

## JUDICIAL REFORMS IN PAKISTAN THROUGH CONSTITUTIONAL AMENDMENTS: A CASE STUDY OF THE PAKISTAN PEOPLES PARTY (PPP) GOVERNMENT (2008-2013)

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### **Abstract**

*Judicial reforms from time to time are essential for an effective justice system and judicial independence. In Pakistan, the PPP government during 2008-2013 brought about revolutionary reforms in the judiciary through constitutional amendments. This paper aimed to highlight these judicial reforms in the light of constitutional amendments during the 4<sup>th</sup> regime of PPP which were also promised in the historic Charter of Democracy (CoD) sign in 2006. The paper also analysed the judicial reforms introduced by 18<sup>th</sup> and 19<sup>th</sup> amendments and its effects on judicial independence. In this paper, historical and analytical approaches with mostly secondary sources of data for the results finding have been used. The paper is also a source of guide for the students of law, political science, Pakistan Studies, policy-makers, readers and researchers who are interested in the judicial history of Pakistan and also eager to conduct research on the judicial reforms in Pakistan.*

**Key Words:** *Judicial Reforms, Constitutional Amendments, Pakistan Peoples Party, Charter of Democracy, Judicial Commission, Parliamentary Committee*

### **INTRODUCTION**

PPP leader Benazir Bhutto was killed on December 27, 2007. Days before the scheduled national elections, she was murdered, dealing a fatal blow to Musharraf's chances of holding onto power. The general elections of February 18, 2008, were overwhelmingly won by Musharraf's PML-Q and its Islamist allies, despite deliberate manipulation. The PPP, which is currently led by Asif Ali Zardari, Bhutto's widower, and his son Bilawal Zardari Bhutto, secured the most seats in the National Assembly, ahead of Nawaz Sharif's PML-N. The PPP was his most ardent opponent in the civilian arena. But on March 9, Zardari and Sharif agreed to create a coalition government by signing the Murree Declaration (Khan, 2016). The judges that were removed from office and the political prisoners including attorneys arrested during the emergency were freed by the coalition government led by the PPP. Since then, the alliance has disintegrated due to disagreements between the two parties regarding the reinstatement of the fired justices. However, bringing back the dismissed justices was just the beginning of the judiciary's transformation and preservation of judicial independence. Only by constitutional measures can it be accomplished. In spring 2008, while engaging in discussions with the PML-N over democratic reform in general and the reinstatement of the removed justices in particular, the PPP government had written a bill amending the constitution (Dawn, 2008, September 10). The 1973 constitution underwent significant changes to restore judicial independence, parliamentary democracy, and the rule of law. These changes included the Eighteenth and Nineteenth amendments. The 1973 original constitution gave the president the authority to name justices for Pakistan's Supreme Court and

High Court. That was a contentious process that raised concerns about the judiciary's independence (Khan, 2016). Nevertheless, the government implemented radical changes in the nomination of judges to the Superior Courts by the eighteenth Amendment to the Constitution, which the latter viewed as an assault on its independence. The nineteenth Constitutional Amendment, which the Parliament complied with, enlarged the judicial commission's membership from eight to thirteen. It further stipulated that a nominee who had previously been turned down by the legislative committee could not be submitted again by the judicial commission. In the event of a refusal, the parliamentary committee would need to provide justification. These changes neutralized the process of apex judge appointments and lessened the possibility of conflict between the judiciary and the executive branch (Ali, 2021).

### **The Status of Judicial Reforms during the PPP Previous Governments: A Historical Review**

During the first PPP government a number of judicial reforms were implemented in the country. In a momentous ordinance made on August 12, 1972, Zulfikar Ali Bhutto proclaimed the separation of the judiciary and the executive, ending the infamous and antiquated British system that gave District officers both judicial and executive authority. The people's long-felt needs and deeply held desires have been met by these reforms, which have simplified legal procedures, clearly defined rights and duties, and liberalized criminal litigation. In 1973, a fully representative constitution was enacted by Bhutto's first PPP government. The Constitution includes detailed provisions on the makeup, jurisdiction, authority, and duties of these courts, and it addresses the higher judiciary in a fairly comprehensive manner (Ali, Jabeen, & Jan, 2021). Both "independence of the judiciary" and "separation of the judiciary from the executive" are guaranteed under the Constitution. The grounds, venues, and process for the dismissal of superior court judges are also outlined in the Constitution. The removal of a judge due to misbehavior or physical or mental incapacity may be recommended by the Supreme Judicial Council, which is made up of the senior judges of the Supreme Court and High Courts, on its own or upon a referral from the President (Khan, 2016). In this way, the PPP government guarantees the independence, freedom, and impartiality of the higher judiciary by reforming the Constitution.

