

Role of Judiciary in the Evolvement of Democracy in Pakistan

Iram Khalid*

Abstract

In the case of Pakistan, the judiciary failed to check an extra constitutional regime change. This practice has questioned the judicial independence as well as weakened the confidence of the institution. Technical steps, legislative corrections and reforms cannot revise the role of judiciary. It needs credible commitment by the government to respect the rule of law, a transparent system of judicial appointments and to ensure that judicial decisions at all levels may be practiced. The present research focuses on (i) the constitutional and political experiences of Pakistan's struggle for democracy (ii) to link the stability of the political system with the judiciary will further create certain debatable issues? The research will conclude that a more comprehensive and coherent policy is needed to tackle this technical as well as political issue. For the survival of democracy and stability of the political system it is important that all the institutions must remain in their described limitations. This strategy will avoid any further bumpy ride of Pakistan's political journey.

Key Words: Judicial activism, Democratic evolvement, Rule of law, Role of military, legitimate rule, Democracy.

Introduction:

Democracy is conditional in its nature. The principles of rule of law are the basic substance of democracy. Rule of law includes supremacy of constitution, equality before the law and civil liberties. Democracy is of course the best form of government. The superiority of democracy to the other systems of government lies in the principle of separation of powers and the corresponding checks and balances that the three arms of government exercise over one another (Parry & Mora, 1994; Hague & Harrop, 2001). Pakistan's experience with democracy is not a success story. Lack of performance by the elected institutions gave the opportunity to the state institution to intervene in politics. The strained civil military relations have critical implications for the civilian governments. The strength of the political leaders or the political government is rooted in popular support which only comes through the performance. When this factor is lacking then non-representative institutions find the gape and took the control. In this scenario judiciary failed to check an extra constitutional regime change in the case of Pakistan (Sayeed, 1983: 90-96; Callard, 1968: 95-100).

* Author is Associate Professor of Political Science Department, University of the Punjab, Lahore.

In such a grim scenario role of judiciary has also not been solid. As a matter of fact Pakistan is one of the glaring examples of non consolidated democracies. The history of democracy in Pakistan has created the institutional inabilities, so the state is still countering with the structural inabilities. It is only because of this that army got open opportunities to usurp power and dismantle the basis of democracy. Army has always been in quest of legitimacy and judiciary has fulfilled this requirement very often. It is observed that Judiciary has momentous role in the course of democratization. This state institution can do commendable service in building up a democratic society. Indeed it is predestined for the success of democracy. Thus, for this purpose it should work as a free institution which has its own network as far as rules and regulations are concerned and work without any pressures by government as well as from any other institution¹. In case of our country this has never come true. In order to get a clear picture of the issue under discussion it is essential to assess minutely the working of judiciary and to analyze few significant cases. Under both civil and military rule judiciary kept on working under several notions and requirements. Pakistan's security profile has strong implications over the democratic and institutional development. In such a scenario role of judiciary has never been the simple one. There have been several issues and impacts to be catered and compromised. That is why when course of democracy is assessed all these factors are kept in view that have shaped the mode of institutions and line of harmony standing in between the institutions (Yusuf, 1998: 31-68; Mahmud, 1990: 17-22).

Impact of Judiciary on Democratic Evolvement

Civil government initiated the history of democracy in Pakistan. It was an elected assembly that continued the democratic rule in Pakistan in 1947. The task before that constituent assembly was immense. It was destined to set trends and democratic values. It was its task to shape the future institutions. Unfortunately this significant task was undermined by several personal interests, lack of consensus and some prevailing security issues and economic pressures. It is interesting enough to observe that it during this era it was judiciary that gave protection to the undemocratic moves of the governor general and then military rule. On the other hand the allegation is reversed. It observed on the part of judiciary that it has to face pressures at the hands of executive and military rules. Justice Qazi Muhammad Jamil is of the view; the judiciary cannot fight the dictators. We require strong Political Institution which are lacking in the country.

