

Judiciary and Democratic Process in Pakistan: A Study of Supreme Court Judgments (1988-2000)

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Abstract

Constrained by unfavorable societal conditions that shape, the record of higher judiciary of Pakistan in promoting democracy has been mixed at best. Judiciary has often not been in a position to direct the state to uphold the rule of law and follow democratic norms for several reasons. The roots of constitutionalism in Pakistani state and society are weak. Judiciary is a part of the state structure and shares a common political culture with other state institutions. It is dependent on them for resources needed for its institutional development and enforcement of its judgments. It is yet to achieve a degree of durable institutional autonomy which can help guarantee its independence from other political actors and institutions. Whatever independence it has achieved is less the result of its own struggle or assertion and more the consequence of changes occurring in the polity and society. This research examines how changes in external conditions enabled or constrained the Supreme Court of Pakistan to deliver democracy – supporting or democracy – retarding judgments.

Keywords: Judiciary; Democracy; Descriptive; Qualitative; Quantitative.

1. Introduction

An independent judiciary is considered a necessary element of democracy. Thanks to the beneficent inheritance of British theory of justice, the authority of the legal spirit can be explained as a special aspect of English institutions. At the same time the working of democratic institutions in Pakistan for example cabinet, parliament and political parties were far away from adequate and had established impolite setbacks under the direct or indirect severe management, the institutions of the judiciary in Pakistan has a reasonable record. Even the military rulers have shown some respect to the judiciary. In the same way several judges of Supreme Court and High Court have demonstrated courage and self-determination in charging the rule of law. (Azam, 2001; p.45)

The existence of an independent judiciary is a necessity for defending the constitution and enforcing the rule of law in a society and therefore ensuring order. Absence of an autonomous judiciary eventually leads to disorder. Pakistani judiciary has played a splendid role in complicated circumstances. It has ensured the ruling of law, protected the fundamental rights of the citizens and their rights to shape and connect political parties and contribute in the democratic process through them. (Burky, 1999; p.112)

It cannot be moreover insensible judgment by saying that the judiciary in Pakistan has several times acted to the maximum authority to support the welfare of the State against its citizens. The military has ruled the country for a great part of its subsistence and, both by default and intention, encouraged definite policies and

personalities. It presided over the national fortune in the 1960s, through the East Pakistan crisis and all during the late 1970s and 1980s and cannot release itself of quite a few decisive as well incapacitating developments of the past. It is this very organization which has encouraged and in many cases fostered and promoted forces of aggression and intolerance in society. (Malik, 1983; p.62)

The contentious role of the judiciary in politics can be traced back to 1955 as Chief Justice Mohammad Munir backed Governor General Ghulam Mohammad's illegal attempt to dissolve the first Constituent Assembly of Pakistan, which tried to decrease the Governor General Powers. (Ajmal, 2004; p.102)

Justice Munir in the Molvi Tamizuddin Khan's case stated that the Assembly was not an extreme body. Munir said that the Constituent Assembly had "lived in a fool's paradise, if it ever was considered with the idea that it was the sovereign body of the state."

Munir had not been able to find any firm cause to justify the move of the Governor General, who permitted his dissolution of the Constituent Assembly. But this was dismissed as a 'gap' in legal order. He maintained that in order to appreciate the role of Pakistan's Governor-General, it was necessary to go 'way back in history and trace the source and expansion of the British Empire itself. "(Ajmal, 2004; p.125)

The conclusion reached by the judge, in his dissenting note Cornelius was totally diverse. He stated Munir's clarification of the history of the Commonwealth had its own significance. He argued that the historical reality is that Pakistan was formed in comprehensive independence, and pointed to what he assumed to be clear differences in the state of administrative power, and the new domination of Pakistan. (Kibria, 1989; p.78)

According to Allen McGrath, author of the "Destruction of Democracy in Pakistan" when Munir rejected the 'existence of an independent body, he spoiled the constitutional foundations of the existing Pakistan. He had done more impairment when he did not state where sovereignty resided. It has produced a space that was a prospect for Ghulam Mohammed. The lack of a constitutional origin is an injury that has lived in Pakistan since Ghulam Mohammad left office.