The second PPP government was formed under the leadership of Benazir Bhutto in 1988. Before going ahead towards judicial reform, soon a tug of war broke out over the judicial appointment between the Prime Minister and President. The issue was challenged in the Lahore High Court where the court declares that article 193 of the Constitution did not mention the role of Prime Minister in Judicial appointments (Faqr, 2017). The decision was challenged in the Supreme Court but soon the Federal Government withdraw its appeal and the issue remained unresolved for years and lead to the dissolution of National Assembly in 1990 (Bhatti & Shaheen, 2019).

In the third PPP Government (1993-96), though she did the exact opposite, Benazir Bhutto broke her pledge to reform the judiciary and pick judges after consulting with the opposition. The selection of judges was based on their loyalty to their party. The PPP had promised to separate the judiciary from the administration in the election program, but it never followed through on this promise (Ali, Jabeen, & Jan, 2021). This era is regarded as the era of judicial crises when the government violates the convention of seniority by appointing justice Sajjad Ali Shah as Chief justice of Pakistan, who was fourth on seniority list. In addition, several appointments were made to Lahore and Sindh High Courts against the recommendations of the Chief Justice (Faqr, 2017). In this way the judicial reform in which the procedure of appointment is an indispensable essential to the independence of Judiciary, the PPP government damaged it. For this reason it remained a legal and political issue in the history of PPP government (Bhatti & Shaheen, 2019). These legal and political issues were highlighted in historic CoD that lead to PPP during its forth government to shift from a conventional method to a more democratic procedure in 2010 in eighteenth and nineteenth amendments (Gohar, & Bibi, 2022).

### **.Judicial Reforms and Charter of Democracy (CoD), 2006: A Guideline**

Pakistani politics changed after General Musharraf's takeover in 1999. PPP chose to begin pursuing politics of accommodation and reconciliation after taking a lesson from the politics of the 1990s. It sparked an environment of amity and compromise that finally led to Nawaz Sharif and Benazir

Bhutto signing the historic "Charter of Democracy" (CoD), a 36-point document, in London on May 14, 2006. Since 2008, Pakistan's politics have been impacted by the CoD, which has so far had favorable effects on the nation (Gohar, & Bibi, 2022). Some other parties of the Alliance for the Restoration of Democracy (ARD) signed the CoD document on July 2, 2006, including Jamiat Ulema-e-Pakistan (JUP), Jamhoori Watan Party (JWP), Pakistan Democratic Party (PDP), Jamiat Ahle Hadith (JAH), and Pakistan Christian Party. It was an extensive document that addressed most of the issues that had been impeding Pakistan's democracy's growth. PPP committed to upholding judicial independence under the CoD by establishing a Judicial Commission to appoint judges to the Supreme Court and High Court. This commission would be chaired by the Chief Justice of the Supreme Court, and would also include the next two most senior Supreme Court justices, four provincial chief justices, a member of the Pakistan Bar Council (PBC) chosen by the PBC, the president of the Supreme Court Bar Association (for matters pertaining to the Supreme Court), and the four presidents of the High Court bar associations (for matters pertaining to their unique High Courts). By upholding the seniority norm in the selection of chief justices for the Supreme Court and High Courts, the PPP pledged under the CoD to guarantee judicial independence (Khan & Alam, nd). As part of the CoD, the PPP committed to preserving judicial independence by giving the Judicial Commission the authority to discipline current judges and to nullify nominations to the Supreme Court and High Courts in the event that the oath of allegiance to the constitution was broken. "No judge shall take oath under any Provisional Constitution Order or any other oath that is contrary to the exact language of the original oath prescribed in the Constitution of 1973," is what the PPP had agreed upon in the CoD. As part of the CoD, the PPP also promised that the Federal Constitutional Court would develop and that equal representation would be granted to all federating units in order to address constitutional disputes (Gohar, & Bibi, 2022).

#### **Judicial Crisis and Emergence of PPP as Governing Party: An Early Scenario**

The declaration of martial law in Pakistan in October 1999 effectively silenced all proponents of democracy. A military coup was supported by the majority of judges who took an oath of office after General Pervez Musharraf issued the Provisional Constitutional Order (PCO) in 1999. All the democratic leaders were exiled from Pakistan (Khan, 2016). The Chief Justice of Pakistan was appointed by Musharraf in 2005 and is named Iftekhhar Muhammad Choadhry. As subordinate judiciary gained prominence and the military faced numerous obstacles in pursuing this goal, a breach between the two branches of government quickly developed. Iftekhhar Choadhry refused to collaborate with the military, and numerous lawsuits were heard at the time against the executive (Ali, Jabeen, & Jan, 2021).

