

The Judiciary during Benazir Bhutto's Second Term (1993-1996): An Analytical Study

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Abstract

This paper explores Benazir Bhutto's deep resentment and hatred against the judiciary, stemming from the execution of her father in April 1979. Benazir considered it to be a judicial murder and believed that the judiciary was responsible for it. These feelings further deepened over judiciary silence in the face of human rights abuses during the eleven-year long tenure of Zia-ul-Haq's regime. During this time, Benazir, along with other PPP leaders and workers remained behind bars for several years on political grounds but hardly obtained any relief from the judiciary. Subsequently, during her first term, the judiciary was largely hostile to her government and declined to restore it when it was dismissed in 1990. Against this backdrop, during second term in 1993, Benazir attempted to assert influence over the judiciary by packing it with like-minded judges which led to a confrontation between her government and the judiciary. This study will help in understanding the efforts made by political leaders to influence the judiciary, as well as the challenges they face in doing so. Utilising a qualitative methodology, this study conducts a comprehensive analysis of primary and secondary sources, including government documents, judicial rulings, law books, autobiographies and contemporary news reports. The findings indicate that the judiciary's resistance to Benazir's attempts to influence it significantly undermined her political authority and contributed to the broader challenges faced by the PPP in the political landscape of Pakistan. The study also indicates that the judiciary has historically tended to exhibit

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submissiveness during military regimes, whereas civilian governments have often been unable to establish effective control over it. In the end, it became one of the major causes of the premature dismissal of her government.

Keywords: Bhutto, Judiciary, PPP, Supreme Court, High Courts, Sajjad Hussain, Constitution

1. Introduction

The judiciary in Pakistan has historically played an ambiguous and often controversial role, frequently lending support to military regimes and validating their unconstitutional manoeuvres.

¹ On multiple occasions, the judiciary has endorsed unlawful actions that undermine democratic institutions. For instance, the judiciary upheld Governor General Ghulam Muhammad's order of dissolution of the first constituent assembly in 1954. Similarly, it validated the martial law put forth by Iskander Mirza on October 07, 1958, the coup d'état of General Muhammad Ayub Khan in the same year, the martial law of General Agha Muhammad Yahya Khan on March 25, 1969, of General Zia-ul-Haq on July 5, 1977 and emergency provisions of Pervaiz Musharraf on October 12, 1999.² The judiciary largely remained indifferent to the abrogation or suspension of constitutions and the curtailment of the fundamental rights under the military dictators.³ At the onset of each martial law, the judiciary had often turned down petitions challenging the validity of military regime

¹ Oldenburg, Philip, "The Judiciary as a Political Actor," in *Pakistan at the Crossroads: Domestic Dynamics and External Pressure*, ed. Christophe Jeffrelot (Gurgaon: Random House India, 2016), 89.

² Stephen Philip Cohen, *The Idea of Pakistan* (Lahore: Vanguard, 2005), 58; Tahir Kamran, *Democracy and Governance in Pakistan* (Lahore: South Asia Partnership Pakistan, 2008), 2-3.

³ Waris Hussain, *The Judicialization of Politics in Pakistan: A Comparative Study of Judicial Restraint and Its Development in India, the US and Pakistan* (London: Routledge, 2018), 72.

or the curtailment of fundamental rights.⁴

It does not imply, however, that all the judges capitulated to the military regimes. Few made efforts in their individual capacity to stand before the military regimes and perform their constitutional duties, but military regimes cunningly removed them from the scene. The military dictators were aware of the constitutional power of the judiciary; therefore, it always remained their priority to control the judiciary. In this way, military rulers had often purged the judiciary of those judges who were threats to their regimes. For instance, during the regime of Zia-ul-Haq, some judges of the Supreme Court did not align themselves with the establishment. The three of the seven judges' bench, who were hearing the petition of Zulfikar Ali Bhutto (hereafter ZA Bhutto), issued the verdict in his favour explicitly stating in their judgment that he was not involved in the alleged murder and should be acquitted.⁵ The Sindh and Balochistan High Courts, too, were not in a mood to cooperate with the regime and give relief to its political opponents. Thus, Zia-ul-Haq promulgated the Provisional Constitutional Order (PCO) in 1981 and fired those judges who were hostile to the regime.⁶ According to Benazir 25 per cent of the judges were laid off by the regime.⁷ Only those judges were permitted to take oath who were either considered right-wing leanings or sympathisers to Zia's programme of Islamisation.⁸ Meanwhile, the regime inducted those new judges who had ideological association with Jammāt-e-Islami and believed

⁴ Mohammad Waseem, *Political Conflicts in Pakistan* (London: Hurst Company, 2021), 293.