However the judiciary has not been since powerful against infringement or deviation of constitutions. On four occasions when authoritative personalities abrogated, or suspended constitutions to accomplish their political ends it did not strain it. It either accepted or lent legitimacy to such procedures by invoking conflicting and irregularly suspicious doctrines such as a success of an attainment conferring authenticity to it. The higher judiciary also has ultimately influenced the democratic development to the lack of the opposition parties by delaying judgments deliberately or accidentally on some very important issues. (Zulfiqar, 1995; p.204)

Constrained by unfavorable common situations that shaped it the record of higher judiciary of Pakistan in supporting democracy has been mixed at best. Judiciary is frequently seen not to express the state to support the rule of law and follow democratic standards for many reasons. The origins of constitutionalism in Pakistani society and state are fragile. Judiciary is a component of the state composition and shares a common political tradition with additional state institutions. It is dependent on them for requisition of resources for its institutional development and enforcement of its judgments. It is until now, to complete a level of institutional autonomy which can help assurance its freedom from other political factors and institutions. (Shahid, 1991; p.32)

Many observers recommend that whatever independence it has attained not as much of the result of its own effort or affirmation but the effect of changes available in polity and society. On the other hand on every occasion conditions had been positive to its independence it did deliver judgments accommodating of democracy. In this research we will examine how change in external conditions facilitated or contracted the

Supreme Court of Pakistan to deliver democracy supporting or democracy retarding judgments. (Habib, 1988; p.138)

Since middle of fifties up to middle of nineties the Supreme Court has given some significant judgments that comprehensively affected the course of political development of the country. Some of these judgment may be expressed as democracy supporting judgment and some other democracy retarding .The democracy supporting judgments consisting of those given in the Usif Patel case (1955), the Asma Jilani case (1972), the Benazir Bhutto case(1988) , the Hajji Saifullah case (1988)and in the Nawaz Sharif case(1993).

The judgment in the Usif petal case had forbidden the Governor General from receiving the constitution framed by a particularly elected convention after he dissolved the Constituent Assembly in 1954.The judgment in Asma Jilani case completed the occupation of power by Yahya Khan from Ayub Khan as usurpation and upturned the former judgment of the court in Dosso's case that had legitimized Ayub, s martial law. It also confirmed the obligation of martial law itself as an, unconstitutional act. (Safder, 1987; p.62)

The judgment in the Benazir Bhutto's case stressed out two points: an election in a democracy cannot be legitimate without the contribution of political parties and that the development of political parties was a primary right of the citizens that the state cannot remove. The judgment in Hajji Saifullah case pointed the range of the president's powers of dissolving the assemblies. The judgment in Nawaz Sharif's case further restricted the option use of these powers and for the exceptional in the history of Pakistan reinstated the dissolved assemblies. (Sajjad, 1995; p.220)

The democracy retarding judgments consist of the judgment in Tamizuddin Case which cancelled the writ issued by the Sind Chief Court against Governor General Order of execution of the Constituent Assembly by the Governor General. During Bhutto rule the court confirmed a ban on NAP by the PPP Govt. The judgment in Nusrat Bhutto case that granted the authority on Zia-Ul-Haq martial law and the judgment in Khawaja Tariq Rahim case declaring valid the termination of assemblies by president in 1990. The impact of these democracy retarding judgments on democratic development had been diverse those that legitimized the two martial law had left the negative impact ranging from the stoppage of democratic process to exclusion of political parties. (Bhutto, 1974; p.43)

II. Review of Literature

The importance of reviewing the relevant literature cannot be over emphasized, as it is pre requisite for obtaining background knowledge of the subject to be investigated. A number of books have been written regarding the role of judiciary in the development of democracy in Pakistan. This study will be mostly based on primary and secondary sources. Government publications and official data would also be consulted. However the following books have discussed the role of Judiciary and provide us somewhat background knowledge.

