 689-90.

455. *Muhammad Sharif*, 40 PLD at 767-68 (Sidhwa, J., concurring).

The majority, nine out of twelve judges, thus stood by a *Broad Interpretation* in this second dissolution case.

3. Nawaz Sharif Case—The Third Dissolution

In the *Nawaz Sharif* case, Justice Shafiur Rahman once again wrote the leading opinion and vacillated this time towards a *Narrow Interpretation*.⁴⁵⁶ So did Chief Justice Nasim Hasan Shah in his concurring opinion, with which two other judges, Justices Abdul Qadeer Choudhry and Fazal Ilahi Khan, agreed.⁴⁵⁷ All of them, with the exception of Justice Fazal Ilahi Khan, who was not a Supreme Court judge at the time, had propounded and agreed with a *Broad Interpretation* in the *Ahmad Tariq Rahim* case.⁴⁵⁸

Justice Muhammad Afzal Lone also agreed with a *Narrow Interpretation*,⁴⁵⁹ even though he had agreed with a *Broad Interpretation* in the previous case.

On the other hand, Justice Saad Saud Jan⁴⁶⁰ and Justice Sajjad Ali Shah⁴⁶¹ agreed with a *Broad Interpretation*. Justice Saad Saud Jan had also earlier agreed with a *Broad Interpretation* in the *Tariq Rahim* case.⁴⁶² However, Justice Sajjad Ali Shah had earlier adopted a *Narrow Interpretation* in the *Tariq Rahim* case.⁴⁶³

Justice Saeeduzzaman Siddiqui, while quoting both the *Haji Saifullah* and *Tariq Rahim* tests, showed an inclination towards a *Case-by-Case Approach*.⁴⁶⁴ He seemed to be propounding a *Case-by-Case Approach* while adjudicating upon the Bhutto government's first dissolution in the Sindh High Court as well.⁴⁶⁵

Moving on to the other judges, Justice Ajmal Mian seemed to be agreeing this time with a *Narrow Interpretation*,⁴⁶⁶ though in the *Tariq Rahim* case he had also agreed with a *Broad Interpretation*.⁴⁶⁷ Justice Saleem Akhtar also agreed with a *Narrow Interpretation*,⁴⁶⁸ though in the Sindh High Court,

456. Muhammad Nawaz Sharif v. President of Pak., 45 PLD 473, 579 (1993) (Pak.).

457. *Cf. id.* at 568.

458. *Tariq Rahim*, 44 PLD at 664.

459. *See Nawaz Sharif*, 45 PLD at 758-59.

460. *See id.* at 647.

461. *See id.* at 783-85.

462. *Tariq Rahim*, 44 PLD at 664.

463. *Id.* at 710, 715, 720.

464. *Id.* at 661-62.

465. Khalid Malik v. Pakistan, 43 PLD 1, 48 (Sindh High Ct. 1991) (Pak.).

466. *See Nawaz Sharif*, 45 PLD at 699.

467. *Tariq Rahim*, 44 PLD at 664.

468. *Nawaz Sharif*, 45 PLD at 815.

while adjudicating upon the Benazir Bhutto government's first dissolution, he had gone for a *Case-by-Case Approach*.⁴⁶⁹

And most surprisingly, Justice Rafiq Tarar advocated a *Deathblow Interpretation*,⁴⁷⁰ whereas in the high court he had advocated a *Broad Interpretation* while adjudicating the Benazir Bhutto government's first dissolution as the Chief Justice of the Lahore High Court.⁴⁷¹

Overall, this case stands for a *Narrow Interpretation*, with seven out of the eleven judges adopting that interpretation.