⁵ Owen Benett Jones, *The Bhutto Dynasty: The Struggle for Power in Pakistan* (London: Yale University Press, 2020), 111; Dorab Patel, *Testament of a Liberal* (Karachi: Oxford University Press), 102.

⁶ Hafeez Malik, *Pakistan: Founders' Aspirations' and Today's Realities* (Karachi: Oxford University Press, 2001), 46.

⁷ Benazir Bhutto, *Daughter of the East* (London: Simon & Schuster, 2007), 148.

⁸ Mariam Mufti, et al, *Pakistan's Political Parties: Surviving between Dictatorship and Democracy* (Washington DC: Georgetown University, 2020), 242.

in the building of an Islamic state.⁹

Benazir's interplay with the judiciary first started during her father's trial at Lahore High Court in 1977, followed by an appeal against the decision of Lahore High Court before the Supreme Court. It was a bitter experience because the Courts awarded the death penalty to ZA Bhutto which in the eyes of Benazir was politically motivated and unjust.¹⁰ Moreover, the judiciary remained silent over human rights abuses and persecution of PPP workers during Zia-ul-Haq's regime. Even Benazir remained behind bars or solitary confinement for around five years during Zia-ul-Haq's regime but failed to achieve any remarkable relief from the judiciary. This nurtured the seed of hatred among the ranks and files of the PPP.

The judiciary, however, gave relief to the PPP in a few cases at the end of Zia's rule and shortly after his death. For example, the Supreme Court gave judgment against Zia-ul-Haq's decision to hold party-less elections and decreed that the elections would be held on party basis. The Court also ordered for allotment of symbols to political parties.¹¹ Meanwhile, the Supreme Court also declined to reinstate the government of former prime minister Muhammad Khan Junejo which was dismissed by Zia-ul-Haq on May 29, 1988. The non-restoration of Junejo's government paved the way for the 1988 general elections and subsequently for Benazir to become the Prime Minister.¹² However, this was a small effort to undo the injustices of eleven years, and it could hardly please Benazir and the PPP leadership.

⁹ Owen Bennett Jones, *Pakistan Eye of the Storm* (London: Yale University Press, 2002), 17.

¹⁰ Benazir Bhutto, *Daughter of the East*, 222.

¹¹ Ralph Braibanti, *Chief Justice Cornelius of Pakistan: An Analysis with Letters and Speeches* (Karachi: Oxford University Press, 1999), 340

¹² *Government of Pakistan v. Muhammad Saifullah Khan*, PLD 1988, SC 43.

In this backdrop when Benazir was elected as a Prime Minister in December 1988, her relations with the judiciary were not up to the mark. One of the reasons was that the judges in the superior courts were appointees of Zia-ul-Haq and most of them were influenced by Islamic dogma propagated by Zia during his rule. On the other hand, Benazir was left leaning and wanted to secularise the country while the judiciary at large wanted to make the country an Islamic one.¹³ The judiciary, too, was under the influence of the establishment which had estranged relations with Benazir. The establishment made all efforts to keep Benazir out of power and only accepted her as prime minister when no other option was left for it. During her term in office, the judiciary with the support of the establishment remained hostile to Benazir and created problems for her government. Similarly, when her government was dismissed in August 1990, the order of dissolution was challenged in all four High Courts.¹⁴ Except for the Peshawar High Court, the other three High Courts upheld the dismissal of the PPP government at the centre and in Sindh Province.¹⁵ The Supreme Court, too, affirmed the dismissal despite its previous ruling in the *Haji Safiullah case* that the power of dissolution by the president could only be used in extraordinary situations.¹⁶ On this ground, the Supreme Court restored the government of Nawaz Sharif when it was dismissed by the President in 1993.

¹³ Yasser Kureshi, "Judicial Politics in a Hybrid Democracy: Pakistan's Judiciary and Political Parties," in *Pakistan's Political Parties: Surviving between Dictatorship and Democracy*, ed. Mariam Mufti et al (Washington DC: Georgetown University, 2020), 289.

¹⁴ Jan Muhammad Dawood, *The Role of Superior Judiciary in the Politics of Pakistan* (Karachi: Royal Book Company, 1994), 87.

¹⁵ Hamid Khan, *A History of the Judiciary in Pakistan 2nd ed.* (Karachi: Oxford University Press, 2023), 208-209.

¹⁶ Najam Sethi, *Pakistan Under Benazir Bhutto: Reportage, Comment, Analysis* (Lahore: Vanguard Publishers, 2021), 249. *Government of Pakistan v Muhammad Saifullah Khan*, PLD 1988, SC 43.