Ikram Azam,(2004) in his book; Pakistan 1998 -2003; has discussed,the judiciary of the country and considered it the supreme custodian of its supreme law, the constitution and guardian of democracy.(p.112)

Tahir Kamran, (2008) Analyzed the relations between judiciary and Nawaz Sharif in his book, Democracy and Governance in Pakistan; and throws light on its political background. (p.78) Sajjad Ali Shah, (1995) in his book "Law Courts in a Glass House, describes and comments on some very important phases of judicial history of Pakistan. The book also provides background events of some of the crucial events of Pakistan's political cum judicial occurrences. (p.145)

The Myth of Constitutionalism in Pakistan by Zulfikar Khalid Maluka (1995) gives a detailed picture of hurdles in the way of constitutionalism, federalism and political legitimacy. Lust for power of the rolling elite, in particular the army that has caused great loss to democracy has also been discussed. (p.212)

A Judge Speaks out. is a book authored by Ajmal Mian,(2004) ex-Chief Justice of the Supreme Court. It narrates some very important events of the history of Pakistani judiciary.

Pakistan Problem of Governance, by Mushahid Hussain(1997) described that the judiciary has essentially been a political institution which changed the course of history in Pakistan and its decisions have always had political fallout.

Muhammad Nasrullah Virk(2003) PhD scholar in his study under the title ‘Doctrine of Necessity-Application in Pakistan-Cases of Immense Importance-A Critical Review.’ has tried to critically review and analyze some titled case i.e. Molvi Tamizuddin Khan’s case , Usif Patel’s Case, Dosso’s Case, Asma Jalini ‘s Case, Begum Nusrat Bhutto Case, Miss Benazir Bhutto and Syed Zafar Ali Shah. These cases have provided the way out or way in for imposing martial law in the country time and again. It is also evident from these cases that due to reasons the court of law also supported such actions, which eventually adversely affected the spirit of the constitution of Pakistan. These actions by various individuals never allowed flourishing of Democratic and political institutions. (P.24-28)

Shahid Javid Burki,(1999) in his book ‘Pakistan Fifty years of National hood” Describes that Sharif, like Prime minister Mohammad Khan Junejo and Benazir Bhutto before him, then appealed to the supreme court: Junejo and Bhutto had Failed to convince the judges that the president- Zia Ul Haq and Ghulam Ishaq Khan , respectively –had acted unconstitutionally .Sharif was more successful ; the supreme Court under the direction of chief Justice Nasim Hassan Shah, ruled against the president and ordered the restoration of the National Assembly in order to develop democratic process in country.

Golam w Choudhury, (1997) stated the importance of judiciary in Democratic Process in his book “PAKISTAN TRANSITION FROM MILITARY TO CIVILIAN RULE” (P.115) an independent judiciary is also regarded as a fundamental ingredient of democracy. Thanks to the beneficent legacy of the British concept of justice, the predominance of legal spirit. According to him while the working of democratic institutions in Pakistan such as Cabinet, Parliament, and political parties were far from satisfactory and had received rude set back under the direct or indirect authoritarian regimes ,the role of judiciary in Pakistan has a better record. Even the military rulers have shown some regard to the judiciary; similarly, judges of Supreme Court and high courts have demonstrated courage and independence in upholding the rule of law.

According to Dr Inayatullah,(1998) wrote an essay by title “STATE AND DEMOCRACY IN PAKISTAN “ The presence of an independent judiciary is a prerequisite for protecting the constitution and enforcing the rule of law in a society and thus ensuring order. The Pakistani judiciary has played a commendable role in very difficult circumstances.

