

*Bakht Munir**

*Ataullah Khan Mahmood***

Evolution Of Democracy In Pakistan: A Case Law Study Of The Superior Courts Judgments

Abstract

Since its inception, Pakistan has been passing through a democratic transition. In all its evolutionary phases, the democratic government had barely completed its constitutional tenure and substituted with the military regimes. With the establishment and validation of the military regimes, the military has not only entrenched its authority in its direct rule but significantly transform its influence to the civilian governments. Despite the fact that the Superior Courts validated extra constitutional acts of the military, it has successfully curtailed unbridled authority and transformative preservation of the military regimes. With validation of each extra constitutional action, the Superior Courts have systematically constrained the military's authority. This article categorically examines the leading constitutional cases whereby the judiciary validated extra constitutional military's actions and cases where the judiciary reinforced the democratic governments by invalidating the military's actions.

Introduction

In Pakistan, the judiciary significantly contributed in shaping and promoting the democracy. However, for numerous reasons the judiciary has not been able to direct the state's authorities for upholding the democratic norms and rule of law: fragile tendency towards constitutionalism, judiciary's dependence on other state organs for its institutional development and enforcement of its judgments, and lack of enduring judicial-autonomy from other state-actors and institutions. As evident from the legal and political history of Pakistan, whatever autonomy judiciary has been achieved is more likely due to changes witnessed in the democratic transition, rather than its own struggle for independence. This article investigates how democratic changes influenced the judiciary: anti-democracy judgments and pro-democracy judgments, which substantially contributed in Pakistan's constitutional and democratic transition.

* Bakht Munir, PhD Law (Scholar), International Islamic University, Islamabad, Lecturer at the Institute of Languages and Linguistics, New Campus, University of the Punjab, Lahore, Email: muniradv@yahoo.com, Contact: 03469452228

** Dr. Ataullah Khan Mahmood, Incharge Postgraduate Programmes, Faculty of Shariah & Law, International Islamic University, Islamabad, Email: wattoo888@gmail.com, Contact: 03345064833

1. Cases where the Judiciary Endorsed Extra-Constitutional Steps

The following cases examine how the superior judiciary supported extra constitutional regimes at the cost of democracy and elected government on the basis of state necessity.

1.1. In *Federation of Pakistan v. Moulvi Tameez-ud-Din*¹, the Governor General, *Gulam Muhammad* dissolved the Constituent Assembly on October 24th, 1954, was challenged by *Moulvi Tameez-ud-Din* who was serving as Speaker of Pakistan's Constituent Assembly before the Sindh Chief Court on the basis of an act without jurisdiction, illegal, void, and ineffective. The Court decided that case in petitioner's favor. On the Appeal, it was decided in the appellant's favour. The Court introduced the necessity doctrine and relied on *Bracon's* maxim, which is otherwise unlawful can be made lawful by necessity.

Two Writ Petitions were filed in the Chief Court of Sindh: firstly, writ of *Mandamus* or any other appropriate writ restraining the respondents from the enforcement of the Proclamation Order. Secondly, writ of *Quo Warranto* whereby challenged the respondents' authority of claiming to be members of the Council of Ministers.²

The Federal Court, headed by Justice Munir, with the dissenting opinion of A.R. Cornelius, reversed the Chief Court's decision and validated the dissolution order. The Court observed that Section 223-A of the 1935 Act, on the basis of which the Sindh Chief Court issue the writs has not yet become law for it has not yet received Governor's assent. Further, the respondents' appointments as Ministers neither caused any personal injury to the petitioner nor adversely affected his interest. The petition for *Quo Warranto* was, therefore, not maintainable. The power to dissolve assembly is the Crown's prerogative, which vests in the Governor General by virtue of Section 5 of the 1947 Act. This decision marked the foundation for constitutional and political crisis in Pakistan. The decision also invalidated forty-six Acts passed by the Constituent Assembly, from its establishment till dissolution, without formal consent of the Governor General. In response, these constitutional crises were further deteriorated with the Emergency Power Ordinance (IX of 1955) whereby the Governor General was authorized to legalize selective laws passed by the Constituent Assembly effectuated from the back date. Interestingly, the same bench of the Federal Court invalidated the Emergency Powers Ordinance (IX of 1955) in the subsequent case.

