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Executive Assaults on Supreme Court of Pakistan and Movement for Independent Judiciary: 2007-09

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Abstract

Pakistan, since independence, has become a laboratory for constitutional experiments, with the judiciary playing the most controversial role. Under the theory of necessity, the superior judiciary has legalized military takeovers. Although controversial as a judge of the Supreme Court of Pakistan, Iftikhar Muhammad Chaudhry was found to be a changed person the moment he took his seat as a Chief Justice of Pakistan. However, the situation was not conducive for any action that went against the will of the military ruler. But the Judge-Bench collaboration supported by the entire civil society initiated a movement to negate and nullify the dictates of a dictator. The movement led by the Black Coats community extended over years, bearing hardships of all kinds. The movement was successful in forcing General Musharraf to uphold the provisions of the constitution and rules of established law. The entire nation emerged victorious in upholding what is called the rule of law.

Key Words: Judiciary, Supreme Court, Chief Justice of Pakistan, Rule of Law, Army

Introduction

“Why should a judge be removed for an action which is legal under the constitution?” There are apprehensions of judges being dismissed because governments dislike what they lawfully say or do in democracies that are either fragile or in the state of development and has yet to find roots (ROBERTSON, 2013). This defines the situation the best in Pakistan when judiciary and executive arms of the state came eyeball to eyeball in the year 2007, making crisis like circumstances. However, it was not all of a sudden. It was for quite a while that the then President in uniform and Chief Justice had developed differences on a number of issues related, especially to the interpretation of constitutional provisions and matters of general public interests. In a final blow, on 9th March 2007, after years of powerful executive rule, General Musharraf made up his mind to send the Judge packing. The General called him into the army house and asked him to step down (Qureshi, 2009). But when Chaudhry Iftikhar, while asserting his authority, refused to resign, he was made hostage for five long hours. The President, while exercising his power under the constitution, then issued orders deposing the Chief Justice of Pakistan from his office by sending a reference to the Supreme Judicial Council on allegations of nepotism and misuse of authority (International Bar Association Human Rights Institute Report, 2007). However, since then, Iftikhar Muhammad Choudhry has become a brand name for the independence of the judiciary in a society where historically Judges-Generals have worked together for the repeated subversion of the country’s constitution as well as derailing the democratic process.

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Judicial independence, as often perceived, is neither an all-or-nothing concept nor an end in itself but maybe a mean to an end. It is a mean whose ultimate end is to ensure constitutional supremacy, the rule of law and democratic continuity in the country. During military rule, the judiciary has been hit hard in a way to make the judges subservient to the will of dictators so as not to allow them to work independently and impartially. However, the same even continues with the return of civilian rule in Pakistan, and a series of confrontations between Parliament and the Supreme Court on the one hand and executive and judiciary on the other has raised concerns that the same judiciary celebrated for challenging the military rule—while invoking exactly the same perceived notion of judicial independence—might now be asserting autonomy from weak civilian institutions is portrayed in a manner that it undermines Pakistan's efforts to consolidate its fragile democracy and constitutional supremacy (Kalhan, 2013). This can't be approved.

Importantly, democracy is about cooperation among the three pillars of the state, but troubles emerge when one institution tries to interfere in the other's domain to show its dominance. If such a situation happens to occur, extra responsibility falls over the shoulders of the judiciary, which has played a controversial role by making decisions contrary to the established norms of democracy. Pakistan constitutional history is witness to the fact that there are times when the judiciary has given approval to the high handedness of executive, mostly military executive, by trashing the norms of the established law of the land. The history here has no good lessons to teach.

Since its very inception as a nation-state in August 1947, Pakistan has had troubled constitutional memories (Blue, Hoffman, & Berg, 2008). Judiciary, being the protector and guarantor of the constitution, has never been found up to the task by legitimizing extra-constitutional adventures. Ironically, this judges-generals honeymoon since independence has given the later enough courage and confidence to do away with people's mandate and abrogate or suspend the constitution time and again in the name of bringing order into the society. Military takeover negates the rule of law. But what has hurt Pakistan's polity the most when the judiciary has legalized what has no place in the books of democracy and constitutionalism.

Judiciary and Military Rule: A History with Controversies

Earlier, when the struggle for supremacy started between executive authority and legislature, which assumed the form of conflict (Iqbal, 2001), the judiciary being the arbitrator, failed to come up to the popular expectations by making decisions contrary to the established law of the land. Pakistan was plunged into a Constitutional crisis in 1954 when the Governor-General dissolved the Constituent Assembly. This first major subversion of the constitutional process was challenged before the Sindh High Court. The court, after hearing the case, declared the dissolution to be illegal and unconstitutional. The reason recorded by the bench says that the Constituent Assembly was an independent body aimed at making a constitution for the country and could not be dissolved so long as that objective is not met (Choudhury, 1959). The decision of the Sindh High Court was challenged in the Federal Court, which overruled the decision of the former and validated the dissolution of the assembly in the Moulvi Tamizuddin Khan case (1955) (Blue, Hoffman, & Berg, 2008). One is surprised over the decision of the last court of appeal as to what legal and constitutional ground could be provided for a decision that subsequently guided the constitutional and judicial proceedings of the country.

