

LEGITIMACY OF MILITARY REGIMES AND THE SUPERIOR COURTS IN PAKISTAN

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Abstract

Military played a dominant role in Pakistan's politics. During military rule, executive was a dominant institution over the judiciary. There is always a marriage of convenience between the military and the judiciary. They used judiciary as a tool while suspending or amending the constitution. The appointment and removal of the judges was the discretionary powers of the military regimes. This paper is an attempt to highlight that why military directly intervened in the Superior Courts? What was the response of Superior Courts over military interventions? How the Superior Courts legitimized military regimes?

Key Words: Military, Martial Law, Judiciary, Supreme Court, Legitimacy

Introduction

After gaining independence in 1947, Pakistan was ruled for about eleven years by political elites who frequently and readily changed their party loyalties. Pakistan had a total of seven Prime Ministers during this period. Although the military and bureaucracy played a significant role in governance during this period, the nominal rule of the country remained in the hands of civilians. The most significant constitutional developments during this period were the dissolution of the Constituent Assembly in 1954 and promulgation of the 1956 constitution.¹

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Unfortunately, within a short period of time, serious differences arose between political leaders as regards the nature of Constitution, the quantum of provincial autonomy, the national Language which the country should adopt and many other disputes of fundamental nature. A great deal of intrigue and dog fighting started in Constituent Assembly and other committees. An actual tug of war started between the politicians to seize and retain power. The continuous wrangling on the part of the politicians brought four periods of Military regimes in the country and Pakistan had the misfortune of living under military for a long time.²

First Martial Law and New Judicial Set up

On the night of 7th October 1958, President Iskander Mirza abrogated the constitution of 1956, the central and provincial Assemblies were dissolved, and cabinets were dismissed. Political parties were also banned and General Ayub Khan was appointed Supreme Commander of the armed forces and Martial Law was declared throughout Pakistan. In his proclamation, President Iskander Mirza explained the circumstances which forced him to take step. He said that the pathetic political conditions and the growing corruption in the society and the inability of the politicians to change their ways had left him with no alternative but to take this step. General Ayub Khan addressed the nation on 8th October, 1958, and explained that the army entered politics “with great reluctance but with the fullest conviction that there was no alternative to it except the disintegration and complete ruination of the country”. This was the first phase of Martial law.³ Meanwhile, at top level, much more important matters were on the move. Ayub Khan was made the Prime Minister of Pakistan on 26 October 1958, with a cabinet but he wanted to accumulate all the powers in his hand. He made a plan against Mirza.⁴ Twenty days later the second phase started when the army Generals forced Iskader

Mirza to resign from the office of President. Iskader Mirza silently obliged. General Ayub Khan combined in himself the office of the president and the Chief Martial Law Administrator.⁵ Why did President Iskader Mirza proclaim Martial Law? It was told that there were gloomy chances for him to get himself reelected as president.⁶ President Mirza also wrote to ex- Prime Minister Noon, explaining the reason for his actions and expressing regret that Martial Law had to be imposed during his premiership. The Chief Justice of Pakistan, Muhammad Munir, was asked to prepare a new constitution more suited to “the genius of the Pakistani people”. President Mirza favored the American system of a presidential executive with an independent legislature and judiciary.⁷ Later, even when Iskander Mirza was still the president, General Ayub disclosed that it was at his initiative that the president imposed martial law “ I said to the president: are you, going to act or are you not going to act? It is your responsibility to bring about change and if you do not, which heaven forbid, we shall force a change”.⁸

General Ayub thought that he had to justify his unconstitutional and illegal seizure of power in two ways both to Pakistanis and to the outside world. First, he had to establish clearly that the previous regimes had brought Pakistan to the brink of disaster. Secondly, he had to show that he had not only saved Pakistan but could also get the country moving on the highroad of political stability and social and economic reform.⁹