Geoffery K. Roberts opines that "judiciary is the branch of government and administered by the executive branch, in cases where dispute arises as to meaning, validity or supposed branch of such laws" (1971: 61). Judiciary is the guardian of the mass liberties and rights. Its independence is one of the essentials of democracy. It because of such significance H. Rahman asserts that. "Nothing touches the welfare and security of the citizen more than the judiciary. No mass, therefore, can over-estimate the importance of the

Role of Judiciary in the Evolvement of Democracy in Pakistan

mechanism of justice” (Rahman, 1958: 189). Moreover The Universal declaration of human rights Art.10 and the international covenant on civil and political rights Art.14 (1) proclaim that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. An independent judiciary is indispensable to the implementation of this right. Simply stated, judicial independence is the ability of a judge to decide a matter from pressure or inducements. Additionally, the institution of the judiciary as a whole must also be independent by being separate from government and other concentrations of power. There are several hurdles in the way of an independent judiciary. A very tactful control is required when there is question of the control of army by judicial means. A mature political system must possess maturity. It is only because of this maturity there can emerge the virtue of accommodation, acceptance, flexibility, transparency and accountability. In the institution like army there is required sound process of socialization that can be helpful in making it accept the supremacy of civilian institutions.

Democracy in Pakistan has passed through several ebbs and flows. There are numerous factors responsible for it. Currently it will be assessed that how military and judiciary have halted the course of democracy. The constitutional history of Pakistan is not smooth and sound. The first constitution was passed in 1956. Prior to this constitution the country was being governed under the amended act of 1935. Governor General under this act had acquired autocratic powers. It because of this fact that whenever there emerged any Constitutional crisis, the superior judiciary has been asked to play its leading role for resolving it. The court's judgment in such Constitutional cases was with far reaching effects. It can be easily observed that the court's decision proved to be with long reaching effects on stability and instability for democracy and Constitutional Assemblies (Aziz, 2009: 33-46; Cohen, 2012: 1-69).

Role of Judiciary in Crisis Management in Pakistan Politics (Study of Some Cases)

First Era 1947- 1958

The first case that actually has cast its shadow over the years of democratic evolvement came forth on 24th October, 1954. Governor General, Ghulam Muhammad dissolved the first constituent assembly by deeming it that it had lost the confidence of masses and unable to work accurately. The speaker of that very assembly, Maulvi Tamizuddin Khan filed a petition against the action of, Ghulam Muhammad to dissolve the constituent assembly. The Sindh Chief Court issue a writ of mandamus to the appellants and order for the restoration of it by equating its dissolution as illegal. The Governor General than filed an appeal before the federal court against the verdict of Sindh high court that it had no jurisdiction to issue writs under Article 223A. The court decided in favour of Ghulam Muhammad and set aside the

decision of Sindh Chief Court by alleging that it did not have a jurisdiction to issue writs, as the bill for this did not received the assent of Governor General (Ahmad, 2009: 80-120).

Validation of the dissolution of assembly by the court set a sorry precedent in the parliamentary history of Pakistan. This decision generated political instability which proved disastrous for the future of democratization. Judiciary stood up as a hurdle in the way of democracy after such a decision. It was such decision which made the situation a complex one. In fact it was this judgment which affected the prestige and credibility in the eyes of common masses. Not only this but this decision gave rise to other issues regarding powers and privileges of Governor General and nature of the laws passed by the Assembly.

As a result "*Usif Patel and other VS Crown,*" was presented before the court. This case was the result aforesaid case. The core issue was regarding the validity of "*Section 92-A*" of the government of India Act, 1935. It was argued that the insertion of any section into India Act, 1935 would be invalid without the assent of Governor General, as was held in Maulvi Tamizuddin Khan Case. They demanded for their liberty by deeming it under that law which had not took the assent of Governor General. The court upheld the detention of petitioners as illegal and set the appellants at liberty. An emphasis was also laid that the Governor General could not substitute the constituent assembly, therefore, it was asked for the immediate need to form another representative body, so that invalid legislation could be validated (Sayeed, 1980: 90-100).