Mir Khuda Baksh Marri, (former Chief Justice of the Baluchistan High Court) wrote in his book “A judge May Speak “with reference to Maulvi Tameezuddin Khan’ s case: “Note this ill fated judicial and executive engineering which was perpetrated on the people of Pakistan. Had it been avoid our present constitutional wrangles and successive Martial laws might not have been encouraged. (p.76)

III. Methodology

The Research will be descriptive and analytical. All qualitative and quantitative techniques would be applied in the study. In order to obtain authentic information all documents and judgments of Supreme Court

would be consulted in depth. In addition, articles published in the reputed journals and news papers would be used.

3.1. Discussion and Findings

The development of the accessible judicial structure in Pakistan took over an extensive period of time. The legal history of Pakistan can simply be divided into four periods the time of the Hindu and the Muslim period, as well as the Mughal Empire, the British period and the post - independence period. The system has evolved through a process of modification and development, and passes from side to side four significant stages of historical development, a Hindu kingdom, the Muslim rule, the British rule and the past partition period.

There are three types of fields for courts in Pakistan, in particular, constitutional courts, the ordinary courts and special courts. All constitutional courts obtain their powers and jurisdiction from the Constitution. Ordinary courts are originated and their jurisdictions and powers are defined by ordinary laws. Special Courts are established and their powers are provided by special laws.

The general rule with which to consider the jurisdiction and powers of all courts is that no court has a jurisdiction unless that jurisdiction is conferred by the constitution or by law. The Parliament has the power to determine the competence and powers of all courts, as regards matters in the Federal List, including the High Courts, but not the Supreme Court, which derives most of its powers by the Constitution.

3.2. Democracy Sporting Judgments of Judiciary

Pakistan has experienced three constitutions (1956,1962, 1973) though the Constitution of 1973, which is currently under-enforcement, has to practice a range of alterations of basic nature quite a few times. The parliamentary structure of government was adopted by the nation after the formation of Pakistan. On the other hand keeping in view the extra ordinary circumstances the Indian Independence Act of 1947 empowered the Governor General with more powers in order to address the conditions of that time which demanded for an authoritative administration. Since mid-fifties up to mid - nineties the Supreme Court, the apex Court of Pakistan, has given ten important judgments that have significantly affected the course of political developments of the country. Some of these judgments which may be called democracy-supporting judgments' include those given in the Usif Patel case 1955 in the Asma Jilani case 1972, in the Benazir Bhutto case 1988, in the Hajji Saifullah case 1988, and in the Nawaz Sharif case 1993 and in the Zafar Ali Shah case 2000.

3.3. Democracy Retarding Judgments

Pakistan might have been a different country today, if some events which distorted the course of its history had not occurred, Almost all these events are attributable to the conduct and performance of the civil and military bureaucracy, the politicians and the superior judiciary. Most of the bureaucrats exceeded their authority or deserted to follow the Law and liaised with every ruler. Some of them, namely, Ghulam Muhammad, Ch. Muhammad Ali, Muhammad Ali Bogra, Iskander Mirza and Ghulam Ishaq Khan directly ruled the country as head of the government or the State. The military overcame four times and ruled the country for more than half of the period of its life. They subverted the Constitutions and upset the democratic and political process. The politicians failed to establish democratic institutions and did not confirm themselves capable of giving the country a stable political system. They failed to frame the constitution although the first Constituent Assembly functioned for over seven years.

The judgment in the Usif Patel case prevented the Governor General Ghulam Muhammad from getting the constitution framed by a hand-picked convention after he dissolved the Constituent Assembly in 1954. The

judgment in Asma Jilani case declared the takeover of power by Yahiya khan from Ayub khan as usurpation and reversed an earlier judgment of the Court in Dosso case that had legitimized Ayub, s martial law. The judgment in the Benazir Bhutto, s case stressed two points, an election in a democracy cannot be genuine without the participation of political parties and it was a fundamental right of the citizens that the state cannot take away. The judgment in the Haji Suifullah, s case narrowed the scope of the presidential power of dissolving the assemblies.