2. Judiciary During Benazir's Second Term

Benazir returned to power in November 1993. She was lucky enough that the then army chief General Abdul Waheed Kakar and the then Director of General Inter-Services Intelligence (DG-ISI) General Javaid Ashraf Qazi were apolitical and believed in civil supremacy. Benazir was on good terms with both of them.¹⁷ She had no pressure from the military establishment in dealing with the judiciary. By learning from her experience, Benazir came to the conclusion that the assertion over the powerful institute of the judiciary was essential for the smooth running of the government. So, Benazir decided to assert over the judiciary by packing it with pro-PPP and like-minded judges. She withdrew all the names proposed by the caretaker government of Prime Minister Moeen Qureshi to fill the vacant posts of judges in the superior courts.¹⁸

At the time of her appointment, Justice Nasim Hassan Shah was the Chief Justice of the Supreme Court whom she did not like because he was among the four judges of the Supreme Court who upheld the death penalty of ZA Bhutto. Nasim Hassan's tenure, however, was a short stint as his retirement was due in mid-April 1994. However, Benazir tried to tease him and to humiliate him by sacking him from the position of the President of the Cricket Board. Nasim had deep passion for cricket, and he was appointed to that position at his request to former Prime Minister Nawaz Sharif.

Benazir's real tug of war with the judiciary started after the retirement of Nasim Hassan Shah on April 14, 1994. Benazir appointed Saad Saood Jan, the senior most judge of the Supreme Court as Acting Chief

¹⁷ Benazir Bhutto, *Reconciliation: Islam Democracy and the West* (London: Simon & Schuster, 2008), 258.

¹⁸ Sartaj Aziz, *Between Dreams and Realities: Some Milestone in Pakistan's History* (Karachi: Oxford University Press, 2009), 152.

Justice. Benazir did not appoint him as a permanent judge apparently to keep him under pressure. It appears that in the beginning, Justice Saood tried to please the government. For example, on 25 February 1994, the President dismissed the government of Sabir Shah and imposed Governor rule in the NWFP (now Khyber Pakhtunkhwa).¹⁹ Sabir Shah challenged the imposition of Governor rule in the Supreme Court and claimed that the dismissal of his government was based on mala fide. The Supreme Court heard the case and held by majority of seven to two that the president's proclamation had violated Article 234 of the 1973s Constitution.²⁰ However, Justice Saad did not agree to the majority view, presumably, to please the government.

The verdict in the Sabir Shah case further stimulated Benazir to fill the judiciary with like-minded judges. The government started packing the Supreme Court supposedly with pro-PPP Judges on an ad hoc basis. Initially, Justice Saad Sood Jan accepted the appointment of a few judges but finally, he decided to resist this move. When the federal government asked him to approve the names of two advocates and two retired judges of the Lahore High Court as the ad hoc judges of the Supreme Court, he declined to do so.²¹ Observing that the Acting Chief Justice was non-cooperative at its length, Benazir decided to bypass him and elevated Justice Sajjad Ali Shah, a junior judge as Chief Justice on June 5, 1994.²² It occurred for the first time that the seniority principle was ignored and a

¹⁹ Sabir Shah was elected as the Chief Minister of NWFP after the election of 1993. He was heading a coalition government of Pakistan Muslim League (N) and Awami National Party.

²⁰ Sabir Shah v. Federation of Pakistan, PLD1994, SC 738.

²¹ Hamid Khan, *A History of the Judiciary in Pakistan 2nd ed*, 208-209.

²² He was junior to Justice Jan, Justice Ajmal Mian and Justice Abdul Qadeer Chaudhry. Justice Jan was the most senior judge of the Supreme Court at that time.

junior judge was appointed as Chief Justice in the Supreme Court.²³

Sajjad's out of turn promotion was largely the result of his two dissent notes which he authored as a judge of the Supreme Court that went in favour of Benazir. In his first dissent note, he went against the majority of judges when they declined to restore Benazir's government in 1990. Sajjad Shah concluded that the motive behind this dissolution was to get rid of the government of the PPP. In his dissent note, he declared Ishaq Khan's order of dissolution as invalid.²⁴ Sajjad wrote his second dissent note at the time when the Supreme Court was hearing the dismissal case of Nawaz Sharif's government in 1993.²⁵ This time he was the only judge in the eleven-member full court bench who favoured the President's decision and declared that the president had rightly dismissed the government. Sajjad Shah criticised Nasim Shah for his controversial remark that the nation would soon hear great news, implicitly saying that the Court was going to restore the government.²⁶ He pointed out that when the governments of Benazir Bhutto and Muhammad Khan Junejo, the two prime ministers who hailed from Sindh were sacked, the Supreme Court refrained from restoring them, but when the turn of a Punjabi Prime Minister (Nawaz Sharif) approached, the court willingly restored the government.²⁷ In addition to these two dissent notes, he was among two dissent judges in the above mentioned Sabir Shah case.

²³ Ilhan Niaz, *The Culture of Power and Governance of Pakistan; 1947-2008* (Karachi Oxford University Press, 2011), 191; Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi: Oxford University Press, 2016), 434.

