

GENERAL ZIA UL HAQ LEGACY:PROVISIONAL CONSTITUTIONAL ORDER(PCO) MARCH 24, 1981. AN ANALYTICAL STUDY

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Abstract:

The Provisional Constitutional Order popularly term as PCO is an Emergency and Extra Constitutional Order, in which wholly or partially suspends the Constitution of Pakistan. The PCO fulfills the legal vacuum and act as temporary constitution in abeyance or suspension. Mostly, the Martial Law Orders have been enforced in country on behalf of CMLA. Constitution is an essential element of democracy. The constitution is a set of principles for guided the state affairs; the representatives elected through the democratic process and possess right way to make amendments in the constitution and determining according to the mandate of public. The amendment in the constitution is sometimes indispensable under the prevailing circumstances, necessity and time. Such amendments were made with the guidance and principles of constitution and the procedure for the change has been clearly defined in the constitution. If the procedure would not adopt then amendment would be un- legitimized and deviation of the law. The elections held under the military umbrella were never admirable on international or national levels, but in country, the situation was quite contrary because whenever a dictator sensed the need of amendments in the constitution, he accomplished it without any hesitation.

Keywords:Constitution deviation, Constitution Abrogation, Crisis of Political Govt.

The Provisional Constitutional Order popularly term as PCO is an Emergency and Extra Constitutional Order, in which wholly or partially suspends the Constitution of Pakistan. The PCO fulfills the legal vacuum and act as temporary constitution in abeyance or suspension. Mostly, the Martial Law Orders have been enforced in country on behalf of CMLA. Constitution is an essential element of democracy. The constitution is a set of principles for guided the state affairs; the representatives elected through the democratic process and possess right way to make amendments in the constitution and determining according to the mandate of public. The amendment in the constitution is sometimes indispensable under the prevailing circumstances, necessity and time. Such amendments were made with the guidance and principles of constitution and the procedure for the change has been clearly defined in the constitution. If the procedure would not adopt then amendment would be un- legitimized and deviation of the law. The elections held under the military umbrella were never admirable on international or national levels, but in country, the situation was quite contrary because whenever a dictator sensed the need of amendments in the constitution, he accomplished it without any hesitation. It is worth mentioning that seven amendments had already been made by its originator. Zia-ul-Haq gave intentions to hold elections within ninety days would be handed over to the public representatives but later on, he began to show ill wills to prolong his rule. Zia-ul-Haq deliberately initiated propaganda under a proper planning that there should be balance of powers between the President and the Prime Minister. Moreover, he said if the President considered that the government was not function properly under the constitution and threat to the national solidarity, then the President would dismiss the

government and hold fresh elections. So that to stop the path of Martial Law. General Zia-ul-Haq framed a plan of enhanced the power. He amended in Article-199; which gives stability to his rule.1*Article 199: According to the Constitution of Pakistan it is about the Jurisdiction of High Court (i).According to the Article, the High Courts could not issue any orders in such matters, which used to fall in the jurisdiction of military courts, tribunals, or CMLA office. Hence, the high courts were forbidden from any orders against the decision of military courts. Zia has interviewed with Symons Winchester, Zia exposed his views:***Who can stop me, Army is with me and I am in power to do what I want. What is constitution? A book of ten to twelve pages, if I tear it off and say to live under some other system from tomorrow. Who can stop me?***

2-Maluka, Z. Khalid, The Myth of Constitutionalism in Pakistan. Karachi, 2002, p. 73.

He started meeting the politicians for the completion of the process of accountability. Meanwhile, Zia-ul-Haq suddenly announced the postponement of the elections. When he was asked about the decision, he said that this advice has been given by the leaders of PNA.3Lubna Kanwal, Multan, Pakistan, 2015, p.4.After the postponed of elections, General Zia-ul-Haq turned towards his actual designs and he stressed the need of the due constitutional role of armed forces in the politics. He said that the elections could be held only conditionally, if they produce "Positive Results".4, Baxter, Craig. 1997, p.71.He actually meant that if the PPP succeeded in the elections then he would have to be answerable for overthrowing Bhutto's Government and suspending the Constitution, which was an Act of Treason and its punishment, is death sentence, according to the Article: six of the Constitution of 1973.Zia-ul-Haq said the Constitution had not been abolished and neither any obstacle to functioning the courts; so the country's affairs had been smoothly running without any hindrance.5-

Chimayo, M. Kotera. 1997, p.193.