The after effects of this case made the situation worse. It ignited a set of litigations challenging a number of governmental actions. As far democratization is concerned it played a positive and conducive role. For instance, it was because of court's verdict that bound's the Governor General not to concentrate all powers to himself rather court induces him to form constituent assembly of elected representative. Therefore, it can be alleged that by this the Federal Court took a bold decision and played its constructive role for the sake of democracy. It kept the then Governor General within certain limits, as he was intended to formulate a Constitution of even his own desires. That's why it goes in the favour of establishment of democracy and curtailment of the powers of the then Governor-General. Governor general, in response, made a reference before the Federal Court under section 213 of India Act. He invoked various questions before the superior court to seek its vantage point. The apex court relied on the "*Doctrine of State Necessity*" in order to avert the legal and political gap. That was how doctrine of state necessity crop up in the Constitutional and Political History of Pakistan. Unfortunately after this, the country could not relinquish this doctrine of state necessity for giving validity to what was illegal. In later course of time this allures the future politicians and power seeker to use it as a pretext for taking extra-constitutional steps. Although it was correct that the situation very grave yet it ignited a question in one's

Role of Judiciary in the Evolvement of Democracy in Pakistan

mind that was it the outcome of Federal Court's verdict in Maulvi Tamizuddin Khan Case which created this complexity. The very answer can be in positive that there was something wrong in aforesaid verdict which give rise to further complexities.

The first constitution was promulgated in 1956. It suggested parliamentary form of government and ensure freedom to judiciary. It was being expected that the democracy will take roots in the country. Unfortunately high handedness of executive and legislature made situation worse. Judiciary is regarded as the guardian of constitution but in this grim scenario it came up as a weak institution which could not curb the acts of violation of constitution.

Second Era 1958- 1973

The constitution of 1956 could not survive for long and on October 7, 1958 the Martial Law was proclaimed. Assemblies that were set up under the constitution of 1956 were dissolved and Mr. Ayub Khan took the office as Chief Martial Law Administrator. It was first military intervention which set a sorry precedent for the future army take over. The validity of the imposition of Martial Law was challenged in a Constitutional Case entitled, *The State Vs Dosso and Others*. The core issue before the court was about the validity of the Law Continuance in Force Order, 1958. They strongly asserted that their appeals should be decided according to 1956 Constitution. In fact by this they challenge the validity of Martial Law. It was such a unique situation with which the court was having to experience. The apex court validated this very imposition of Martial Law under, Kelson's Pure Theory of Law. The apex court allege that the victorious revolution or successful coup de'E'tat is an internationally recognized legal method of changing a Constitution. After a change of that character as has taken place, the national legal order must depend for its validity upon the new law creating organ. It further stated that even court lose their existing jurisdiction and can function only to an extent and in a manner determined by new Constitution (Khan, 2003: 200-250).

As far as role of judiciary in the promotion and development of democracy is concerned, pronouncement in Dosso Case did not promote the establishment and upholding of democratic institutions. President Ayub abrogated the Constitution of 1956. Instead he introduced a new concept of '*Basic Democracy*' which cannot be stated as substitute to the National and Provincial assemblies. As such that system opened the door for one man government and source of all powers. At this point of history, one can argue that if the court subs the military take over on the very first time the situation of the country might have been different. It can be asserted that the role of this verdict was appeared to be of a long reach, it showed a way to those who acquired a chance to intervene. The role of judiciary to validate the imposition was not according to the demands as required for democratization. The other side of the issue asserts that Dosso case play its part in the prevailing conditions. If this case was decided on merit of justice,

there might start an unending tussle between executive and judiciary. For this situation they ascribed this doctrine of necessity as appropriate. Whatsoever the justifications it remained intact that this doctrine for validation of military takeover was not substantial when one carefully took the analysis of this court's verdict. However the fact remains intact that it became difficult for the country to depart from this doctrine. Consequently, Pakistan has to face Martial Law again and again.

