

A Survey of the Role of Judiciary in Validating Military and Authoritarian Regimes in Pakistan

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Abstract

Pakistan has faced manifold crises in its seventy years history. But the most fatal of all crises it faced is the failure democratic institutions and the Martial law regimes. At an early phase this country remained under the sway of authoritarian ruler and military dictators. Due to different internal and external factors the military gradually got strong hold of politics in the due course of time. This study aims at sorting out factors behind the failure of civilian rule over time and deepening role of military in politics. Also, a very important research question is answered – why the Judiciary failed to play the role of a true third pillar? It also aims at sorting out the role played by judiciary in validating different unconstitutional, authoritative and emergency acts under the maxim of, the so called “doctrine of necessity”.

Keywords: Authoritarian; Doctrine; Intervention; Necessity; Regime; Validate

Introduction

Pakistan has remained most of the time in history under military and authoritarian regimes. The military has played a very decisive role in shaping the present day culture of governance. Judiciary being considered the third tier in the entire democratic setup has mostly remained as “grinding axe” for military and authoritarian rulers. The part which it ought to have played for democratic development, safeguarding the constitution, protecting individual rights and interpreting the clauses of the constitution in place acted otherwise. It not only validated the extra-constitutional regimes but also provided legal grounds for strengthening them. The maxim of doctrine of necessity has always been the sole rule for judiciary aimed at supporting regimes and their extra-constitutional acts.

On 7th October, the first Martial Law was imposed by Mr. Iskandar Mirza, with the help of the army chief Ayub Khan. After the coup the constitution in place was abrogated and Ayub Khan was made the chief Martial Law administrator who arrested the former and sent him on exile to Britain. This act was validated by the Supreme Court under doctrine of necessity. Not only that but different acts taken under second Martial Law e.g. the abrogation of 1962 constitution, the LFO and making Zulfikar Ali Bhutto the civilian chief Martial Law administrator all were validated by the Supreme Court Judges.

On a third time in the history judiciary rescued the General Zia who imposed Martial Law, disposed the democratically elected government of Mr. Bhutto though there were allegations of rigging from opposition parties and health of election was suspicious. But the then chief justice Anwar Ul Haq invoking the doctrine again validated the unlawful acts. The October coup of General Pervez Musharraf was also validated by a bench headed by the Chief Justice Mr. Irshad Hussain. General Musharraf disposed Nawaz Sharif elected government and invoked the Provisional Constitutional Order the so called PCO. Throughout, the judiciary has been taken as a utility for granting legality to authoritarian and military regimes and different unlawful acts which were made during the coup.

An overview of the doctrine of necessity

The Doctrine of Necessity provides the casual basis for extra-legal and extra-constitutional actions by military dictators and authoritarian

rulers aimed at restoring law and order. The doctrine of necessity is neither a law in itself nor it is based on any lawful proposition but it has been taken for a granted rule which aim at legalizing or validate extra-constitutional acts. Basically it is based on the maxim of necessity which was originated in the writings of Henry de Bracton who was a jurist. Some modern jurists like Blackstone also made such justifications on the ground of necessity.

In Pakistan the doctrine was first invoked by Chief Justice Munir who validated the use of extra constitutional powers by the then governor general Mr. Ghulam Muhammad. The chief justice invoking Bracton’s maxim held that what was not lawful become lawful by necessity. So, it is said that a rule was laid for future justification of such moves by any authority having powers to use it under different circumstances.

The doctrine has been under usage in different countries where under this rule the extra constitutional acts are being legalized. In 1985, the maxim of necessity was invoked by the Chief Justice of the High Court of Grenada to validate the existence of a court trying for murder of persons who were accused for cough against Maurice Bishop a former leader. In 2010, the doctrine was invoked in Nigeria to legalize the extra legal actions.

Reasons behind military interventions in Pakistan

It is said that the third world countries are suffering from the trauma of military coups and interventionist regimes. According to one research writer the causes of military interventions in Pakistan are :

- Leadership Vacuum
- Weak Political Institutions

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- Internal Political Dynamics; and
- Regional and geo-strategic compulsions.