He was of the view that if political process had continued and political parties were allowed a free hand, it would have been nearly impossible to protect the federal principles. This was unmistakably evident from the mood of politicians and political parties.¹⁰

Supreme Court Validated Martial Law

In certain matters before the Supreme Court of Pakistan, a question arose as to what was the effect of the abrogation of the late

constitution and its replacement by the laws (continuance in force) order, 1958 on writs issued under the existing pieces of legislation. The Supreme Court, headed by the Chief Justice Muhammad Munir, delivered a judgment on 27 October 1958 in four appeals generally known as Dosso case. To the effect that a victorious revolution for a successful coup d'états was an internationally recognized method of changing a legal order, and citing Kelson general theory of Law and State, gave legal sanctity to the coup d'état of 1958. But Justice Cornelius dissented, as he did not think that the coup could be legally justified.¹¹

By the time of Ayub's coup, two critical issues had been settled. First, parliamentary democracy would not be allowed to function in Pakistan. Second, a strong central executive would dominate the provinces. Pakistani politics have never recovered from these twin setbacks.¹² The new cabinet consisted of civilians as well as generals. The office of the prime minister was abolished and Ayub Khan's cabinet begun to function as a presidential cabinet.¹³ One of the first acts of the Martial law was to keep the politicians away from public life. The ban on political parties which had accompanied the proclamation of Martial Law was followed up by freezing of the bank accounts of many political parties and the detention of some of their leaders. The activities of the politicians were brought under a heavy restraint by the Elective Bodies (Disqualification) Order, 1959, (EBDO), which provided the former politicians with the option of being tried for misconduct or disqualifying themselves from engaging in political activities for seven years. Such was the lack of faith in specially constituted criminals, that the majority preferred the later course. About 7000 persons, at least 3000 from West Pakistan, come to labour under EBDO disqualification or were 'ebdoed' as it was called in popular parlance. With one stroke the political voice of the nation was silenced. Subsequently, under an amendment made to the

political parties act, 1962, the 'ebdoed' politicians were banned from even making political statements.¹⁴

The Martial Law regime appointed law reforms commission in December 1959 to suggest improvements in the legal system inherited from the British. The recommendations of the commission covered a wide field and their implementation was only feasible over a number of years. The objective of the recommendation was to make available the speedy and less expensive justice. Ten ordinances were issued during 1962-63 to streamline the administration of justice.¹⁵ The implementation of the recommendations of these two commissions, no doubt had some healthy effects on the legal system of Pakistan, but the ideal of "speedy and less expensive justice" was too high to be achieved through the steps taken by the military regime.¹⁶

Second Martial Law

General Yahya Khan assumed the power of Chief Martial Law Administrator on March 26, 1969. Later on became the president of Pakistan without facing any opposition. He followed Ayub Khan's course very closely.¹⁷ The 1962 constitution was abrogated and he assumed the control for the direction of the nation's life, the country, by any reckoning, presented a situation of great complexity and danger.¹⁸ Yahya Khan decided to merge the states of Chitral, Swat and Dir with West Pakistan. Hitherto, these states were being ruled by their princes despite their accession to Pakistan. Another important administrative reorganization was the abolition of the integrated province of West Pakistan (One-Unit Scheme). He also promised to hold 'fair and free' elections and transfer of power to the elected representatives. The Legal Frame Work Order (LFO), issued on 30th March 1970, provided the guidelines for the general elections and outlined the principles which the

military leaders thought the National Assembly must keep in mind while framing the constitution.¹⁹

Soon after assumption of power, Yahya Khan issued a constitutional arrangement which provided that until a constitution was enforced; Pakistan would be governed as nearly as possible by the 1962 constitution. Fundamental rights were suspended and no court was authorized to pass any order, issue any decree or writ against the order of the Martial Law Administrator or any other Martial law authority. No judgment of a special military court or summary military court could be challenged in any ordinary court of law. The Order further provided that the president could make such provisions, including constitutional provisions, as he may deem fit, for the administration of the affairs of the state.²⁰