Zia-ul-Haq continued since four years with suspended Constitution. The Supreme Court declared the "Doctrine of the Necessity" for Zia-ul-Haq's as in Nusrat Bhutto Case and conferred the Authority for Amendments in the Constitution.6-PLD-657. SC1977.However, the Courts retained the right to revise those Martial Law Regulations, which would be against the national solidarity and public welfare.7 Mumtaz Ahmad, 1996, p. 3-7. Contrary to this, most of Judges of Supreme and High Courts were agreed the fact that Zia-ul-Haq was not authorized to make huge and fatal amendments, in the constitution, in Mrs. Nusrat Bhutto case. Former Judge of Supreme Court, Mr. Justice Durab Patel (1924-97), he was the part of that bench, which gave the verdict. He explained, "We put three conditions on Martial Law Authority, it was stance of the Judiciary that the Constitution of 1973 would remain the Supreme Law of the Country, Superior Court continue to perform their duties under the constitution, and power of the Courts remains intact and third condition was that the elections would be conducted within a stipulated time."8-Hussain, Ejaz. 2010, p.204. However, Zia-ul-Haq ignored some decisions of the Supreme Court and Amended the Article-212-A.9*-For detail see article in Constitution of 1973. In Amended Article, the Supreme Court was deprived from the right of revision. Furthermore, former CJP Mr. Justice Yaqoob Khan said, firstly the government postponed the elections and Amended in Articles No. 199 and 212, which snatched all these powers from the High Court and Supreme Court, that they cannot heard the cases against Martial Law' Authority.10- Mushtaq Ahmad, 1992,p.189.Although, the Amended Article 212-A removed the hurdles in the path of CMLA, but the sky was

still overcast and the Judiciary and Establishment were not pleased with the current arrangements. It was the demand of the Military Courts that they should function without the Civil Intervention. While, the Superior Judiciary claimed that Military Courts were interference in their jurisdiction. Syed Sharif-ud-din Pirzada (1923-2017) and Mr. A.K. Brohi Jurist (1915-1987AD) were the legal advisor of the President Zia-ul-Haq. They advised to Zia, solution of these political complications and entanglements must be found, so that they gave proposal to Promulgated the PCO. The political experts believed it was the idea of the adviser to imposition the P.C.O. CMLA endorsed it on March 24, 1981. Chief Martial Law Order No. 1. Was enforced as Provisional Constitution Order 1981(PCO March, 1981).11-Nawaz Shuja, 2008, p.121.

Zia-ul-Haq apprised the public after the promulgation of PCO that with this order the stability of law and the threats confronted the national solidarity, and its remedies to address the assumptions and doubts about the powers of the superior courts. Infect the country faced a new constitutional crisis after the P.C.O.1981. Former Chief Justice Mr. Justice Molvi Mushtaq Hussain explained the reasons about “Provisional Constitution Order 1981” and said: “A writ petition of Air Marshal (R) Asghar Khan (1921-2018) was under legal process in which the longevity of Martial Law was challenged in High Courts. The government anticipated that the verdict was against him, so they decided to send me at Supreme Court and meanwhile the P.C.O was promulgated.”12- Mushtaq Ahmad, Justice, 1987, p.215.He also explained that the state agencies informed that the decision of the court would be anti-government. However, it was assumed that the expected decision had been taken down. Hence, the government imposed the P.C.O. and abolished the powers from the Supreme Court, which had been accorded in Nusrat Bhutto case. The *Times*, mentioned in its editorial; “The objective of the PCO 1981 was to curb the freedom of the judiciary and restrained them”.13-The Daily Times, USA, March 29, 1981.When Zia-ul-Haq was accorded the right to amend the constitution, CJP, Mr. Justice Anwar-ul-Haq termed it a right decision according to the Theory of Necessity with the condition that the court will retain the right of Judicial Review.14-Zafar Iqbal, 1994, p. 86.The Court would observed that these amendment by the CMLA has any legal sense or not, but Zia-ul-Haq imposed the interim Constitution 1981, he snatched the right of judicial revision from the Supreme Court.” Sheikh Anwar-ul-Haq further said, “It is beyond my Judgment’s Jurisdiction”.15- Zahid Yasin,2016, p.7-9. Zia-ul-Haq promptly replied, you have accorded a person to amend the constitution, so he has also amended that the courts do not have the right of judicial revision any more. Hence, I have deprived you from this right by applied the powers conferred by you.16- Mahmud Malik, 1996, p. 104.

According to Roedad Khan (1928---), “The government wounded the judiciary with its sword and with the presentation of Interim Constitution. He has excluded the activities of Martial Law from the judicial process.”17-Roedad Khan, 1999, p. 71.