Pakistan was created under charismatic leadership of Quaid-e-Azam Muhammad Ali Jinnah. His untiring efforts changed the destiny of the Muslims of the sub-continent by making them a free and independent nation. But he left soon, and after the assassination of Prime Minister Liaquat Ali Khan the successors were not capable to lead the nation. Ghulam Muhammad the so called financial wizard of Quaid-e-Azam failed to prove an alternate for the Baba-e-Quom. Due to incapable leadership and priority to self-interests rather than national interests the constitution making was delayed for nine years. In the words of Baloch and Gaho, “that it is a matter of fact that Pakistani polity has suffered since its inception from what may be called leadership syndrome [1].” Pakistani leadership suffers the following inefficiencies:

- Ineffectiveness
- Inconsistency
- Indecisiveness
- Inarticulate and rootless.

Explaining, the writers further elaborates that in times if there had been apparently articulated, effective and visionary leaders they failed because of negative trends such as authoritarian tendencies and lack of political discipline. It is also crystal clear that Pakistani political leaders greatly depend upon military in crises. Due to increased dependency of civilian governments on military the later developed a thought that only it has the capacity to bring stability to the country. Another important dimension of military intervention is its corporate interests in the words of Ayesha Siddiq, “military has two fold interests, firstly its economic interests are expanding in Pakistan and, secondly the interests of elite class intermingling with army create an authoritarian political system in the country [2].”

According to the thesis of Baloch and Gaho, the first paradox of military intervention in Pakistan is the weak political institutions. It is due to many reasons that institutions in Pakistan have not been developed so as to deliver their tasks accordingly. The first reason is the authoritarian nature of rulers and elite after the demise of great leaders. Secondly, the military has to play prominent roles in the early decades after the formation of Pakistan. Thirdly, bureaucratic inefficiency and its hierarchical dominance over politically elected representative. Fourthly, the lack of strong political parties – political parties are considered as the veins of democracies. After the formation of Pakistan and demise of meaningful leadership Muslim League the creator of Pakistan gradually lost its role and repute among the masses. There came splits and mergers in the party. The alternative political forces were not strong enough to replace the losing league which ultimately resulted in authoritarian tendencies to emerge and army to play active political roles.

The military is so much politicized that it becomes difficult for the ruling parties to govern without the directive from military establishment. It has also been a strong legacy of the military dictators that after assuming powers they try to form political parties but sometimes they do so after losing their active role and the restoration of civilian rule. They are criticized for being playing the game of divide to pressurize and control the ruling parties.

It is supposed that where political institutions are strong, civil

society is organized and mature, media is free and elections are fair and transparent then military would rarely mingle in political affairs. In Pakistan the picture is upside down and the things are doing vice versa. So the internal political dynamics had supported military and authoritarian rulers throughout the history.

Another dynamic of army in politics is geo-politics and regional power structure. Since its inception condition have been created both internally and externally for army to come to the rescue – for most of the time our policy has been guided by the Indian factor and war phobia. In the beginnings years Pakistan was militarily not very capable to respond to external threats. The core issues which has kept Pakistan army intact with politics are Kashmir and water disputes with India.

The soviet military intervention in Afghanistan and the Afghan jihad bring the role of army into limelight. During which our internal and external policies were guided and directed by army. During the recent Kargil episode the military and civilian government went at the daggers drawn which ultimately resulted in another fatal blow to civilian rule and military intervention was the consequence.

After the 9/11 and USA and coalition forces expedition in Afghanistan and the geo-strategic and regional scenarios the role of army has become much prominent. Due to present day internal dynamics e.g. rising terrorism in the country, armed operations against the terrorist organizations and most importantly the growing suspicious activities of spy agencies like RAW and Mossad and CIA in Afghanistan and Pakistan’s border areas left the army an open choice to consult and guide the external and internal policies of Pakistan.