²⁴ Muhammad Azem, *Law, State and Inequality in Pakistan: Explaining the Rise of the Judiciary* (Singapore: Springer nature, 2017), 169.

²⁵ General K.M. Arif, *Khaki Shadows: Pakistan 1947-1997* (Karachi: Oxford University Press, 2004), 311.

²⁶ Muhammad Nawaz Sharif v Federation of Pakistan, PLD1993, SC 473.

²⁷ Ibid.

2.1 Packing the Judiciary

The practice of influencing the judiciary and to bring it under the control of the government continued even after the appointment of Sajad Ali Shah.²⁸ The Government continued to induct the pro-PPP judges in the superior judiciary.²⁹ This practice, however, was not a novel one in Pakistan. Earlier, both the military and civilian rulers inducted judges in superior courts based on their anticipated loyalty to the government.³⁰ ZA Bhutto, the civilian ruler, had actively intervened in the appointments of the judges. When the judiciary began to give relief to ZA Bhutto's political opponents, he introduced the Fourth Amendment in the Constitution which prohibited the High Courts from issuing orders for preventive detention of a person or grant bail to anyone detained under such circumstances.³¹ Similarly, military rulers also purged the judiciary from those judges who were not ready to follow the path carved by them. However, the case of Benazir was different because the PPP government was not as powerful as the military rulers had been. Neither, she had political strength equal to her father. Her party did not have a simple majority in the parliament and the opposition was strong. The opposition strongly objected to every move of Benazir to influence the judiciary which emboldened the judges to resist her government. Consequently, she had to face severe resistance from the judiciary when she tried to intervene in its internal affairs by packing it with like-minded judges.

The first major step that Benazir's government initiated to pack the judiciary was the induction of the Chief Justices of Sind and Punjab High Courts of its own choice. Justice Nasir Aslam Zahid was replaced with

²⁸ Hafeez Malik, *Pakistan: Founders 'Aspirations' and today's Realities*, 73.

²⁹ Ibid.

³⁰ Ayesha Jalal. *The Struggle for Pakistan: A Muslim Homeland and Global Politics* (Massachusetts: The Belknap Press of Harvard University Press, 2014), 211.

³¹ Constitution (Fourth Amendment) Act, 1975, Act LXXI of 1975. *Central Status*, 337.

supposedly pro PPP judge, Justice Abdul Hafiz Memon, as a Chief Justice of the Sindh High Court while Mian Mehboob Ahmad was replaced by Justice Muhammad Ilyas as Chief Justice of the Punjab High Court.³² The foregoing judges were transferred to the Federal Shariat Court (FSC) without their consent which was against the judicial norms.³³ So, both judges demonstrated their displeasure over the transfers. Justice Mian Mehboob preferred to apply for early retirement instead of getting a new assignment.³⁴ The new appointees were the judges of the Supreme Court, and they were appointed as chief justices of their respective High Courts on ad hoc basis.

The case of Justice Abdul Hafiz Memon is very interesting. Memon was highly respected among the PPP circles because he was among one of the few judges who declined to take oath under Zia-ul-Haq's PCO in March 1981. When the PPP came into power in 1988, Memon was appointed as a Supreme Court judge, largely because of his refusal to cooperate with the military regime and his premature retirement. However, it was rumoured that he had a close association with the PPP. In 1991, considering him a pro-PPP judge, the successive government of Prime Minister Nawaz Sharif removed him on the grounds that his appointment had been made contrary to the law.³⁵ When Benazir again came into power, she appointed Memon as an Acting Chief Justice of the Sindh High Court. But his order of appointment was immediately withdrawn because Memon, this time had crossed the age of sixty-two which was a superannuation period for a judge

³² Ardeshir Cowasjee, "Dishonesty- from Day one," Dawn (Karachi), 9 November 1997.

³³ Nasim Hasan Shah, "Judiciary in Pakistan: A Quest for Independence" in *Pakistan: 1997* ed. Craig Baxter & Charles Kennedy (Colorado: Westview Press, 1998), 62.

³⁴ Hamid Khan, *Constitutional and Political History of Pakistan*, 435.

³⁵ Sajjad Ali Shah. *Law Courts in a Glass House: An Autobiography*, (Karachi: Oxford University Press, 2001), 198.

of the High Court.³⁶ Consequently, the government issued another notification forthwith, this time appointing Memon as the judge of the Supreme Court where the retirement age was sixty-five years. Then he was immediately transferred to Sindh High Court.³⁷ Similarly, Justice Muhammad Ilyas was supposedly brought into the Punjab High Court because he had grievances against Mian Nawaz Sharif who did not appoint him as the Chief Justice of Punjab High Court and transferred him comparatively to a less important position of a judge of FSC. Ilyas was a judge of the FSC when Benazir was elected as Prime Minister. She first appointed Ilyas as the judge of the Supreme Court, after which, he was transferred to Punjab High Court. Besides the Sindh and Punjab High Courts, the Peshawar High Court had already been run by an Acting Chief Justice. These appointments of Acting Chief Justices enabled the government to assert its authority over the judiciary.