1.2. In *Usif Patel and Others v. the Crown*³, the District Court of Larkana convicted the appellants under the Goondas Act⁴. The appellants filed an appeal against the impugned order in the Sindh Chief Court under Section 491, Cr PC. The Court rejected the appeal and declared the Act was not *ultra vires* and their detentions were legal.⁵ On Appeal, the Court declared that the dominion-Governor General was not competent to issue an ordinance on constitutional matters; hence emergency power ordinance (IX 1955) was invalid. The validity of Section 92-A of the 1935 Act was the main issue before the Federal Court. It was alleged that the insertion of any provision, without the consent of the Governor General, to the 1935 Act was invalid and alleged that appellants'

detention under such law was invalid. The Court declared the appellants' detention unlawful and held that the Governor General was not authorized to substitute the Constituent assembly. The Court directed for the formation of another representative body, in order to validate invalid legislation.⁶ Both these cases had left an adverse impact on the democratic culture, shook the whole political and administrative set-up of the state to its very foundation. The superior judiciary embarked an aberrant jurisprudence for Pakistan's legal scholarship.

1.3. In *State v. Dosso and other*⁷ the respondents were convicted by Deputy Commissioner for murder under Section 11 of the Frontier Crime Regulations, 1901 (FCR) and were referred to the Council of Elders, *Special Jirga*, which founded the responded guilty. The respondents filed writ petitions of *Habeas Corpus* and *Certiorari* at the High Court. It was alleged that FCR's provisions permitting the executive authorities for referring criminal cases of a particular sect of the society to council of elders, were repugnant to Article 5 of the Constitution⁸, hence void by virtue of Article 4. The Court while accepting the contention set aside the conviction.⁹

On October 7th, 1958 the President, *Iskander Mirza*, declared martial law, annulled the Constitution, ousted jurisdiction of the Superior Courts, dissolved the Federal and Provincial Cabinets and Assemblies, and appointed Ayub Khan, the Commander-in-Chief, as the Chief Martial Law Administrator. The Law Continuance in Force Order, 1958 was issued by the President, which validated laws other than the Constitution and restored courts' jurisdiction. Four Appeals of the same nature were brought before the apex Court, in order to check validity of the writs issued by the High Court in respect of convictions under Section 11 of the FCR, which is criminal reference to the council of elders.¹⁰

The Court held that according to the new legal order, Article 5 of the Constitution has lost its effectiveness. Nevertheless, the FCR is still effective and the references made to the council of elders and the subsequent proceedings thereof were good. The Court while validating martial law applied the same test of state necessity and observed that a victorious revolution is internationally recognized legal instrument for changing a constitutional order. For its validity, the existing legal order must comply and adhere to the new order. The Court further observed that even jurisdiction and functions of the courts remained subject to the new constitutional order.¹¹

The President, *Iskander Mirza*, was deposed by *Ayub Khan* who introduced the concept of *Basic Democracy*, which could not be accepted as a substituted for the assemblies. That system, however, initiated the concept of concentration of powers in one person, which was contrary to the principles of democratization. Had the judiciary resisted the first military intervention, the situation would have been different.¹²

1.4. In *Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan*¹³ the Court once again validated the military coup on ground of state necessity. On July 5th, 1977, *General Zia-ul-Haq* proclaimed martial law and became the Chief Martial Law Administrator, removed the PPP

government, suspended the Constitution, dissolved the assemblies, and charge of acting governor of the provinces were entrusted in the chief justices of the respective provinces. The president was permitted to continue as a nominal head of the state. *Mr. Zulfiqar Ali Bhutto* along with ten other PPP's leaders were arrested and detained at various prisons in different provinces. Petition was filed in the Supreme Court that the Chief of Army Staff leveled unfair allegations against the PPP's government, in order to justify PPP's leadership detention and intention to prosecute them before the military courts or tribunals.

The petitioner alleged that the detentions were based on *mala fide* coupled with the ulterior motive to prevent the PPP from effectively participating in the anticipated elections October 1977. On the ground of non-maintainability, the Court dismissed the petition. The Court while legalizing martial law observed that the government was unable to maintain law and order situation and the political crisis led to constitutional breakdown. The Chief of Army Staff intervened for the state's integrity, in order to rescue the country from bloodshed, chaos, and the same was justified to suspend citizens' fundamental rights. Further, the Court gave directions for making arrangements so that to ensure fair elections.¹⁴

This case resulted military coup for more than a decade where the army availed the opportunity resulted from the executive malfunctioning. Mostly, the incapacity or despotic and autocratic executive created opportunity for the military takeovers. The military also influenced the judiciary. The judges' appointments have been made by the president, being head of the executive, who remained influenced by the military. This is how the military not only legalized its direct rule but also entrenched its authority to the civilian governments, which is reflected in the judicial decisions.