The lawyers' movement got its start in 2007 when Musharraf made it apparent that he intended to remove Chaudhry from his position. It generated controversy in the legal establishment and raised anti-Musharraf sentiment in the populace. Musharraf's choice to run in the presidential elections added gasoline to the flames. Lawyers, civil society organizations, and opposition political parties brought legal action against Musharraf since he was unable to run for office because he was holding the dual positions of President and Chief of Army Staff. Musharraf declared an emergency and fired every member of the judiciary because he was fully aware that the court would rule against him on November 3 (Gohar, 2022). Two thirds of the judges disobeyed his orders to take new oaths in accordance with the November 2007 PCO. Musharraf clamped down on the media and jailed thousands of lawyers. Following eight years of military rule, Pakistan returned to civilian governance in February 2008 following the assassination of Benazir Bhutto in December 2007. In this case, the judiciary believed that if it contested the National Reconciliation Order (NRO), which Benazir Bhutto and Musharraf signed, it may put the PPP and the state in political jeopardy and muddle the integration of the legal profession (Ali, 2021). Later on, the PPP's collaboration made it possible for judges to be reinstated; undoubtedly, this required them to organize a "Long March." "Retreat and revival" was the name of the fifth phase, which runs from August 2008 to March 2009. The lawyers were obliged to conclude that "the restoration was a lost cause" as a result of "Long March's" failure. Due to Musharraf's concurrent holding of the positions of President of Pakistan and Chief of Army Staff under the LFO of 2002, the major political parties began to call for his

resignation. His resignation in August 2008 placed Zardari in the President's office, which improved Pakistani lawyers' prospects. The PPP government saw the acceptance of the lawyers' demands and the restoration of all the judges who had been removed due to the emergency (Khan, 2016).

Asif Ali Zardari and Nawaz Sharif, the head of the Pakistan Muslim League-N, inked an agreement in Murree in March 2008, during the entire process of restoring the judiciary. The Bhurban Accord is a historic pact that was signed in order to bring back true democracy to Pakistan. Musharraf removed the legal authority in November 2007, and considerable emphasis was given to their reinstatement. The legal community found it to be very beneficial in bolstering its restoration effort. These initiatives and agreements led to the belief that 2009 marked the official start of Pakistan's judiciary's revival (Gohar, 2022).

This constitutional package was prepared by the PPP government's Parliamentary Committee on Constitutional Reforms (PCCR), which was made up of 26 members representing the majority of political parties, during negotiations with the PML-N on democratic reform in general and the reinstatement of the deposed judges in particular, had prepared a bill in early 2008 amending the constitution. The PCCR was able to forge extraordinary political agreement. Law Minister Naek emphasized that both inside and outside of parliament, there remained room for debate, discussion, and revision of the proposed package of reforms drafted by his ministry. The government removed those revisions from the previous draft of the bill that, as HRCP accurately noted, were unlikely "to deepen democratic governance," including significant judicial reform. The bill restores parliamentary democracy, judicial independence, and the rule of law. In addition to supporting constitutionalism and the rule of law, an independent, reformed judiciary was essential in averting another direct or indirect authoritarian intervention (Gohar, 2022).

#### **Restructuring the Judiciary through Eighteenth Amendment: A Glimpse**

In April 2010, the PPP tabled a constitutional amendment known as Eighteenth amendment, before the Parliament. The Eighteenth Amendment to the Pakistani Constitution was approved by Parliament on April 15, 2010, and it came into effective on April 19 after the President signed it into law. Finally, the amendment restructured the judiciary and also introduced a new system for judicial appointments (Ali, 2021).

**Judicial Appointments:** For significant judicial reform, the pre-emergency judiciary's restoration was insufficient. It could only be accomplished by constitutional clauses that guarantee open, honest, and free procedures for the appointments, promotion, and removal of judges. By shifting the power from the individuals to the institutions, the Judicial Commission and the Parliamentary Committee, the Eighteenth Amendment imposed mild limitations on judicial sovereignty, in contrast to the previous system where the Chief Justice and the President had sole authority over the appointment of judges (Munir, Khan, & Ahmad, 2021).