The PPP government did not stop over the appointments of Chief Justices of Sindh and Punjab High Courts. Now, it began to appoint the puisne judges of the High Courts of its own choice. In mid-1994, in another move, the government appointed nine judges in the Sindh High Court.³⁸ The government had to face stiff resistance from the opposition political parties who accused that the appointments were made on political grounds and on favouritism.³⁹ But this did not stop Benazir's government. In its next move, the government inducted a bulk of twenty judges in the Punjab High Court in August, 1994. Some of the newly appointed judges were not practising lawyers and thereby did not have the required professional experience.⁴⁰

³⁶ Hamid Khan, *Constitutional and Political History of Pakistan*, 435.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Several appointees bypassed the standard recommendation process involving the Chief Justice and the Governor and lacked endorsement from a constitutional consultee. There are rumours that some names were quickly added, with the Prime Minister's Office sending them via fax to the Law Ministry for inclusion in the forthcoming notification.

The legal experts believed that the judges were appointed because of their close association with the PPP legislators and leaders.⁴¹ These claims have some weightage. For example, Chaudhry Altaf Hussain, the then Governor of Punjab managed to appoint his younger brother Chaudhry Iftikhar Hussain as a judge.⁴² Similarly, a son of the influential PPP-MNA and a friend of the Chief Minister of the Punjab were among the new appointees.⁴³

The government wanted to strengthen its position by taking control of the Supreme Court. So, it began to induct like-minded judges on an ad hoc basis. The number of ad hoc judges at one time reached seven against the ten permanent judges. As Justice Memon and Ilyas were transferred to the High Courts, so virtually there were eight permanent and seven ad hoc judges in the role of the Supreme Court.⁴⁴ Sajjad Ali Shah was rarely consulted for the judicial appointments, yet he endorsed all these appointments because he was also a beneficiary of the system as promoted out of turn. In the beginning, Sajjad did not refrain from serving "Contempt of Court" notices to those who raised their objections on these appointments.⁴⁵

But this mayhem lasted for a few months and soon differences arose between Benazir and Sajjad Ali Shah over the appointments of judges and certain other issues. It is said that the elevation of Agha Rafiq from the position of Session Court judge to the position of the Sindh High Court significantly annoyed Sajjad Hussain and he decided to resist the government. Agha Rafiq was amongst the most junior judges in the Sindh

⁴¹ Hassan Askari, *Military, State and Society in Pakistan* (Karachi: Oxford University Press, 2000), 223.

⁴² Chaudhry Iftikhar Hussain later served as the Chief Justice of the Punjab High Court from 2002 to 2007.

⁴³ Hamid Khan, *Constitutional and Political History of Pakistan*, 435.

⁴⁴ *Ibid.*

⁴⁵ For example, the contempt of court notice was issued to renowned journalist Ardeshir Cowasjee who criticized the ad hoc appointments in his article published in *Daily Dawn*. A Notice was also issued to the editor of the *Dawn*.

Session Court but got his way to the High Court purportedly due to the influence of Benazir's spouse.⁴⁶ Sajjad Ali raised objection to his appointment and pointed out that his name in seniority list stood at number thirty-six out of the total thirty-eight session judges of the Sindh, therefore he was not fit for the promotion to the High Court. Shah was unheard of and reminded of his own appointment ahead of three senior judges.⁴⁷ Another incident which widened the gulf between Benazir and Sajjad Hussain was the appointment of Justice Irshad Hassan Khan as the judge of the Supreme Court. Irshad was a close friend of General Khalid Mehmood Arif, the Voice Chief of Army Staff, in Zia regime. Irshad also worked as Federal Law Secretary under Zia's regime. Benazir was initially reluctant to appoint him as the judge of the Supreme Court, however, upon the insistence of Sajjad Shah, she eventually agreed. But later, she became suspicious when she was told Shah had developed a close relationship with Irshad and the latter had often been found in the chamber of the Chief Justice.⁴⁸

2.2 Reaction of Judiciary

The PPP appointments within the judiciary was not liked in the legal circles and the civil society. Habib Wahab Al-Khairi, a member of the Supreme Court Bar, submitted a writ petition before the Lahore High Court contesting the appointments of the Acting Chief Justice of the Lahore High Court, and of twenty new judges and non-confirmation of six additional judges.⁴⁹ The Lahore High Court, however, on September 4, 1994, dismissed the petition, asserting that the government possessed arbitrary powers to make judicial appointments.⁵⁰ The decision of Lahore High

⁴⁶ Iqbal Akhund, *Trial and Error: The Advent and Eclipse of Benazir Bhutto* (Karachi: Oxford University Press, 2000), 195.