- 1.5. In *Ahmad Tariq v. Federation of Pakistan*¹⁵ on August 6th, 1990, the President, in exercise of his authority under Article 58 (2) (b), dissolved the Assembly on the pretext that the government's affairs could not be carried as per the spirit of the Constitution so an appeal to the electorate was indispensable. The petitioner challenged the impugned order in the Lahore High Court. The Court while dismissing the petition held that the President was justified in forming the opinion for dissolution of the National Assembly. On Appeal, the petitioner contended that the impugned order cannot be sustained in the light of the principles elucidated by the Court¹⁶ that dissolution of the National Assembly can be justified only where there is an actual constitutional breakdown.

The Court dismissed the petition with response to the various objections raised by the petitioner: firstly, the President's authority for the exercise of the alternative powers is subject to the Prime Minister's advice. The President, however, cannot act entirely at his own discretion in this regard. Secondly, the argument that the National Assembly is directly elected by the people of Pakistan, its dissolution should not be left at the mercy of the Parliament. The Court held that the Constitution expressly authorizes the President for exercise of his power to dissolve the National Assembly. Fourthly, the petitioner objected various grounds such as horse-trading, corruption, nepotism, and violation of individual

constitutional provisions continued to be taking place even after the impugned action. The Court held that identification of an evil is followed by remedial and corrective measures. Fourthly, the petitioner objected that the dissolution, being an extreme authority, should be only exercised in exceptional circumstances of actual breakdown of the constitutional machinery. Nevertheless, the same should not be exercised in the absence or failure to observe a particular constitutional provision, which is different from the constitutional breakdown. The Court held that the order for the dissolution of assemblies may rightly be exercised when a country is governed by an extra constitutional means as opposed to the constitutional order.

1.6. In *Sayed Zafar Ali Shah and others v. General Pervez Musharraf*¹⁷ the Court legalized the Provisional Constitutional Order of 1999, whereby General Pervez Musharraf proclaimed emergency and the Oath Order¹⁸. The Court, however, limited the scope of the regime, required to conduct the elections within three years. In this case, the Court addressed various legal and constitutional issues: firstly, the country was facing a situation where the military intervention became inevitable and was justified on the basis of necessity doctrine, which is recognized not only in Islam but also in other religions, and the same has also been recognized by prominent international jurists such as *Hugo Grotius, Chitty, and De Smith*.¹⁹

Secondly, the Federal Government provided sufficient material in support of the military intervention through extra constitutional arrangements, which were relevant and admissible for justification of military intervention. Thirdly, all the executive actions, which were indispensably taken for running the state's affairs and public welfare, were declared valid. Fourthly, the Constitution remained the highest and ultimate law of the land but on the basis of state's necessity some of its parts held in abeyance. Fifthly, the judiciary has to carry on its functioning under the Constitution and the same position has not been derogated by the Oath Order²⁰.

Sixthly, the superior courts' judges who either refused to take oath under the oath order or to whom the oath has not been given are hit by '*past and closed transaction*' doctrine, cannot be reappointed. Seventhly, the government should advance the accountability mechanism, in order to ensure transparency and the superior courts' judges are neither above the law nor the Constitution and are subject to accountability as envisaged by Article 209 of the Constitution. Eighthly, removal of Musharraf without observing principle of natural justice was *ab initio void* having no legal effects. Ninthly, the Chief Executive shall hold election within three years and the Court reserved the authority to review the continuation of emergency of October 1999 at any subsequent stage.²¹

1.7. In *Tika Iqbal Muhammad Khan v. General Pervez Musharraf*²² the petitioner challenged the imposition of emergency, the PCO Order of 2007, and the Oath Order, 2007. The situation that led to the imposition of emergency coupled with two orders was identical to that of July 5th 1977 and October 12th 1999, which had been validated by the Court²³ in the largest state interest and public welfare. The Supreme Court, constituted under the PCO Order of 2007, justified the extra constitutional measure of the Army Chief and the President. The Court

held that the Constitution remains the highest law of the land, despite the fact some of the Constitutional provisions are held in abeyance, considering the larger public interest. Even though, the Court declared acts of the Army Chief extra constitutional, yet the court validated all his actions on the same conventional grounds, which derailed the democracy unless the same was invalidated by the Court²⁴.