4. Benazir Bhutto Case—The Fourth Dissolution

In the *Benazir Bhutto* case, Justice Sajjad Ali Shah wrote the leading opinion. Justice Fazal Ilahi Khan, Justice Munawar Ahmad Mirza, and Justice Raja Afrasiab Khan agreed with him. They advocated a *Broad Interpretation*.⁴⁷² Justice Fazal Ilahi Khan had agreed with a *Narrow Interpretation* in the *Nawaz Sharif* case.⁴⁷³

Justice Saleem Akhtar went this time for a *Case-by-Case Approach*⁴⁷⁴ whereas in the previous case he had gone for a *Narrow Interpretation*.⁴⁷⁵ Justice Irshad Hasan Khan also adopted a *Case-by-Case Approach*.⁴⁷⁶ Justice Zia Mahmood Mirza was the only one who subscribed to a *Narrow Interpretation*.⁴⁷⁷ Therefore, this time, four out of seven judges stood behind a *Broad Interpretation*.

5. Summary of Tests Adopted in Dissolution Cases

The following table is helpful in capturing the adoption of different tests by the judges in the four high court and four Supreme Court dissolution judgments.

469. *Khalid Malik*, 43 PLD at 69 (Akhtar, J., concurring).

470. *See Nawaz Sharif*, 45 PLD at 796-97.

471. *Ahmad Tariq Rahim v. Pakistan*, 43 PLD 78, 105-06, 116 (Lahore High Ct. 1991), *aff'd*, 44 PLD 646 (1992) (Pak.).

472. *See Benazir Bhutto v. President of Pak.*, 50 PLD 388, 430, 558-64 (1998) (Pak.).

473. *See Nawaz Sharif*, 45 PLD at 568.

474. *See Benazir Bhutto*, 50 PLD at 575-85 (Akhtar, J., concurring).

475. *See Nawaz Sharif*, 45 PLD at 815.

476. *See Benazir Bhutto*, 50 PLD at 662 (Hasan Khan, J., concurring).

477. *See id.* at 764 (Mahmood Mirza, J., dissenting).

Table 2**Adoption of Tests by Individual Judges in the High Courts and the Supreme Court to Gauge the Validity of Dissolutions**

	Honorable Judges	Deathblow	Narrow	Broad	Case-by-Case	No Judicial Jurisdiction
1.	Muhammad Haleem		Haji Saifullah 1989			
2.	Aslam Riaz Hussain		Haji Saifullah 1989			
3.	Muhammad Afzal Zullah		Haji Saifullah 1989	Tariq Rahim 1992		
4.	Nasim Hasan Shah		Haji Saifullah 1989 Nawaz Sharif 1993	Tariq Rahim 1992		
5.	Abdul Qadir Shiekh		Haji Saifullah 1989			
6.	Shafiur Rahman		Haji Saifullah 1989 Nawaz Sharif 1993	Tariq Rahim 1992		
7.	Javed Iqbal		Haji Saifullah 1989			
8.	Ghulam Mujaddid		Haji Saifullah 1989			
9.	Saad Saood Jan		Haji Saifullah 1989	Tariq Rahim 1992 Nawaz Sharif 1993		
10.	Usman Ali Shah		Haji Saifullah 1989			
11.	Ali Hussain Qazalbash		Haji Saifullah 1989			
12.	Naimuddin		Haji Saifullah 1989	Tariq Rahim 1992		
13.	Abdul Qadeer Ch.		Nawaz Sharif 1993	Tariq Rahim 1992		
14.	Ajmal Mian		Nawaz Sharif 1993	Tariq Rahim 1992		M.P. Bhandara 1988
15.	Rustam S. Sidhwa		Muhammad Sharif 1988		Tariq Rahim 1992	
16.	Muhammad Afzal Lone		Muhammad Sharif 1988 Nawaz Sharif 1993	Tariq Rahim 1992		
17.	Sajjad Ali Shah		Tariq Rahim 1992	Nawaz Sharif 1993 Benazir Bhutto 1998		