The commission, chaired by the Chief Justice and comprising representatives from the judiciary, executive branch, and Bar Association, was tasked with making appointments in accordance with the new appointment system. One nominee has been forwarded to the Committee, which consists of eight members with equal representation from the opposition and the Treasury, for each vacancy. The Committee has fourteen days to reject an appointment, after which it would be deemed confirmed. After the amendment was passed in April 2010, judges of the Supreme and High Courts were appointed by a judicial panel made up of seasoned attorneys and other judges, without the president's input. Given that judges make up the vast majority (6/9) of the commission, several reports claim that this reform significantly reduced the executive branch's appointment authority. We assess the effect on judicial independence and decision quality, interpreting the change from presidential appointment of judges to judicial commission selection as a *de jure* decrease of executive influence over the judiciary (Ali, 2021).

**Judicial Activism:** The Supreme Court may act on its own initiative and issue binding rulings on "a question of public importance with reference to the enforcement of any of the Fundamental Rights" granted by the constitution, according to Article 184(3). Although the court has generally opted to ignore violations of fundamental rights by authoritarian regimes, it has occasionally exercised its judicial authority (Ali, 2021). Under the PPP government's Eighteenth Amendment, a bench of at

least five judges, including the chief justice and two of the most senior Supreme Court judges, would consider matters on a suo moto basis. It would also take away the judiciary's power to issue binding orders, restricting it to solely declaratory rulings in matters involving basic rights. The Eighteenth Amendment was an attempt to balance the powers, but in the years after the amendment, judicial activism peaked (Akhtar, Kasi, & Khan, 2022).

**End of Doctrine of Necessity:** As stated in Article 6 of the Constitution: "Anyone who uses force or shows force, or by other unconstitutional means, abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subvert the Constitution shall be guilty of high treason." The Eighteenth Amendment, enacted by the PPP government, abolished the 'doctrine of necessity' and forbade any court, even the Supreme Court or a High Court, from endorsing, upholding, or justifying "any extra-constitutional measure or takeover (of government) by use of force or show of force or by other unconstitutional means as envisaged in Article 6" (Niazi, The Express Tribune, 2020, May 19). The amendment additionally stipulates that a judge of the Federal Shariat Court, the High Court, or the Supreme Court who takes an oath that differs from the one specified in the Third Schedule would lose their position as a judge in that court, depending on the situation. As a result, the Amendment changed Article 6 of the Constitution, expanding the definition of high treason to include suspension, keeping the Constitution in abeyance, and preventing the higher judiciary from endorsing such acts. This article appears to have limited the ability of judges to register and approve military regimes and extra constitutional acts (Akhtar, Kasi, & Khan, 2022).

**Establishment of Fifth High Court:** The Islamabad Capital Territory was to be served by a fifth high court, as suggested by the government in 2007. As a result, the Court was founded on August 14, 2007, by Presidential Order of the then-military dictator, Pervez Musharraf. The Lahore High Court had blocked this idea, but on December 24, 2007, the Pakistan Supreme Court reversed the ruling. The Supreme Court of Pakistan's ruling on July 31, 2009, in response to Constitution Petition Nos. 09 and 08 of 2009, declared the Court to be dissolved. Justice Hameed Dogar of the Supreme Court had ruled in favor of the creation of the IHC. However, once its establishment was contested, the Lahore High Court granted a stay order, which caused its creation to be postponed. The IHC was scheduled to go online in February 2008 (Dawn, 2010, April 23). The Islamabad High Court Act of 2010 reinstated the court. 2010 saw the establishment of the Islamabad High Court as a result of the 18th constitutional amendment. All federation units would be considered for the appointment of the chief justice and judges to the IHC. President Asif Ali Zardari gave the oath of office to Justice Iqbal Hameed ur Rahman, the first constitutional Chief Justice of the Islamabad High Court, on January 3, 2011, at the Governor's House in Karachi (AAJ News, 2011, January 3).

#### **Reforming the Judiciary and Nineteenth Amendment: A Revise Consideration**

Under the argument that the court's interpretation of the Eighteenth Amendment violated judicial autonomy, rules pertaining to the appointment of judges were challenged. The petition for a hearing before the entire bench was accepted by the court. It was a novel move for the courts to sit in judgment on constitutional amendments. Rather than issuing a final ruling, the Court remanded the case to Parliament, provided some minimal guidelines for constraints, and gave suggestions on how to amend the Amendment to bring it into compliance with the Constitution (Ali, 2021). In light of its recommendations, the Court made it plain that it would invalidate the provisions pertaining to the appointment of judges in the event that Parliament was unable to alter them. The Court recommended two primary modifications: first, increasing the number of judges on the Commission from two to four. Second, in the event that the Committee declines the nomination made by the Commission, the former will return the case to the latter for further consideration along with reasonable justifications for the declines. The letter should restate its earlier suggestions, the former must abide by them, and the President must designate people in accordance with them. These suggestions had certain ramifications, including the judges' overwhelming majority on the Commission and their overriding power over the Committee, which was a throw back to the times before the Eighteenth Amendment (Akhtar, Kasi, & Khan, 2022). In accordance with the Court's orders, the government ratified the 19th Constitutional Amendment by changing the 18th Amendment to reflect the Court's recommendations. On December 21, 2010,