2. Cases where the Judiciary Reinforced the Democratic Institutions

The following are the cases where the judiciary reinforced the civilian government, invalidated extra constitutional actions and military interventions:

2.1. In *Miss Asma Jilani v. Government of the Punjab and another*²⁵, the Appellant's father, Malik Gulam Jilani, was arrested in Karachi under Defense of Pakistan Rules, 1971. The Appellant challenged the detention at the Lahore High Court, which was allowed for hearing and notice was served to the government. Nevertheless, a day before the hearing, the impugned order was substituted by another order, which was supposed to have been issued by the Martial Law Administrator Zone "C" in the exercises of authority conferred on him by virtue of Martial Law Regulation No. 8. The government raised objection regarding jurisdiction of the Court due to bar imposed on the Courts' jurisdiction by the last Martial Law regime. While relying on the *Dosso case*²⁶, the High Court gave validity to the Jurisdiction of Courts Order, 1969 and declared that it had no jurisdiction to entertain the petition.²⁷ The Supreme Court, however, overruled the decision of *Dosso case* and the proclamation of martial law imposed by General Yahya Khan on March 25th 1969 was declared void.

2.2. In *Federation of Pakistan v. Muhammad Saifullah Khan*²⁸ General Zia-ul-Haq dismissed Junejo's government on May 29th, 1988 and dissolved assemblies under Article 58 (2) (b) on four grounds: firstly, the National Assembly was not able to meet the objectives for which it was elected. The Court while replying to this ground held that the reason being too wide is not a reasonable ground for the dissolution of National Assembly. Secondly, the law and order situation went so worst created immanent loss to public lives and properties. The Court responded to this argument that the issue of law and order should have been addressed under the emergency powers, provided under part X of the Constitution. Thirdly, there was imminent threat to the lives, dignity, and security of the people. The Court declared this ground to be patently too wide. Fourthly, public morality declined exceptionally. The Court strike down this justification that such general argument changed by generations. Hence, the dissolution of assembly could not be validated.

2.3. In *Muhammad Nawaz Sharif v. the President of Pakistan*²⁹ the President, Ghulam Ishaq Khan, in exercise of his discretion under Article 58 (2) (b), dissolved the Assembly and dismissed the Prime Minister. Under Article 184(3) of the Constitution, the petitioner filed a writ petition and contented that the impugned order was based on *mala fide* and passed without lawful authority. The petitioner prayed that the

impugned order should be rendered null and void, the functioning of caretaker government should be declared void, the president should be restricted from intervening with the affairs of the government, and should create no obstacles in the smooth functioning of the National Assembly.

The Court held that the dissolution order was not within the exclusive authority of the President conferred under Article 58 (2) (b) of the Constitution. The Court further held that the other enabling powers available to the President have been passed without lawful authority having no legal force. The Court directed for the restoration and resuming functioning of the National Assembly, the Cabinet, and the Prime Minister. Unlike the previous cases, the Court not only invalidated the dissolution order but also restored the deposed government.

2.4. In *Sindh High Court Bar Association v. Federation of Pakistan*³⁰ the Court disregarded the necessity doctrine, introduced by the superior judiciary in *Tamizzuddin's case*³¹, for validation of extra constitutional actions, in order to justify military intervention at the expense of the civilian government. In the instant case, the Court not only invalidated the emergency imposed by General Pervez Musharraf on November 3rd, 2007, PCO No. 1 of 2007, and Oath Order, 2007, but also quashed various enactments followed by the emergency. The receipt of the letter regarding national security concerns from the Prime Minister, Shaukat Aziz, addressed to the President, General Pervez Musharraf, was contented to have been the basis for imposition of emergency.

The Court held that from the content of the letter, which was sent to the President not to the Army Chief, it cannot be construed that the armed forces were directed to act in aid of the civil power under Article 245. The President has no constitutional authority to suspend the Constitution, to issue an Oath Order, and to impose emergency and PCO No. 1 of 2007. The Court held that the Prime Minister neither asked the President to take such action nor it was an advice tendered by the former under Article 48. The Court held that the imposition of emergency, the PCO Order of 2007, and the Oath Order, 2007 were based on *mala fide*, hence declared unconstitutional, illegal, and *void ab initio*. The Court also nullified the notification which was issued by the Ministry of Law for the restoration and reappointment of the judges who hold office under the PCO No. 1 of 2007 and the Oath Order, 2007. The Court also admitted the fact that in the past it had wrongly validated extra constitutional actions of the military regimes as well as their interventions.

3. Critical Analysis

To conclude with, Pakistan's democratic transition has been facing challenges from the military and other nondemocratic forces. The judiciary, without realizing its impact on the democracy, validated military's extra constitutional actions at the expense of the civilian rule. The superior judiciary, while relying on the state necessity doctrine, enabled the military forces to entrench its authority not only in its direct rule, but also preserved and transformed its authority to govern the state during the civilian governments. In the preservation of its transformative authority, the military and its alliance influenced the judiciary by various means: appointment and removal, incentives, insecurity of person, office, property, and

family. In order to keep its direct control on the judiciary, the presidential form of government is relatively more favorable to the military. Nevertheless, with the validation of each extra constitutional action, the judiciary circumscribed the military's authority.