The first constitution of the country enacted in March 1956 remained intact for almost two years when it was abrogated through the first military takeover in October 1958. The validity of this action was challenged in the apex court of the country. The Supreme Court of Pakistan, headed by Justice Muhammad Munir, delivered a judgment on 27th October 1958, legalizing Ayub Khan's proclamation of martial law on the pretext that a victorious revolution was an internationally recognized method of changing a legal order (Iqbal, 2001). The decision made is perhaps the most controversial of all, given the legal reason cited for the martial law. A country's legal matters are guided by what is stated in the constitutional provisions, which take precedence over any other law, be that regional or international. Unfortunately, the country which

had come into being to nourish democratic ideals was converted into autocracy soon, and the judiciary carries the burden of blame for helping it happen so. The foundation stone had been laid for more extra-constitutional evils to unfold.

Asma Jelani, a human right activist, challenged Yahya Khan's martial law in the Supreme Court of Pakistan. The learned court declared the martial law to be illegal and dubbed the Chief Martial Law Administrator as a usurper. The court went further by stating that earlier Kelsenian Theory had been wrongly applied; that no valid law comes into force from the foul breath or smeared pen of a person guilty of treason against the national order. Ironically since then, the superior judiciary has legitimized Zia ul Haq July 1977's and Parvaiz Musharraf October 1999's martial laws under the theory of the state of necessity besides empowering them to go on with amending even the constitution of Pakistan. This was no omen for democratic institutions standing on fragile foundations. However, one must not forget the prevalent peculiar political parameters of that particular era courts were working in to understand the rationale of these decisions properly. The judges were well aware that an opinion that ran contrary to the interest of the establishment would not be acceptable. If they delivered a judgment that was not likely to be implemented, its defiance would be detrimental to the prestige of the judiciary (Iqbal, 2001). The absence of organized public opinion and vigilant press further strengthened these apprehensions in judges' minds.

The judiciary in Pakistan is the creature of the constitution. Whenever Pakistan has been ruled by the constitution with executive authority in the hands of the civilian head of the government, the judiciary as an institution has been prompt to uphold the supremacy of the constitution and the rule of law. A series of judgments passed by the Supreme Court upholding the right of political parties to participate in the elections, removal of the restriction imposed on the allocation of a common election symbol to candidates of a political party, besides ensuring the separation of Judiciary from Executive are worth mentioning here. These judgments paved the way for the successful working of a parliamentary form of democracy in the country. These were followed by judgments in Nawaz Sharif's case and the Judges 'case, which are watersheds in the judicial history of Pakistan. With these judgments, the constitutional role of the judiciary has been institutionalized (Iqbal, 2001).

2007-09: Years of Controversies

However, favours given to military executives from time to time at the cost of judicial independence made the former strong enough to feel unbridled, and it was now time to make onslaughts on the judiciary. However, unlike in the past, the superior judiciary was acting on its own. Exercising his authority under article 209 of the 1973 constitution (Khalid, 2012), the General turned President sent a reference to the Supreme Judicial Council in order to get rid of the non-conformist Iftkhar Chaudhry. The defunct Chief Justice was alleged to misuse authority for personal benefits and gains. He was in the first instance accused of inducting his son, a veterinary doctor by profession, into police services of Pakistan (Hamid, 2007). It was alleged that the transaction would never have been possible had his father not been a chief justice and if he had not exerted his official position to make this induction happen. However, the matter is not that much simple. There is a background extended over many years to what may be dubbed as executive-judiciary confrontation. This confrontation left lasting effects on the political as well as legal landscape of the country.

Though judicial activism has been one of Pakistan's judicial system's prominent features for more than half a century, under Iftkhar Chaudhry, it became more and more active in making interference in the executive domain of responsibilities. Under the guise of *Suo moto* power as provided by the 1973 constitution, the Supreme Court started hearing litigations that involved matters related to the public interest (Khan, Fakhrul, & Rizvi, 2013). However, it was two cases that drew the line between the executive led by the man in uniform and the Supreme Court led by Iftkhar Chaudhry. In the first instance, the Supreme Court of Pakistan nullified the sale of steel mill in 2006, alleging that the government headed by Shaukat

Aziz had approved the underpriced sale of the national asset (Qureshi, 2009). In other words, the government was accused of corruption and nepotism, and the Supreme Court thought it as its national responsibility to act proactively, not to allow the government to sell what was once a profitable national enterprise.