Senator Raza Rabbani, the head of the constitutional revisions committee, introduced the 19th amendment to the parliament. The law received assent from the national assembly on the 22nd and the Senate on the 30th of the same month (Gohar, 2022). On January 1, 2011, the 19th constitutional amendment was ratified by President Asif Ali Zardari. Zardari described it as “a New Year’s gift of democracy” for the country since it was meant to remove a possible point of contention between the parliament and the judiciary. The articles 81, 175A, 182, 213 and 246 were altered by this amendment. The majority of the modifications address judicial appointments and Pakistan’s legal system (The Express Tribune, 2011, January 2).

**Enlargement of Judicial Commission:** By amending clause 2 of Article 175-A, the revision strengthened the judicial commission from seven to nine members and added appointment of two additional senior judges. In the event that the current chief justice of the high court is unavailable for whatever reason, the chief justice would have the authority to designate a former judge or chief justice of the high court to be a member of the judicial (Munir, Khan, & Ahmad, 2021)

**Experience for Membership of JC:** The member chosen from the Supreme Court bar council ought to have fifteen years of professional advocacy experience. It was also outlined how the provincial bar councils would be represented on the Judicial Commission, which chooses high court chief justices. Included in the JC would be the senior advocate with fifteen years of experience from the provincial bar council. This change ensured that the judicial commission consists solely of devoted and seasoned professionals (Munir, Khan, & Ahmad, 2021).

**Rename the Fifth High Court:** Article 81 and 175, two of the High Court of Islamabad’s articles, were amended to create the new name Islamabad High Court (The Express Tribune, 2011, January 2).

**Formation of Parliamentary Committee:** A parliamentary committee was established with eight members. The appointment of judges, suggested by the Supreme Judicial Council would be ultimately approved by this committee. The list of nominated judges would proceed to the Prime Minister House upon confirmation by this committee, and the president would then need to ratify the names. In the event that the parliamentary committee rejects the names, they would be required to provide the rationale and supporting documentation (Ali, 2021).

**PM Role in Judicial Appointment:** The committee incorporated the prime minister in the appointment of judges by altering Article 175-A, clause 13. The prime minister was given a role in the appointment of judges, despite never having had one before. The committee’s list of nominees may be rejected by the prime minister; in this case, further names will be taken into consideration (Munir, Khan, & Ahmad, 2021).

**Scrutiny of Jurisdiction:** The parliamentary committee would have eight members, if the assembly were to be dissolved then all of whom would come from the Senate. The parliamentary sessions would be held behind closed doors, and members would have the authority to examine judges’ conduct. However, they would not be permitted to debate issues pertaining to judges’ conduct in the parliament building or in public (The Express Tribune, 2011, January 2).

## Conclusion

Conclusively, we can say that reforming the Pakistani judicial system was crucial for the independence of judiciary. There was a dire need of restructuring the judiciary due to the prevailing judicial crisis in Pakistan during that time. After the judiciary’s restoration in 2009, the PPP government amended the constitution in order to guarantee the primacy of the Parliament and preserve a sensible equilibrium between the independence of the judiciary and its limitations. One of the main concerns in CoD was the need for judicial reforms, namely with regard to the appointment of judges to the higher courts. These modifications to the constitution also addressed this issue. The first goal of these constitutional amendments was to stop extra constitutional conduct and additional military participation. Secondly, to avoid excessive judicial intervention in executive concerns, the judiciary should be subject to at least mild limitations. Thirdly, to provide the judiciary certain constitutional protections so that it can’t support extra constitutional behavior in the future. The PPP government through eighteenth amendment resolved all these issues. Furthermore, the long standing issue of federal high court was also resolved. On the other hand,

the judiciary challenged the Eighteenth Amendment's provisions on the appointment of judges and ordered the government to reevaluate the amendment in light of the recommendations made by the court. Although the PPP government passed the landmark Nineteenth Amendment, which brought neutrality to the process of appointing supreme judges, gave the prime minister a role in the appointment process, and lessened the possibilities of conflict between the executive and judiciary, some of the provisions can be considered a return to the traditional pre-Eighteenth Amendment roles, meaning that the balance of power between the Parliamentary Committee and the Judicial Commission remains questionable. Once again judicial reforms in Pakistan are needed to resolve issues between judiciary and executive.

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