The judiciary has asserted certain measure of autonomy from the military. The Supreme Court in *State v. Dosso* had not imposed any restrictions on the regime's legislative authority and a successful revolution was declared is a basic law-creating factor. However, in *Nusrat Bhutto v. Chief of Army Staff*, the Court validated Zia's intervention on the pretext of state necessity, but simultaneously required the regime to take measures appropriate to the necessity. The Court further declared that the proposed arrangements should be temporary in nature, which is limited to the duration of exceptional situations. The Supreme Court in *Zafar Ali Shah v. Musharraf* case further narrowed down the scope of regime's authority. The Court validated Musharraf's takeover, but required elections within three years.

In this whole democratic transition, the judiciary's role remained very crucial: the judiciary validated extra constitutional military's actions but at the same time confined unbridled military's autocratic regimes, stood behind democratic government, and now shifting itself to another critical role of direct confrontation with Parliament. Keeping in view the trichotomy of powers envisaged by the Constitution, the state organs including the judiciary must adhere to its constitutional limits without encroaching upon the others' jurisdictional bounds, in order to keep the trichotomy of powers intact.

Notes & References

-
- ¹ Federation of Pakistan v. Moulvi Tameez-ud-Din, PLD 240 (FC 1955).
 - ² Ibid. p. 96.
 - ³ Usif Patel and Others v. the Crown, PLD 387 (FC 1955).
 - ⁴ Governor's Act, XXVIII of 1952.
 - ⁵ Ibid.
 - ⁶ Iram Khalid, "Role of Judiciary in the Evolvement of Democracy in Pakistan," *Journal of Political Studies* 19, no. 2 (2012): 128.
 - ⁷ State v. Dosso, PLD 533 (SC 1958).
 - ⁸ The Constitution of Pakistan, 1956.
 - ⁹ State v. Dosso, PLD 533 (SC 1958).
 - ¹⁰ Ibid.
 - ¹¹ Hamid Khan, "Constitutional and political history of Pakistan," (Oxford University Press, USA, 2005).
 - ¹² Iram Khalid, "Role of Judiciary in the Evolvement of Democracy in Pakistan," *Journal of Political Studies* 19, no. 2 (2012): 129-130.
 - ¹³ Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan, PLD 657 (SC 1977).
 - ¹⁴ Ibid.
 - ¹⁵ Ahmad Tariq v. Federation of Pakistan, PLD 646 (SC 1992).
 - ¹⁶ Federation of Pakistan v. Muhammad Saifullah Khan, PLD 166 (SC 1989).
 - ¹⁷ Seyed Zafar Ali Shah and others v. General Pervez Musharraf, PLD 869 (SC 2000).
 - ¹⁸ The Oath of Office (Judges) Order 2000.
 - ¹⁹ Muhammad Nasrullah Virk, "Doctrine of Necessity Application in Pakistan," vol. 2, issue 2 (2012): 86.
 - ²⁰ The Office (Judges) Order No. 1 of 2000.
 - ²¹ Ibid. 86-89.
 - ²² Tika Iqbal Muhammad Khan v. General Pervez Musharraf, Constitution Petition Nos.87 and 88 OF 2007, C.P.No.87/07.
 - ²³ Begum Nusrat Bhutto v. Chief of the Army Staff, PLD 657(SC 1977); Syed Zafar Ali Shah v. Pervez Musharraf, Chief Executive of Pakistan PLD 869(SC 2000).
 - ²⁴ Sindh High Court Bar Association v. Federation of Pakistan, PLD 879 (SC 2009).
 - ²⁵ Miss Asma Jilani v. Government of the Punjab and another, PLD 139 (SC 1972).
 - ²⁶ State v. Dosso, PLD 533 (SC 1958).
 - ²⁷ Miss Asma Jilani v. The Government of the Punjab and another, PLD 139 (SC 1972): 42-43.
 - ²⁸ Federation of Pakistan v. Muhammad Saifullah Khan, PLD 166 (SC 1989).
 - ²⁹ Muhammad Nawaz Sharif v. the President of Pakistan, PLD 43 (SC 1993).
 - ³⁰ Sindh High Court Bar Association v. Federation of Pakistan, PLD 879 (SC 2009).
 - ³¹ Federation of Pakistan v. Moulvi Tameez-ud-Din, PLD 240 (FC 1955).