In yet another case, the Supreme Court started hearing the petition filed by the Human Rights Commission, seeking the recovery of missing persons. Since Pakistan joining the American led war against terror after 9/11, certain national intelligence agencies had been accused of abducting and disappearing people, especially from Baluchistan and Khyber Pakhtunkhwa. Often these missing persons were found dead, and their corpses returned to their family members. Even the Chief Justice summoned the heads of these intelligence agencies into the courtroom, questioned them for their illegalities and asked them to find a solution to the long-standing issue. The matter, of course, was of a very serious nature and the intelligence services in the country wanted no institution, including the judiciary, to take up the issue and discuss it openly in the court. However, Chaudhry was adamant and wanted the issue to be to deal with as per law. Such a situation was certain to create ill-feelings between the government led by a man in uniform and the Supreme Court. Given such a scenario, the government could no longer afford the Supreme Court to be working under the Chief Justiceship of a man who didn't make any compromise over the rule of law.

On March 9, 2007, as already noted, Musharraf summoned Chief Justice Chaudhry to his office and effectively dismissed him for alleged "misuse of office (Khan, Fakhru, & Rizvi, 2013). This was the worst of all actions taken ever by a military government. Through his popular decisions, Iftikhar Chaudhry had already won much of the public goodwill to his credit. Everywhere if the government was found short of performing to the expectations of the people, the Supreme Court interfered with filling the vacuum. Under the Public Interest Litigation, the apex court had taken up cases purely falling in the executive's domain of authority as the later had been found short of any real response to the genuine grievances of the masses. In most of these cases, even the victims had been compensated by the judiciary one way or the other besides exposing serious loopholes and weaknesses in the governmental mechanism. Without caring for the legal aspects of these cases, the overall impact of such petitions was quite positive on people's minds. Moreover, the mishandling of CJP and mishandling of the emerging constitutional crisis by executive authorities worked to the advantage of Iftikhar Choudhry, making his case stronger against the government and raising his stature in people's eyes.

As the situation worsened, things started unfolding in a different direction. Over the years, people had hardly cared about any unconstitutional and unlawful act of the ruling junta. Resultantly, the executive had found it easy even to do away with the constitution of the country and scrape it without any hindrance. However, with the emergence of Iftikhar Muhammad Chaudhry as the Chief Justice of Pakistan, people's perception of the judicial system had changed. They were now more aware and vigilant of what is right and what is wrong as far as constitutional provisions and obligations were concerned. People in large number poured into the streets of the country in support of the CJP. They demanded the immediate restoration of the Chief Justice to ensure the restoration of the rule of law. Although lawyers in black coats played the most dominant role in the movement to bring constitutionalism back into the country, there is no denying the fact that every member of the society contributed more than what he was asked to. The solidarity showed by civil society further added to the courage of the judges on the bench.

On 8th May 2007, a thirteen-member bench of the Supreme Court headed by Justice Khalil ur Rahman Ramday stayed the proceedings before the Supreme Judicial Council on a petition moved by Iftikhar Choudhry. The hearing commenced on May 15, 2007, and concluded on July 20, 2007 (Hamid, 2007). President Parvaiz Musharraf lost the legal battlefield when the Supreme Court declared Choudhry's dismissal as unconstitutional. Ten out of thirteen Judges of the bench called for Choudhry's reinstatement (Qureshi, 2009). The four months-long popular movement led by the black coats community helped in having its judicial independence restored. The judgment nevertheless proved imputes for democratic

culture to take roots and restored people's confidence in the judicial organ of the state. Above all, the rule of law prevailed over autocracy.

But it was not yet over as crisis of far bigger magnitude were in the offing, for the newly born independent judiciary positioned itself to uphold constitutional supremacy. Parvez Musharraf's next challenge was to be elected as President of Pakistan. The difficulty lay not in the votes but in the Constitution (Qureshi, 2009). The opposition parties challenged Musharraf's running for the presidency once more in the Supreme Court of Pakistan on the ground that it was unconstitutional for the Army Chief to hold a civilian office whatsoever simultaneously.

The Supreme Court's reaction to Musharraf's candidacy for and re-election to the presidency in 2007 was the culmination of the continuous battles with the judiciary. By now, Choudhry had made his impact; the Supreme Court had already shown that it was willing to continue challenging the executive, and the legal community had poured into the streets to support judicial independence (Qureshi, 2009). However, Musharraf vowed to resign his military commission following re-election, but he would become even more politically vulnerable as a civilian president (Kronstadt, 2007). The General won the presidential elections on 6th October 2007, but the Election Commission of Pakistan's notification of election result was subject to the Writ Petition pending in the Apex Court. In a pre-emptive move, a state of emergency was declared on November 3, 2007, by General Musharraf, perhaps fearing an unfavourable verdict on the holding of the dual office, thus sending the entire judiciary home (Abbas & Jasam, 2009).