As the Provisional Constitution Order enforced, the judicial institutions almost ended and all the powers were accumulated by CMLA. Now the boundaries of the military government extend, and the influence of the judiciary on the government was finished. According to the Article-16 of PCO, the CMLA had achieved the authority to amend the constitution. According to PCO Order No. 17; all the Judges of Supreme Court, High Courts and Federal Shariat Court along with their subordinate Courts were asked to take fresh oath, to perform their duties under the Provisional Constitution Order 1981.18Zafar Iqbal, Aain Say Enharaf, p. 194.If these judges did not take oath for some reasons, then they would not continue their duties. The

government tried to pressure judges to take oath again under PCO 1981, but some judges refused to do so. The Judges of High Courts were sworn in at their Provincial Metropolis, and Supreme Court Judges at Capital and date was fixed on March 25, 1981. CJP Justice Anwar-ul-Haq indiscriminately criticized the PCO and said that he would not take oath under the interim constitution; “While Zia-ul-Haq asked him to revise his decision.”^{19- Leslie wolf, Philips, 1981, p. 9.} However, CJP declined to do, Zia-ul-Haq said, “he would miss the advice of Justice Anwar-ul-Haq, but he accepted his resignation with a heavy heart.”^{20- Khan, Hamid, , 1990, p. 257.} The judges were bound to take oath again under the new legislation. As the superior courts had been prohibited to issue any order against the military courts, most of judges left their posts themselves. CMLA did not invite them for swearing in. These judges also included the Chief Justice Supreme Court, Mr. Justice Sheikh Anwar-ul-Haq (1917-95), as due to his differences over PCO, he had excused from taking the oath.

Eventually, Mr. Justice Haleem became the Chief Justice of Supreme Court of Pakistan. Two more Judges of Supreme Court also refused to take the oath included Mr. Justice Durab Patel and Mr. Justice Fakhruddin G. Ibrahim. Mr. Justice Molvi Mushtaq Hussain was not invited to sworn. Many Judges of the High Court also left their post as protest. Zia began to bring up his political agenda after getting entire the control on the judicial crisis. Fakhruddin-Ibrahim said about Durab Patel decision, On 24 March 1981, Justice Patel refused to take oath under the Provisional Constitutional Order (PCO), which not only negated the independence of the judiciary but also prolonged Martial Law by nullifying the effect of a judgment giving General Zia’s regime limited recognition. ^{21-Mushtaq Ahmad, Justice, Judge in Politics, p.270.}

As a signatory to the Judgment, Patel could not take the new oath, given his strict conscience. A lesser man might have succumbed. The temptation certainly would have been great; for due to seniority, he was set to become the Chief Justice of Pakistan as soon as the incumbent retired the following year and would have headed the apex court for seven years. Justice Patel did not think twice about rebuffing Zia though, relates a fellow judge, Fakhruddin Ibrahim. As was the custom, the Chief Justice asked the question to the most junior judge, “Not without apprehension, I said, Sir, I am going home.”^{22- Mahmud, M. Dilawer, 2007, p.147.} The same question was put to my colleagues; most of them were ready to take the oath. “I walked up to Durab Patel, and asked him, “What is your decision?” Promptly and without the least hesitation, he said, “How can I take such an oath!”^{23-Durab Petal, 1989, p.198.} Apparently, the new oath was required for the same reasons as prevailed in March 1981. When Zia ordered the new oath, a number of constitutional challenges were faced by Zia. Petitions were pending before the Supreme Court and Chief Justice Anwar-ul-Haq was understood to have set them down for hearing shortly. PCO killed all such petitions. Control over the judiciary was inherent in the logic of military hegemony all over the society. Such restraints were part of the structure of military rule.^{24- Omar Noman, 1989, p. 22.} The constitutional history of country is full of constitutional eventualities as well as extra constitutional military adventurism.

Country practiced more than three provisional constitutions, three permanent constitutions and one interim constitution. Pakistan had been suffered five times to extra constitutional Emergency or Martial Law regimes, when the constitution was either abrogated or suspended. The functions of government were being carried on under Laws Orders or Provisional Constitution Orders. Martial Law was declared in 1958, 1969, 1977, 1999 & 2007. So the excessive military intervention ruled over the country for more than thirty years. In Pakistan, there is no guaranteed to stop the wave

of Martial Law, even we has introduced the Article 6 too, but it was yet not effective in politics.