On 16 December 1971, Pakistan's military commander in East Pakistan surrender to Indian forces, and a new state Bangladesh was carved out of Pakistan. This led to the crisis of legitimacy which made it imperative for the army to withdraw from politics. Bhutto assumed the power in January 1971 as the president and Civilian Chief Martial Law Administrator.²¹

Asma Jilani Case

The interim constitution that came into force on 21 April 1972 led to the withdrawal of martial law. The constitution was adopted by the National Assembly. It is true that this was to be a Constituent Assembly and enjoyed a mandate to give a new constitution. Due to the formation of Bangladesh, the Assembly lost its validity/justification and mandate and the members elected from West Pakistan could not act and form a Constituent Assembly of their own. It would have been appropriate to hold fresh elections in West Pakistan for a constituent assembly on the basis of the change constitutional and political realities so that it could

have had a fresh mandate to give a new constitution.²² Between December 1971 and April 1972 the Supreme Court did deliver some important Judgments. The first was Asma Jilani²³ vs. government of Punjab. In this case, the detention of some eminent persons under martial law regulation 78 was challenged and the Supreme Court was called upon to examine the validity of Yahya Khan's imposition of Martial law. The leading judgment written by Chief Justice Hamood-ur-Rehman in which the principle enunciated in state vs. Dosso was overruled as laying down incorrect law and placing the country on worn lines. Yahya Khan was declared as usurper who had no authority to abrogate the 1962 constitution and to impose martial law. Martial law regulations 78, issued by Yahya Khan, was accordingly declared as void and of no legal effect. The judgment also attempted to warn future military adventures if they took advantage of the concept of revolutionary legality and considered themselves as the new lawgivers, then they would be treated as usurpers. The Supreme Court gave the following judgment:

1. As to whether the doctrine enunciated in the case of State v. Dosso was correct;
2. Even if correct, whether the doctrine applied to the facts and circumstances in which Field Marshal Ayub Khan transferred power to Gen. Agha Muhammad Yahya Khan;
3. If the source of power assumed by Gen. Agha Muhammad Yahya Khan was illegal and unconstitutional, then whether all legislative and executive acts done by him including the imposition of Martial law and promulgation of the Martial Law Regulations and Orders were illegal.²⁴

Chief Justice Hamoodur Rahman then observed that in laying down a novel juristic principle of such far reaching importance, Chief

justice Muhammad Munir proceeded on the basis of assumptions, namely,

1. “That the basic doctrine of legal positivism”, which he was accepting, were such firmly and universally accepted doctrines that “the whole science of modern jurisprudence” rested upon him;
2. That any abrupt political change not within the contemplation of the constitution, constitute a revolution, no matter how temporary or transitory the change, if no one has taken any step to oppose it; and
3. That the rule of international law with regard to the recognition of state can determine the validity also of the state internal sovereignty.

According to the Chief Justice Hamoodur Rahman, the above assumptions were not justified as, according to him, Kilson’s theory was by no means a universally accepted theory nor was it a theory which could claim to have become a basic doctrine of the science of modern jurisprudence. He, therefore, came to the conclusion that the learned chief Justice Muhammad Munir in Dosso’s case not only misapplied the Doctrine of Kelson but also fell into error in thinking that it was a generally accepted doctrine of modern jurisprudence. It was for the first time that, the Supreme Court refused to validate a coup d’état, deciding that Yahya Khan had been a usurper of power and that his regime had been unconstitutional. This demonstration of judicial independence was, however, made after Yahya Khan’s regime had collapsed, and as history demonstrates, the decision constitutes the exception rather than the rule.²⁵