	Honorable Judges	Deathblow	Narrow	Broad	Case-by-Case	No Judicial Jurisdiction
18.	Wali Muhammad Khan			Tariq Rahim 1992		
19.	Fazal Elahi Khan		Nawaz Sharif 1993	Benazir Bhutto 1998		
20.	Muhammad Rafiq Tarar	Nawaz Sharif 1993		Tariq Rahim 1991		
21.	Zia Mahmood Mirza		Benazir Bhutto 1998			
22.	Irshad Hasan Khan				Benazir Bhutto 1998	
23.	Raja Afrasiab Khan			Benazir Bhutto 1998		
24.	Munawar Ahmad Mirza			Benazir Bhutto 1998		
25.	Abdul Shakurul Salam	Tariq Rahim 1992	Muhammad Sharif 1988			
26.	Saeeduzzaman Siddiqui				Khalid Malik 1991 Nawaz Sharif 1993	
27.	Saleem Akhtar		Nawaz Sharif 1993		Khalid Malik 1991 Benazir Bhutto 1998	

The following statistics are of significance:

Judges who sat in three cases:

1. J. Nasim Hasan Shah
2. J. Shafiur Rahman
3. J. Saad Saud Jan
4. J. Ajmal Mian
5. J. Muhammad Afzal Lone
6. J. Sajjad Ali Shah
7. J. Saleem Akhtar

Judges who sat in two cases:

1. J. Muhammad Afzal Zullah
2. J. Naimuddin
3. J. Abdul Qadeer Ch.
4. J. Rustam S. Sidhwa
5. J. Fazal Elahi Khan
6. J. Muhammad Rafiq Tarar
7. J. Abdul Shakurul Salam
8. J. Saeeduzzaman Siddiqui

Judges who changed their test once:

1. J. Saad Saud Jan
2. J. Sajjad Ali Shah

Judges who changed their test twice:

1. J. Nasim Hasan Shah
2. J. Shafiur Rahman
3. J. Ajmal Mian
4. J. Muhammad Afzal Lone
5. J. Saleem Akhtar

Judges who changed their test:

1. J. Muhammad Afzal Zullah
2. J. Naimuddin
3. J. Abdul Qadeer Ch.
4. J. Rustam S. Sidhwa
5. J. Fazal Elahi Khan
6. J. Muhammad Rafiq Tarar
7. J. Abdul Shakurul Salam

Of the seven judges who adjudicated three dissolution cases, two changed their minds once about the test, and the remaining five changed their minds twice about the test.

Of the eight judges who adjudicated two dissolution cases, seven changed their minds about the test.

B. Conclusion

The critics of Article 58(2)(b) in the 1985 legislative debates were prescient in many ways. Pointing out Zia's *mala fides* and the unprecedented nature of this provision, they had predicted the negative fallouts of such concentrated power in an individual. As the *Haji Saifullah* Supreme Court decided, Zia's subsequent dissolution of the Junejo Assembly turned out to be based on *mala fides*, and there is persuasive evidence to suggest that the three subsequent dissolutions were also not fully devoid of bias and partiality. The critics had warned of insecure, non-independent, and unstable governments, constantly wary of a trigger-happy President. The subsequent short and shaky stints in power by Nawaz Sharif and Benazir Bhutto demonstrated this. The critics were wary of the office of President getting politicized and vulnerable to manipulation by vested interest groups. As it turned out, Ghulam Ishaq Khan and Farooq Leghari could not keep their presidencies completely free of such influences. The critics had predicted that instead of creating balance, Article 58(2)(b) would actually bring about constitutional imbalance, and that instead of promoting stability, it would generate instability. Four dissolutions in eight years lend considerable credence to that estimation. Indeed some argue that Article 58(2)(b) has always been used in a partisan fashion, and, given the biased role of the Presidents and the nascent state of democracy in Pakistan, all the dissolved governments should have been allowed to complete their terms.⁴⁷⁸ Their

478. Cf. KHAN, *supra* note 15, at 133-35.

continuation would have helped entrench and consolidate a culture of electoral politics and, eventually, a culture of constitutionalism.⁴⁷⁹