Going through the text of Presidential Order, President Parvaiz Musharraf quoted two reasons for the imposition of emergency. First, the country was subject to worsening law and order situation, and every day there could be seen attacks on government installations. Terrorist activities were on the rise, giving the President a strong reason to impose an emergency. Second, General Musharraf categorically blamed the judiciary for working at cross purposes with the executive and parliament. The apex court interfered in the affairs of other institutions, weakening governmental resolve to curb terrorism and extremism besides seriously damaging economic activities in the country. In such a situation, General Parvaiz Musharraf, in his capacity as President, proclaimed an emergency throughout the country, putting the 1973 constitution in abeyance (Dawn Newspaper, 2007). The judges of the apex courts were asked to take fresh oath under the PCO.

Data and facts reveal very different but interesting realities about what happened afterwards. Unlike the other martial laws imposed in the past, forty-three judges from apex courts, including both from Supreme Court and High Courts, refused to take oath under the Provisional Constitutional Order of President Musharraf in 2007. What is more interesting is that unlike the martial laws imposed in 1958, 1969, 1977 and 1999, a mass mobilization emerged at the grass-root level to resist the imposition of emergency. The most active role was played by those in black coats who led the movement from the front. For the first time in the short history of Pakistan, people could be seen coming out in large for the cause of democracy and the rule of law. The resistance movement right from the very outset started bearing fruits, and one could see many good things happening. The first thing that was so encouraging to know is the fact that this was the shortest martial law in the country that lasted for only forty-three days (Khan, Fakhrul, & Rizvi, 2013). Secondly, Musharraf had to take off the uniform in the face of massive public resistance and gave way to a democratic dispensation.

The movement for the restoration of the judiciary bears particular importance in the history of judicial and constitutional re-making of Pakistan. When a principled stand is taken, the nation unites to face the evil forces in the midst of the dark. Leading from the front, Iftakhar Chaudhry gave new direction and zeal to a community that traditionally had no respect for the rule of law and constitutionalism. Every person, whether young or old, male or female, literate or illiterate, came out in solidarity with the deposed chief justice. As time went on, the movement spread to every corner of the country, tightening screws on the government. At the other end, in GHQ, another five years of Musharraf's "military" presidency did not have a strong

constituency in a military officer corps already demoralized by fighting “Washington’s” unpopular anti-terror war on its own soil. Jealously protective of its institutional prestige and respect, now sullied by its close alliance with a detested and degraded military ruler who had become controversial in the eyes of people, the military as an institution withheld its active support from Musharraf (Shah, 2013). As usual, the popular uprising was making its way.

The PPP led coalition Government, formed in the aftermath of the 2008 elections refusal to restore Judges, stunned everyone with a surprise. The new President, Asif Ali Zardari, delayed reinstating the judges, perhaps out of fear that Choudhry would declare unconstitutional the National Reconciliation Ordinance (NRO), an executive order issued by General Musharraf in 2007 that gave Asif Ali Zardari and others immunity from corruption charges (Berkman, 2010). The situation took a dramatic turn when the Supreme Court declared the Sharif brothers ineligible to run for any public office. In response, the lawyers planned a massive protest in cooperation with Sharif and a number of opposition parties, promising to stage a sit-in in the capital until Choudhry was restored (Berkman, 2010). At last, the government succumbed to the public pressure, and Iftikhar Muhammad Choudhry, along with other deposed judges, were restored on 21st March 2009. And the rule of law made its way through years of executive judiciary confrontation.

Conclusion

Over the years, rather since independence, Pakistan’s judiciary has faced assaults from the executive, including civilian leadership, from time to time. Those in the government have employed different tactics to make the superior courts subservient to the executive head of the government and so influence their decisions. There is no denying the fact that in the process, even the judges have made decisions not covered by the constitution or other legal provisions to secure offices, get additional benefits and avoid any confrontation with the powerful offices at the cost of judicial independence. In the long run, this has caused greater damage to the reputation and independence of the judiciary. However, this time things took a better turn in the opposite direction, and the judiciary decided not to compromise its institutional integrity, independence and constitutional supremacy. Much credit goes to the black coat lawyers who led the movement from the front. The lawyer movement for the restoration of an independent judiciary as envisaged by the constitution of 1973 went through every test of time. However, that’s not the end, and judges would be tested for the responsibility put on their shoulder to ensure that they work within their constitutional limits. Given the governance issues in Pakistan, people’s expectations from the independent judiciary have gone up. They want the judiciary now to be more responsible in terms of constitutionalism and responsive where they traditionally have been found wanting. Their role today is more vital than other democracies around the world.

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