Third Martial Law 1977

On July 5, 1977, no one could foresee that the martial law, imposed by Genral Zia ul Haq, the then Chief of Army Staff, would mark

the beginning of the longest period of military rule. Although, he gave the impression of a reluctant coup maker, he held on to power with a tenacity which belied his declaration about the limited purpose of his action. Disproving all predictions about his early fall authority he wielded from 1977 to 1985 absolute power as a chief martial law administrator (CMLA) and president.²⁶

After the coup of July 5, 1977 a series of White Papers were issued listing Bhutto's misdeeds, which included the rigging of the 1977 general election. The deposed Prime Minister's refutation of this charge, his counter-claim of army and 'external' support for the PNA Campaign is set down a length in his back, "if I am Assassinated". The reality seems to be that a certain PPP victory was inflated by malpractices committed by local officials, which may have affected 30-40 seats. According to the PPP election campaign manager and manifesto architect Rafi Raza who resigned as Production Minister after the polls, Bhutto was unprepared for the furor which accompanied the rigging episode and had not authorized it as some opponents alleged in order to secure the two-thirds majority necessary to bring in constitutional change.²⁷

A semblance of continuity was maintained and Gen. Zia seemed to with caution. The constitution was not abrogated but placed in abeyance. The political parties were not yet banned. President Fazal Elahi Choudary continued as a president. The Chief Justice of the high courts in every provinces were made acting governors. The order issued on the day of proclamation of martial law provided that notwithstanding the abeyance of the constitution the country should be governed as nearly as may be in accordance with the constitution subject to the laws order and any order made the president or any regulation issued by CMLA in pursuance of said order. The superior courts were permitted to function but with restricted powers. The emergency already in force was

continued. No order of the martial law authority could be challenged before any tribunal or court. Fundamental rights were suspended. A number of martial orders and regulations were promptly issued which prescribed numerous offences and provided for the trial and punishment of the offenders by the newly established military courts. The military cracked down on descent on protest and the brutal sentence of flogging often carried out in the public which shocked the nation's conscience, terrorized the people into submission.²⁸

The Nusrat Bhutto Case

The military operation for affecting his coup was code named 'Operation Fair play' to indicate that its purpose was to facilitate disengagement between warring political factions and ensure free elections.²⁹ With imposition of martial law, Zulfikar Ali Bhutto was arrested. After some days, military government released him. Bhutto was rearrested in September 1977 on a charge of the murder of one of his political opponents, Nawab Muhammad Ahmad Khan. Begum Nusrat Bhutto filed a Petition before the Supreme Court, challenging the detention of Mr. Z.A. Bhutto and others.³⁰

The Chief Justice concluded the case emphasizing that "while the court does not consider it appropriate to issue any directions, as suggested by Yahya Bakhtyar, as to define time table for the holding of elections, the court would like to state in clear terms that it has found it possible to validate the extra constitutional action of the Chief Martial Law Administrator not only for the reasons that he stepped in to save the country at a time of grave national crisis and constitutional breakdown, but also because of the solemn pledge given by him that the period of constitutional deviation shall be as short a duration as possible, and that during this period all his energies shall be directed towards creating conditions conducive to the holding of free and fair elections, leading to

the restoration of democratic rule in accordance with the dictates of the constitution. The court therefore expects the Chief Martial Law Administrator to redeem this pledge, which must be construed in the nature of a mandate from the people of Pakistan, who have by and large, willingly accepted his administration as the interim government of Pakistan”.³¹

The Court came to the conclusion that the principle of state necessity and the arguments of the maxim '*salus populi suprema lex*' were fully attracted to the peculiar facts and circumstances of the case, as validating factor. The court derived its jurisdiction from the laws (Continuation in Force) Order and it had to accept and enforce the laws of 'de facto government' for the time being. As a consequence of this unanimous verdict of the Supreme Court, the act of the Chief of army staff, General Zia, ousting Bhutto from power was declared to be valid in the name of 'state necessity'. Begum Nusrat Bhutto's petition challenging the detention of Bhutto and others under martial Law Order 12 was dismissed as incompetent.³²