Reference:

1. Article 199: According to the Constitution of Pakistan it is about the Jurisdiction of High Court (i) directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; or (ii) declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect; or (iii) Subject to the Constitution, the right to move a High Court for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II shall not be abridged.
2. Maluka, Z. Khalid, *The Myth of Constitutionalism in Pakistan*. Karachi, 2002, p. 73
3. Lubna Kanwal, *Zia, Islam and Politics of Legitimacy*, AL-ADWA Assistant Prof. Department of Pakistan Studies, Bahauddin Zakariya University, BZU, Multan, Pakistan, 2015, p.4
4. Baxter, C. *Zia's Pakistan: Politics and Stability in Frontline State*, Vanguard Lahore, 1997, p.71
5. Chimayo, M. Kotera. "*Civil Military Relations: A Comparative Study of India and Pakistan*", PhD. Dissertation, RAND Graduate School, 1997, p.193
6. PLD 657 Nusrat Bhutto VS State, SC 1977
7. Mumtaz Ahmad, *The Crescent and the Sword: Islam, the Military and Political Legitimacy in Pakistan 1977-1985*, Middle East Journal, Vol. 50, No. 3, 1996, p. 3-7
8. Hussain, Ejaz. "*Military Agency, Politics and the State: the case of Pakistan*", PhD. dissertation Heidelberg University, 2010, p.204
9. Article 212-A;

1. Item 45 of the Schedule to P.O. No. 14 of 1985, read with Revival of Constitution Order, 1985, (S.R.O. 1279 (I)/85 of December 29, 1985), omitted Art. 212A (December 30, 1985). The said Article was inserted by section 2 of the Constitution (Second Amendment) Order 1979, P.O. No. 21 of 1979, (w.e.f. July 5, 1977). Article 212-A;

Establishment of Military Courts or Tribunals

- (1) Notwithstanding anything hereinbefore contained, the Chief Martial Law Administrator may by a Martial Law Order, provide for the establishment of one or more Military Courts or Tribunals for the trial of offences punishable under the Martial Law Regulation or Martial Law Orders or any other law, including a special law, for the time being in force specified in the said Martial Law Order and for the transfer of cases to such Courts or Tribunals.
- (2) The jurisdiction and powers of a Military Court or Tribunal shall be such as may be specified in a Martial Law Order issued by the Chief Martial Law Administrator.
- (3) Notwithstanding anything hereinbefore contained, where any Military Court or Tribunal is established, no other Court, including a High Court, shall grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of the Military Court or Tribunal extends and of which cognizance has been taken by, or which has been transferred to, the

Military Court or Tribunal and all proceedings in respect of any such matter which may be pending before such other court, other than an appeal pending before the Supreme Court, shall abate.

10. Mushtaq Ahmad, *Judge in Politics*, Jung Publishers, Lahore, 1992, p.189
11. Nawaz Shuja, "*Crossed Swords: Pakistan its Army, and the Wars With in*", Oxford University Press, Karachi, 2008, p.121
12. Mushtaq Ahmad, *Justice, Judge in Politics*, Lahore, 1987, p.215
13. The Daily *Times*, USA, March 29, 1981
14. Zafar Iqbal, *Aain Say Enharaf*, Alfazeel Books, Lahore, 1994, p. 86
15. Zahid Yasin, *Hypothetical, Political System of Martial Law: A Case Study of General Zia-ul-Haq*, G.C. University Faisalabad, JPUHS, Vol.29, No.1, Jan - June, 2016, p.7-9
16. Mahmud Malik, *Athween Tarmeem Martial law Ka Tawan*, Lahore, 1996, p. 104
17. Roedad Khan, *Pakistan: A Dream Gone Sour*, Oxford University Press, Karachi, 1999, p. 71
18. Zafar Iqbal, *Aain Say Enharaf*, p. 194
19. Leslie wolf, Philips, *Constitutional Legitimacy: A Study of the Doctrine of Necessity*, Third World Quarterly, Vol. 16, No. 4, October, 1979, p. 9
20. Khan, Hamid, *8th Amendment-Constitutional & Political Crisis in Pakistan*, Karachi, 1990, p. 257
21. Mushtaq Ahmad, Justice, *Judge in Politics*, p.270
22. Mahmud, M. Dilawer, *The judiciary and Politics in Pakistan*, Lahore, 2007, p.147
23. Durab Petal, *Military Dictatorship in Pakistan and the role of Judges*, Lahore, 1989, p.198
24. Omar Noman, *Pakistan and General Zia: Era and Legacy*, Third World Quarterly, Vol. 11, No. 1 Published by: Taylor & Francis, Ltd, January 1989, p. 22