Supporters of Article 58(2)(b) continue to describe it as a “safety valve” against martial laws. Although it is true that there was no imposition of martial law while Article 58(2)(b) could be brought into play, it is highly debatable whether the high cost paid for retaining Article 58(2)(b) was worthwhile. If martial laws are undesirable because they create political instability, uncertainty, and regression, Article 58(2)(b) created the same thing but much more frequently. Pakistan has had a bitter historical experience with direct martial laws. It can be argued that given the strong domestic and international condemnation that they have generated due to their patent illegality, it had become much more difficult to impose direct martial laws after Zia’s demise. On the other hand, as it turned out, an ostensible constitutional mechanism to oust elected political governments presented itself as a more efficient and less controversial option to traditional perpetrators of martial laws. That the army continued to play a behind-the-scenes role during the Article 58(2)(b) dissolutions era is epitomized in the manner the revived Nawaz government and President Ishaq Khan were ostensibly sent packing by the junta. Ghulam Ishaq Khan’s close ties with the army and the remarkable coincidence that every political government that attempted to exercise some independence was quickly shown the exit via Article 58(2)(b) lend further substance to the view that Article 58(2)(b) may have simply been the manifestation of a “soft,” constitutionally disguised martial law. It has been discussed in some detail that Zia at least had in all probability visualized it to be so.⁴⁸⁰ Subsequent presidents also discovered it to be a more effective Sword of Damocles for any government wanting to adopt a radical reform agenda detrimental to the establishment’s interest.

An overview of the politics surrounding the dissolutions thus bolsters the argument that instead of taking on the brunt and complexities of direct rule through martial law, the army opted for indirect and yet close control through Article 58(2)(b) over *prima facie* independent civilian frameworks governed by the Constitution. Article 58(2)(b) helped create an unstable hybrid of a presidential and prime ministerial system that lacked the internal integrity and strength of either, wherein both the President and Prime Minister could be pitched against each other to create weak and malleable governments, which could always be shown the door. At the same time, politically weak and immature governments also played into the hands of those who benefited from depicting them as weak and immature. The four inadequately functioning and eventually dissolved governments added to the myth that democracy was perhaps not suited for Pakistan, and popular imagination was tempted to reconsider whether the public really wanted democracy. That is why when Musharraf imposed martial law, his spin-doctors could pontificate that the so-called democracy had done little for the

479. *Id.*

480. *See generally supra* Parts I.E, II.A.

people, and the need of the hour was strong, decisive leadership, regardless of its legality. In view of this, a mechanism such as Article 58(2)(b) can be deemed much more insidiously destructive for the democratic and constitutional ethos of the country than a direct martial law.

Direct martial laws are at least blatantly illegal and easy to identify and condemn. Article 58(2)(b), on the other hand, looks and sounds constitutional. Yet, as we have seen, invocation of Article 58(2)(b) has historically impeded democratic rule in the country. At the same time, the lame-duck assemblies that have been ousted through Article 58(2)(b) have been painted by advocates of Article 58(2)(b) as villains rather than victims. Their stilted and lackluster performance in office has been brandished to undermine and discount the idea of parliamentary democracy and to categorize all Pakistani politicians as inept and corrupt. This is obviously done to reinforce the ostensible need for a check such as that provided by Article 58(2)(b). Furthermore, such demonization of popularly elected governments is always conducted while completely underplaying the many significant ways in which none of the four dissolved governments was allowed to be truly independent and to complete its term in office. This strongly suggests that instead of a “safety valve,” Article 58(2)(b) has been used in Pakistan as what I would describe as a “control valve.”

While the findings of this Article adduce support for the above thesis, it is not really the Article’s focal point. The primary queries and findings of this Article pertain to Article 58(2)(b)’s negative externalities in terms of contradictory and inconsistent jurisprudence and the resultant adverse impact on judicial neutrality and its public perception. Having closely examined this dimension of the debate in this Article, the following is a summary of the main conclusions that have already been exhaustively dealt with:

- (a) The Article 58(2)(b) dissolution judgments divulge major inconsistencies in terms of the adoption and application of the test of gauging the legitimacy of an order of dissolution.
- (b) The Article 58(2)(b) dissolution judgments further show disparities in the rigor and depth with which presidential grounds for dissolution were scrutinized for legitimacy. Compare, for instance, Justice Shafiur Rahman’s spartan review of the grounds in the *Tariq Rahim* case and his painstaking scrutiny of the same in the *Nawaz Sharif* case. This also holds true for the other judges who adjudicated both these cases.
- (c) The courts have been inconsistent in their approach towards standards of admissibility and level of scrutiny of evidence. Compare, for example, the diligent review of

evidentiary material required by the *Haji Saifullah* Court, followed by the very different approach of mere prima facie review of evidence that was adopted in the *Tariq Rahim* case at both the high court and Supreme Court levels. Also, compare the marked reluctance of the *Nawaz Sharif* Court to allow the Federation's reliance on newspaper clippings and correspondence to the *Benazir Bhutto* Court's holding that there was nothing wrong with the production of corroborative and confirmatory material—including newspaper clippings and correspondence—after the date of the order of dissolution, and the further holding that the Court was not even required to scrutinize this material in detail.

- (d) As to the outcome of the cases, it has already been discussed that the *Haji Saifullah* case should probably have been decided differently, as the dissolution had been found patently illegitimate. Similarly, while the outcome of the *Nawaz Sharif* case may be commendable, it makes the decision in the *Tariq Rahim* case decision seem, at best, harsh and, at worst, biased. This is because, apart from a close similarity of various grounds, contributing factors, and circumstances, the one important common ingredient was a highly partisan President. It has to be said that Justice Sajjad Ali Shah made some valid observations when he noted a more sympathetic stance on the part of the rest of the judges towards Nawaz Sharif, as compared to Benazir Bhutto, in terms of the tests applied, as well as the detail, tone, and tenor of evaluation of presidential grounds for dissolution. His own bad blood with Bhutto, however, makes it hard to consider the *Benazir Bhutto* decision as completely objective and unbiased. As it turns out, in terms of outcomes, Benazir Bhutto was always the losing party in these cases.
- (e) The argument of growing political polarization and, equally important, the perception of such polarization of the judiciary, finds ample credence in instances such as: Justice Sajjad Ali Shah's patently political observations in the *Tariq Rahim*, *Nawaz Sharif*, and *Benazir Bhutto* cases; Justice Nasim Hassan Shah's expansive interpretation of Article 17 to admit the *Nawaz Sharif* case and his various out-of-court statements divulging the case's eventual outcome; Justice Sajjad Ali Shah's delaying tactics in

admitting Bhutto's petition in the *Benazir Bhutto* case, as well as his out-of-court statements in that case; the open hostility between Justice Sajjad Ali Shah and Benazir Bhutto; the open hostility between Justice Sajjad Ali Shah and Nawaz Sharif; and, above all, the crisis of the deeply divided judiciary that was witnessed during Sharif's second term in office.

- (f) The political and personality preferences of the judges also come through strongly in, for instance, the opinions of Justice Abdul Shakurul Salam and Justice Rustam Sidhwa in the *Muhammad Sharif* case; Justice Shafiur Rahman's opinion in the *Nawaz Sharif* case; Justice Rafiq Tarar's opinion in the *Nawaz Sharif* case; Justice Sajjad Ali Shah's opinions in the *Tariq Rahim*, *Nawaz Sharif*, and *Benazir Bhutto* cases; and Justice Zia Mahmood Mirza's opinion in the *Benazir Bhutto* case.
- (g) The judgments, while dabbling in highly political questions of constitutional and state structure and ethos, not only encroach into the legislative domain but also, having done so, fail in providing any meaningful answers or vision. Judicial pronouncements vacillate between identification and support of a prime ministerial system as under the original Constitution of 1973 and a post-Eighth Amendment hybrid of a prime ministerial and presidential system with a strong role entrenched for the President. Resultantly, no clarity emerges as to the current nature of Pakistan's constitutional arrangement or its future direction.

The above factors have dented both informed as well as layperson perceptions of judicial capacity and independence in Pakistan. Thus, while it remains empirically untested whether "safety valves" keep out martial laws, Article 58(2)(b) has had many negative fallouts in terms of continuing political and constitutional uncertainty, confused and contradictory jurisprudence, a widely criticized judiciary, and a weak-as-ever legislative and constitutional culture. If and when General Pervez Musharraf strikes using Article 58(2)(b), yet another chapter will be added to this disastrous legacy of dissolutions.