Military takeover of 1999

General Musharraf dismissed the civilian government of Nawaz Sharif on October 12, 1999. Instead of Martial Law, issued a notification on October 14, 1999 and proclaimed emergency. It kept in abeyance the constitution of the Islamic Republic of Pakistan. The Senate, the National Assembly and Provincial Assemblies were suspended including their Speakers and Deputy Speakers. The Prime Minister, Federal Ministers, Federal Ministers of State, parliamentary Secretaries, the Provincial Governors, Chief Ministers, Provincial Ministers and parliamentary Secretaries including advisors to the Chief Ministers ceased to hold their offices. Only President Rafiq Tarar remained unaffected. For filling the constitutional gap, military dictator suspended the constitution and issued

PCO- Provisional Constitutional Order. For filling the gap of Prime Minister, General Musharraf adopted the designation of Chief Executive.³³

Supreme Court Uphold Military Takeover

In December 1999, a constitution petition, No. 63/99, was filed by five leaders, Syed Zafar Ali Shah, Wasim Sajjad, Ilahi Bux Soomro, Raja Zafarul Haq and Chaudhry Pervez Ilahi, on behalf of PML (N) to challenge the validity and legal effect of the army takeover. It prayed inter alia that the said takeover may be declared illegal and violate of the 1973 Constitution. The petitioners had also prayed that the Provisional Constitutional Order No. 1 of 14 October 1999, the proclamation of emergency of the same date and all orders, enactments and instruments issued hereunder may be also declared as illegal, ultra vires of the constitution and of no legal effect.³⁴

The Supreme Court, on May 12, 2000, issued a short order after hearing this petition for four months, and on May, 29, 2000 rejected the pleas made by the petitioners, after a detail judgment, and observed as follows:

1. That the military action on the 12-10- 1999 was validity taken, being justified on ground of state necessity.
2. That the constitution of Pakistan 1973 still remains the supreme law of the land subject to the condition that certain parts thereof have been held in abeyance on account of state necessity.
3. That the superior courts continue to function under the constitution and that the new oath taken under the ‘Oath of Office (judges) Order No. 1 of 2000’ does not in any manner derogate from this position.

4. That the chief executive is entitled to perform all such acts and promulgate all legislative measures as enumerated in the judgment and has also powers to amend the constitution, subject to certain conditions stipulated therein.
5. That the supreme court continue to have the power of judicial review to judge the validity of any act or action of the armed forces in the light of principles underlying the law of state necessity.
6. That the chief executive be allowed a period of three years from 12 October 1999 to achieve his declared objectives and that not later than ninety days before the expiry of the aforementioned period, he shall appoint a date for holding of general elections to the National Assembly, the Provincial Assemblies and the Senate of Pakistan.³⁵

The military government could not have asked for more. After the justification of the military takeover of October 12, 1999 by the Supreme Court, the government allowed for period of three years to accomplish the seven points program declared in the speech of General Musharraf on October 17, 1999. The court did not appreciate that the program was so comprehensive that it might not even be accomplished in many more years. The court also ignored the bitter experience of the past when Zia as head of a military regime was allowed to amend the constitution. He made frequent use of this power and mostly in a wanton and irresponsible manner. He virtually changed the face of the constitution particularly when he introduced amendments in 65 articles of the constitution under the Revival of the Constitution of 1973 Order 1985 (RCO). Conferment of the same power on the chief of the army staff under the judgment of 12 May 2000 has resulted in similar abuse once again.³⁶ The Supreme Court, in order to validate the military regime, ventured into matters which were

not even an issue before the court. The validity of the removal of Musharraf as the chief of the army staff on 12 October 1999 was not directly an issue in the case but the court went out of its way to invalidate his removal on the principles of natural justice. Most unusual was the finding regarding the judge of the Supreme Court who did not take oath voluntarily or judge of the high courts who were not given oath. The matter of not taking or being given oath was declared as a closed and past transaction. The matter was not an issue before the court. Besides, the finding was clearly against the principles of natural justice. None of these judges were heard or even represented before the court and they were all virtually condemned unheard.³⁷ After taking the oath under PCO the Supreme Court ceased to be a constitutional court. It had abandoned its oath to preserve, protect and defend the constitution. In any case, the Supreme Court has no authority to amend the constitution.³⁸