Validating different regimes under the doctrine of necessity

Throughout the history state institutions in Pakistan has remained either under pressure or in fragile conditions. The country had often been prey to authoritarian and military regimes due to which democracy did not fully flourished. During long lasted military cum authoritarian regimes the role of judiciary has been a sign of interrogation. Rather, supporting and developing representative democracy it played opposite roles. The role of judiciary remained twofaced a) extra-constitutional; and b) under constitutional auspices:

Whenever in the history the military had seized the power after overthrowing representative governments the courts not only legalized the coup but also validated their extra-constitutional actions under the “state of necessity” or the doctrine of necessity.

After the restoration of the civilian rule, their behaviour was analogous “under the constitutional auspices” approving the dismissal of civilian governments either by behest or approval of military.

The judiciary has not played a role of the third pillar for strengthening the representative democracy and people’s government in the country. It not only legalized the authoritarian regimes but also credited their dominance. The military in Pakistan after seizing to power has used the transformational discourse of extra-constitutional necessity to mould the judicial mind towards their action and get their approval.

Under the of PCO, the so called Provisional Constitutional Order, says Ayesha Jalal the military declares existential or near existential threat to the state which is enough as justification for displacement of the constitution is favour the Legal Frame Work Order (LFO) or the PCO. The above measures are taken by the regimes for getting gap for their unconstitutional (conditioned when the constitution is in place) actions under the doctrine of necessity. Under the state of

necessity doctrine the judges needed extra-constitutional conditions for retaining their positions by taking new oaths.

The judiciary has remained weaker during the Martial laws and authoritarian regimes and many decision resulted political bearings. Invoking the doctrine of necessity Chief Justice Munir validated the dissolution of first constituent assembly by then Governor General Ghulam Muhammad. This decision was not welcomed by the politicians though few supported it. The decision also dismantled the nascent democratic process in Pakistan.

The so called Operation Fair Play the code name for 5 July, 1977 coup taken by General Zia against the Bhutto democratically elected government though the politicians had reservations upon the health of the elections, once again was validated by the Higher Judiciary of the State. The role played by judiciary during the Junejo restoration Case is said to be influenced by the Chief of Army Staff which called the reputation of judiciary said Javaid in question [3].

During General Musharraf PCO the Supreme Court and High Courts were prohibited from making any decision against the so called Chief Executive or any other person who was exercising powers under his discretion – and the forward move of January, which required all judges to take fresh oaths which made them bound to sustain the proclamation of emergency and PCO. All this came said Siddiqui at a time when the judges in question were going to hear the petition against the legality of October 1999 coup, the situation called for similar measures taken by General Zia in 1981 [4].

Due to unstable democratic governments and frequent military take over the judiciary seems to have lost its credibility thus the independence of judiciary has been maintained as required for its healthy growth as an institution. The Apex Court and Provincial High Courts have been sometimes reshuffled arbitrarily so that they would not rule against the existing executives mostly in the constitutional matter, especially under military rule.

During Musharraf PCO, when the Chief Justice of Supreme Court along with five other judges refused to take fresh oaths to prove their allegiance to the “order” were replaced by other judges but later on some

of the deposed judges were reappointed to their offices for refreshing their allegiance [5,6]. The new judiciary provided legal basis to the military take over on the ground of “doctrine of necessity.” The courts provided full cover to all measures by the chief executive, validated his Legal Frame Work Order and amendments to the constitution [7,8].

Conclusion

Pakistan has remained politically unstable as compared to India where the military has their own ways to go on. India is comparatively luckier than Pakistan because when Pakistan was passing through political trauma and leadership crises India had strong and charismatic leadership. Due to this factor India got comparatively strong political institutions than Pakistan. Though the civilian bureaucracy has similar legacies yet the armed bureaucracies have different dynamics.

Pakistan has always been prey to its lot sometimes in the shape foreign interventions in the neighborly country while other time internal crises. During the last seventy years history military has remained in active politics for more than thirty two years. Even if being not involved in active politics and political decisions are hard to come without its consent.

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