⁴⁷ Hamid Khan, *Constitutional and Political History of Pakistan*, 435.

⁴⁸ Sajjad Ali Shah. *Law Courts in a Glass House*, 201.

⁴⁹ Hafeez Malik, *Pakistan: Founders' Aspirations and today's Realities*, 73.

⁵⁰ Al-Jehad Trust v. Federation of Pakistan PLD 1996 S.C. 324; Nasim Hasan Shah, "Judiciary in Pakistan", 63.

Court was subsequently challenged before the Supreme Court, which heard the appeal and, on March 20, 1996, overturned the judgement of Lahore High Court.⁵¹ In its judgement, the Supreme Court raised questions over the discretionary powers of the government regarding appointment of judges and held that consultation of permanent Chief Justices of respective High Courts and Supreme Court is mandatory for appointments and transfers.⁵² The Court held that all appointments to the superior judiciary made without substantial consultation with the respective Chief Justices would be subject to review.⁵³ As a result of this judgment the PPP appointees in the Sindh and Punjab High Courts during the tenure of Acting Chief Justices, whose names were not approved by the successive permanent Chief Justices were declared invalid.⁵⁴ Moreover, the Supreme Court ruled that the Chief Justice of the Supreme Court and that of the High Courts shall be appointed on a seniority basis while induction of judges in the superior judiciary shall be made with the consent of the respective chief justices.⁵⁵ However, if the government did appoint chief justice of the superior courts ignoring the seniority list, or appointed any judge without the recommendation of the respective Chief justice of the Courts, it had to record cogent reason for this action.⁵⁶ The Court made it incumbent to take the assent of High Court judges before transferring them to the Federal Shariat Court.⁵⁷

The Supreme Court judgement was not well received in the PPP circles as it curtailed the power of the executive in the appointment of the judiciary while the Chief Justices of the superior judiciary got more power

⁵¹ Ibid.

⁵² Roedad Khan, *Pakistan: A Dream Gone Sour* (Karachi: Oxford University Press, 1998), 151. Hassan Askari, *Military, State and Society in Pakistan*, 223.

⁵³ Al-Jehad Trust v. Federation of Pakistan PLD 1996 S.C. 324.

⁵⁴ Mian Ajmal, *A Judge Speaks Out*, 187.

⁵⁵ Al-Jehad Trust v. Federation of Pakistan PLD 1996 S.C. 324.

⁵⁶ Ibid.

⁵⁷ Al-Jehad Trust v. Federation of Pakistan PLD 1996 S.C. 324; Ian Talbot, *Pakistan: A Modern History* (London: C. Hurst & Co, 2009), 348.

in appointment of the judges. Benazir considered that Sajjad Hussain, her handpicked Chief Justice, betrayed her. She mocked the judges by calling them the collaborator of the military establishment. She also criticised the judgement publicly and in her speeches before the National Assembly which was repeatedly telecast on state television.⁵⁸ She tantamounted it to rewriting the constitution.⁵⁹ Benazir argued in her speech before the National Assembly that the constitution did not even ask for advice from the Chief justice regarding appointments of judges.⁶⁰ However, the PPP government was not so powerful to stand before the judiciary and explicitly refused to implement the judgement. The pressure of the opposition political parties also compelled the government to implement the judgement. In an effort to avert charges of contempt of court, she implemented certain aspects of the judgment. The government appointed Permanent Chief Justices in all High Courts within 30 days after the judgement was announced, while ad hoc judges in the Supreme Court were also relieved. Moreover, the PPP government withdrew the appointments of a few judges in the High Courts whose appointment was made without following the due procedure.

In anticipation of the Supreme Court's forthcoming judgment, Benazir's government issued a notification on March 19, 1996, a day prior to the court's decision, confirming the permanent appointment of ten ad hoc judges of the Lahore High Court and seven ad hoc judges of the Sindh High Court.⁶¹ However, Benazir's relationship with the judiciary went into the lowest ebb when the Chief Justices of the respective High Courts declined

⁵⁸ Nasim Hassan Shah, *Memoirs and Reflections*, 117

⁵⁹ Muhammad Ali Shaikh, *Benazir Bhutto: A Political Biography* (Karachi: Orient Books Publishing House, 2000), 224.

⁶⁰ Benazir Bhutto, *Taqareer-o- Bayanat: October 1993- November 1996* (Islamabad: Ministry of Information), 361.