Supreme Court Validated Emergency and PCO 2007

On March 9, 2007, President Gen. Pervez Musharraf dismissed Chief Justice Iftikhar Muhammad Chaudhry based on the allegations for misuse of office.³⁹ Public support for the deposed Chief Justice increased. This agitation was really a challenge for Musharraf. On July 16, 2007, the government lawyers issued a detailed report against the deposed Chief Justice. After four days, on July 20, 2007, a 13-member bench of the Supreme Court of Pakistan restored the deposed chief justice Iftikhar Chaudhry.⁴⁰

Again on November 3, 2007 Musharraf proclaimed Emergency in Pakistan. The Chief Justice was deposed, the constitution of 1973 was suspended, and all the judges of the Supreme Court were removed other judges of that court declared his act illegal. Lawyers, politicians and human rights activists were arrested by police.⁴¹ The supreme court of Pakistan headed by justice Abdul Hameed Dogar affirmed and validated

the state of emergency, imposed by Pervez Musharraf as an army chief. However the court demanded for the revocation of emergency as soon as possible. The seven members bench presided over by Dogar announced the orders for hearing to the petition against the emergency and provisional constitutional order (PCO). This gave the army chief the first formal and legal permission and power to impose emergency and govern through his own PCO. Many lawyers and judges were not surprised by the decision because they already knew that the judges, who have taken oath under PCO, basically have agreed to accept all the actions of an army chief.⁴²

Conclusion

Military intervention in politics of Pakistan is an historical fact. But judiciary intervention in the politics of Pakistan for the purpose of legitimization of military rule is equally historical. This process of intervention and legitimization of intervention of military by superior courts started first in 1958 when Ayub assumed power by force. In Dosso case, judiciary immediately legitimized his rule. When Yaha Khan, another military dictator, left the country, the court ruling in Asma Jillani case considered the rule of Yaha Khan as illegitimate. Again in Zia ul Haq and Musharraf's cases, the court conveniently legitimized their rules. However, the court has showed activism but rarely on major issue during military rule. During the whole history 'doctrine of necessity' was used as a valid card by the military and thus their regimes were legitimized by the superior courts.

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²¹ Aysha Siddiq, *Military INC. inside Pakistan's Military Economy* (Karachi: Oxford University Press, 2007), 78.

²² (Dawood 1994, 29)

²³ Malik Ghulam Jilani was arrested initially under the Defence of Pakistan Rules, which he challenged in the Lahore High Court. Before his hearing, the government rescinded its order, replacing it with Martial Law Regulation No. 78, which barred judicial challenge under the 1969 Courts (Removal of Doubts) Order. Altaf Gauhar was arrested under MLR No. 78, and the Government of Sind presented a new arrest order after Jilani's High Court hearing; when the Sind government withdrew its order in July 1972, the federal government issued a new order under the Defence of Pakistan Rules. Gauhar challenged his detention in 1972 (*Mrs. Zarina Gauhar v. Province of Sind and 3 others*, PLD 1976 Karachi 1257). His attorney, A.K. Brohi, maintained that under the Interim Constitution, the Defence of Pakistan Ordinance was not valid law; Attorney General Bakhtiar maintained that fundamental rights could not be enforced by the courts during emergency. The High Court challenged the Sind government nonetheless. Paula R. Newberg, *Judging the State Courts and Constitutional Politics in Pakistan*, (United Kingdom: Cambridge University Press, 1995), 132.

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