IV. Conclusion

The critics on president's dissolution powers in the 1985 legislative debates were perceptive in many ways. Pointing out Zia's mala fides and the special nature of this provision, they had predicted the negative fall outs of such a strong power in a person. As the Haji Saifullah Supreme Court decided, Zia's succeeding termination of the Junejo Assembly turned out to be based on mala fides, and there is consistent proof to recommend that the three successive dissolutions were also not fully devoid of prejudice. The weak anxious, non-independent, and unsteady governments were repeatedly doubtful of a trigger-happy President. The subsequent and unstable stints in power by Nawaz Sharif and Benazir Bhutto testify this ailment in the political system. The elected leaders were apprehensive of the office of President for being politicized and used by vested interest groups. As it turned out, Ghulam Ishaq Khan and Farooq Leghari could not maintain their presidencies entirely free of such influences. The analysts are of the view that instead of creating stability, amendments in the constitution endangered constitutional disparity, and that then created instability. Four dissolutions in eight years gave substantial reliability to these views. In fact some argue that these powers were used in an inconsistent way, and all the dissolved governments should have been permitted to complete their periods. Their continuation would have helped create and strengthen a tradition of electoral politics and, ultimately, a culture of constitutionalism.

Whatever the pros and cons of the constitutional amendments and the resultant imbalance between the powers of the president and prime minister, it is not far off the mark to say that Higher Courts in Pakistan were not consistent in their Judgments. For Example:

The dissolution judgments showed disparities in the resolution and strength with which presidential reasons for dissolution were analyzed for legality. Justice Shafiur Rahman's critical analysis of the reasons in the Tariq Rahim case and his wary study of the same in the Nawaz Sharif case pointed to the judge's inconsistency.

As to the outcome of the cases, it had previously been discussed that the Haji Saifullah case might be decided in a different way, as the dissolution had been obviously unlawful. In the same way, while the outcome of the Nawaz Sharif case may be creditable, it made the judgment in the Tariq Rahim case decision looked harsh and at most terribly, biased. This was since, apart from a close relationship of diverse reasons, causal factors, and conditions, the one general component was the role of the President. It had to be said that Justice Sajjad Ali Shah made a few applicable clarifications when he noted a peculiar attitude on the part of the rest of the judges towards Nawaz Sharif, as compared to Benazir Bhutto, in conditions of the tests applied, and sense of assessment of presidential grounds for dissolution. His own ill feeling towards Bhutto, though, made it hard to believe the Benazir Bhutto judgment as entirely objective and impartial. When it turned out, in conditions of outcomes, Benazir Bhutto was all the time the losing party in these cases.

The political views and personal inclinations of the judges also emerged visibly during the hearing of the cases and their Judgments for example, the opinions of Justice Abdul Shakur Salam and Justice Rustam Sidhwa

in the Muhammad Sharif case; Justice Shafiur Rahman's attitude in the Nawaz Sharif case; Justice Rafiq Tarar's view in the Nawaz Sharif case; Justice Sajjad Ali Shah's belief in the Tariq Rahim, Nawaz Sharif, and Benazir Bhutto cases; and Justice Zia Mahmood Mirza's opinion in the Benazir Bhutto case.

The judgments, as experimented in greatly political questions of legitimacy and state structure and culture, not only encroached the legislative field but also, failed in providing any significant answers to the political dilemmas of the country. Judicial declarations vacillated between recognition and support of a prime ministerial system as under the original Constitution of 1973 and a post-Eighth Amendment amalgam of a prime ministerial and presidential system with a strong role ingrained for the President. Resultantly, no consensus emerged regarding the recent nature of Pakistan's constitutional arrangement or its future course.

In the light of above findings it could be stated that 'judiciary had not played its due role in strengthening the democratic system in Pakistan under the ambit of the constitution'.

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