⁶¹ S.M. Zaffar, *Mere Mashoor Muqadmay* [Urdu] (Lahore: Bright Books, 2007), 648.

to accept these judges as permanent ones. The judiciary went further, dismissing twenty-four judges of the High Courts that were inducted by the Benazir government in 1994. The judiciary took the stance that these appointments were made without the consultation of the Chief Justices of the High Courts. In response, Benazir rejected the judiciary's ruling, insisting that she retained the authority to appoint judges. While addressing the District Bar Associations of Naseerabad and Jacobabad, Benazir made it clear that the constitution of 1973 grants arbitrary powers to the head of the executive regarding the appointment of judges. She could appoint the Chief Justices of the Supreme Court and High Courts at her own discretion. Furthermore, she stated that she could appoint any member of the bar as Chief Justice at her discretion.⁶²

Benazir also accused the opposition political parties of using the judiciary for political manoeuvring. Benazir targeted Jamaat-e-Islami for its unconstitutional demands for the government's resignation and establishment of a caretaker set up under the judiciary.⁶³ Benazir claimed that the Supreme Court had crossed the limits of its authority in that judgement.⁶⁴ Sajjad Shah took the allegations put forth by Benazir seriously and issued a public statement through which he made it clear that the judiciary was in no mood to confront the government. Sajjad Shah called Benazir's allegations as an effort to ridicule the judiciary and warned her to be careful in future for issuing such careless statements, implicitly indicating that he could charge her with contempt of court over such remarks.⁶⁵

Benazir was in no mood to subdue. On May 16, 1996, the

⁶² Muhammad Azeem, *Law, State and Inequality in Pakistan*, 193.

⁶³ *Daily Dawn*, Islamabad, November 14, 1994.

⁶⁴ *The Muslim*, 17 April 1996.

⁶⁵ Robert LaPorte, Jr, "Pakistan in 1996: Starting Over Again," *Asian Survey* 37, no 2 (Feb 1997): 119.

government filed a Presidential Reference. One of the main objectives of filing reference was to embarrass Sajjad Shah whose appointment as Chief Justice and as a High Court judge was challenged and brought into question. When Shah was recommended as a judge of the Sindh High Court, the Court was headed by an Acting Chief Justice.⁶⁶ It was requested to constitute a full bench, and Shah should not be part of that bench. Sajjad refused to accept both conditions after which the government withdrew the reference.⁶⁷ The six-month tussle between the Government and the judiciary somehow decreased on September 30, 1996, when Benazir advised the President to notify the regularization of twenty-nine judges of the High Courts.

The judiciary began to give seemingly undue relief to the political opponents of Benazir. On September 5, 1995, the federal government dismissed the government of Manzoor Ahmad Watoo and imposed Governor rule in Punjab. Later, Benazir got Arif Nakai elected as the Chief minister of Punjab. However, the Lahore High Court ordered for the restoration of the Watoo government and declared that the election of Nakai was held without lawful authority.⁶⁸ Meanwhile several political opponents of Benazir were granted bails while few were released. For instance, the Court ordered the release of Sheikh Rasheed Ahmed, a close associate of Nawaz Sharif and a bitter critic of Benazir in March, 1996 who was sentenced by a lower court on the charges of illegal possession of an AK-47 gun (Kalashnikov).

The judiciary also indulged in differences with Benazir over the question of the independence of judiciary. The Constitution of 1973 stipulated in Article 175 that the judiciary would be progressively separated

⁶⁶ The News Karachi, 17 May 1996.

⁶⁷ Sajjad Ali Shah, *Law Courts in a Glass House*, 275.

⁶⁸ *Manzoor Ahmad Watoo v. Federation of Pakistan* PLD 1997 Lahore 38.

from the executive over a period of fourteen years.⁶⁹ Nevertheless, the period expired, and preceding governments never implemented this Article. Neither the constitution was amended to extend the period. Sharaf Faridi, the President of Sindh Bar Association, in this regard, filed a petition before the Sindh High Court during Nawaz Sharif's first tenure. The Court heard the appeal and directed that there should be distinction and a proper bifurcation of powers between the judicial and executive magistrates. The judicial magistrates were to remain under the administrative control of the High Court while the executive magistrates would be under control of the government. The government filed a petition for leave to appeal in the Supreme Court. The Court, however, dismissed the appeal and fixed March 23, 1994 as the target date for the separation of the judiciary from the executive at the provincial level.⁷⁰ The verdict, however, went deaf ear as the magistrates continued to exercise judicial powers alongside their executive functions. The separation of the judiciary from the executive branch was scheduled on 1 September 1995 at the federal level. Benazir however, delayed in implementation of the order as she wanted the separation at the Centre and provinces simultaneously. Later, the Supreme Court extended the deadline till March 23, 1996. The government again refrained from implementing the order. In Punjab, the government appointed candidates of District Management Group (DMG) as Session Court Judges which was a clear indication that it was in no mood to separate the judiciary from the executive. The government faced ongoing pressure and criticism from the judiciary but did not implement the ruling in true letter and spirit.

2.3 Dismissal of Government

Benazir's tussle with the judiciary gave an opportunity to opposition

⁶⁹ *The News*, Islamabad, January 07, 1994.

⁷⁰ *The Province of Sindh v. Sharaf Faridi* PLD 1994 SC 105.

political parties to malign her government and they began to build pressure on the government to implement the verdict of the superior judiciary. The conflict with the judiciary too, emboldened President Farooq Ahmad Khan Leghari who had several grievances with the government; the most important one was that he was not consulted on important matters. The brutal assassination of Mir Murtaza Bhutto, the younger brother of Benazir on September 20, 1996, by the security forces further weakened Benazir's government as many people began to believe that the spouse of the prime minister was behind this assassination. Seeing that the government was in trouble, Farooq Leghari on September 25, 1996, just five days after the assassination of Murtaza Bhutto, filed a reference before the Supreme Court, seeking its opinion that whether the Constitution of 1973 conferred upon him to appoint the judges of superior judiciary arbitrarily or the consultation of prime minister is binding on the president. Benazir alleged that there was a conspiracy between the president and Sajjad Shah because the Supreme Court was made open on September 25, 1996, which was a public holiday, to enable the president to file a reference.⁷¹ But before the Supreme Court made any decision, Benazir's government was dismissed by the president on November 5, 1996. One of the reasons Farooq Leghari mentioned in the dissolution order was the non-compliance of the government with judicial orders.⁷²

Benazir decided to challenge the dissolution order and filed a petition on November 13, 1996 before the Supreme Court against the Presidential Order of dissolution.⁷³ Sajjad Shah adopted an uncompromising and rude attitude. His intention seems to frustrate Benazir by delaying the case. Twice he returned the petition on procedural grounds.

⁷¹ Sajjad Ali Shah, *Law Courts in a Glass House*, 286

⁷² Hamid Yousuf, *Pakistan: A Study of Political Development 1947-97* (Lahore: Sang-E-Meel Publications:1999), 247.

⁷³ Sajjad Ali Shah, *Law Courts in a Glass House*, 296.

For example, once he returned the petition just because the language did not follow the court proceedings.⁷⁴ Sajjad Shah began to fix unnecessary pending constitutional petitions which were related to the 8th Amendment.⁷⁵ After much delay, the Supreme Court finally started hearing the petition on December 3, 1996. The Supreme Court clubbed the other petitions which challenged the dissolution order with this petition and a seven-member bench headed by the Chief Justice, heard the case.⁷⁶ The Supreme Court upheld the dissolution order of the President by a majority of six to one.⁷⁷ The decision was announced just four days before the commencement of general elections which put a negative effect on the PPP's performance. Although the PPP leadership had very little hope of gaining relief from the judiciary, yet it was ambivalent about running the elections with full momentum. That was one of the reasons that the PPP performed very poorly in the upcoming elections and the PML(N) managed to achieve a two-thirds majority in the National Assembly for the first time in the country's history.

3. Conclusions

Benazir's interactions with the judiciary were marked by persistent challenges since the overthrow of her father's government. The judiciary, under the pressure of the military regime, awarded the death penalty to ZA Bhutto. Later, during the eleven years of Zia-ul-Haq's regime, it remained silent over the persecution and repression of the PPP leaders and workers. The situation did not change when Benazir came to power in 1988. Benazir got very minimal relief from the judiciary during her first term in office. Instead, the judiciary created problems for her government and somehow played an indirect role in the dismissal of her government. The judiciary's refusal to restore her government in 1990 further alienated Benazir. When

⁷⁴ Nasim Hasan Shah, *Memoirs and Reflections*, 118.

⁷⁵ Hamid Khan, *Constitutional and Political History of Pakistan*, 445.

⁷⁶ Nasim Hasan Shah, *Memoirs and Reflections*, 118.

⁷⁷ Benazir Bhutto v Farooq Ahmad Leghari, PLD 1998 SC.27.

she came into power a second time, she was committed to asserting her authority over the judiciary. In this regard, she appointed Justice Sajjad Hussain Shah, whom she considered her own man, as the Chief Justice of the Supreme Court. She packed the superior courts with pro-PPP and like-minded judges. But packing of the judiciary did not bring any relief to her government. It rather created a conflict between the federal government and the judiciary. Benazir's efforts to bring the judiciary under her control failed because the president, the military high brass and the opposition political parties stood in her way. They all encouraged the judiciary to stand firm against the government. This further intensified the confrontation between the judiciary and the government. Finally, when the president Farooq Leghari, dismissed Benazir's government in November 1996, the Supreme Court, led by Chief Justice Sajjad Hussain, upheld the decision and did not restore her government.