Now the country was under 1962 constitution which was presidential in nature. Basic democracy system never proved a true substitute of genuine democracy. The end result was chaos and a strong public demand for democratic change. Again the result was imposition of Martial Law and abrogation of 1962's Constitution in 1969. It finished even a little bit democracy and the country again reach on the verge of uncertainty. Public, quite naturally looked up judiciary again for salvation. This very imposition of martial was challenged in a Constitutional Case entitled, Miss Asma Jilani Vs the Government of the Punjab and Another, gave a high position to the judiciary to play its decisive role for democratization. In this case the handing over of power to Yahya Khan by Mr. Ayub Khan was declared illegal. It was also decided that all the legal and administrative measures taken by this unauthorized and unconstitutional regime cannot be upheld and the basis of legitimacy. Moreover, the court used a power of judicial review and overruled the courts' verdict in Dosso Case and condones doctrine of state necessity (Khan, 2003).

This case is of great significance. One thing is worth mentioning that this case was decided when Yahya Khan was not in power. After this case Mr. Zulfikar Ali Bhutto 1st Civil Martial Law Administrator removed the Martial Law from the country and allowed the selected assemblies to function. As such the country moved again on the road of democracy after fourteen years of dictatorship. The decision in Asma Jilani case brought back the country to the road of democracy after a long period of dictatorship. In these two eras, it can be observed that judiciary followed the political power trends instead of following the natural trends of judiciary. Now as is described earlier, the role of judiciary as guardian of constitution and democracy did not emerged in case of Pakistan. As far as executive is concerned, it has also not played a mature and responsible role for the promotion of democracy. Insufficient and incapable executive provided chances to army to intervene in the sphere of political power. All these factors get together and undermined the growth and evolvement of democracy.

Third Era 1973 to date

In this era role of judiciary will be assessed under both army and civil administrations. There two army take over (1977 and 1999) and six civilian administrations (Junejo administration, three PPP and two PML-N administrations). The constitution of 1973 is one the great achievement of the democratic government. This constitution is based on consensus. This

Role of Judiciary in the Evolvement of Democracy in Pakistan

constitution just after a short while of promulgation introduced many amendments. These amendments gave executive superiority over judiciary. In order to further avoid the military intervention and 'Article 6' was inserted in 1973 Constitution. In spite of all these precautionary measures there was again the imposition of Martial Law in 1977 (Khan, 2003). Overwhelmingly powerful executive brought the tinge of autocracy and the balance maintained by the separation of power in a pure democracy vanished very soon.

This take over was also challenged in court in Constitutional case entitled, *Begum Nusrat Bhutto Vs Chief of Army Staff and Another*. On 7th July 1977, General Zia-ul-Haq came into power as the chief Martial Administrator after removing the Government of Zulfiqar Ali Bhutto. He suspended the Constitution of 1973 instead of its abrogation after having consultation with the then Chief Justice of the Supreme Court of Pakistan. As Mr. Zulfiqar Ali Bhutto was arrested, therefore, Begum Nusrat Bhutto assumed the leadership of PPP. She submitted a petition before the Supreme Court of Pakistan against imposition of Martial Law and detention of Mr. Zulfiqar Ali Bhutto in aforementioned case. In this case different Constitutional points were discussed in detail regarding the enforcement of Martial Law. Ultimately the Superior Court dismissed the Constitutional petition filed by Begum Nusrat Bhutto by deeming it no-maintainable, relying on the Doctrine of State Necessity. It was stated that the circumstances were so serious after the movement launched by PNA against Mr. Zulfiqar Ali Bhutto that military intervention became necessary to save the country from such critical situation. By this *Doctrine of State Necessity* once again invoked to validate this very imposition of Martial Law.

The conclusion of this case derailed democracy for more than a decade. It was such decision which played its negative role while providing a blanket cover to imposition of Martial Law. Again it was army that utilized the opportunity created by the malfunctioning of executive and judiciary provided protection to this decision. While commenting on the role of judiciary and military one cannot turn a blind eye to the insufficiencies of executive. As is the case of the evolvement of democracy, nothing can be ignored that halted the way of democracy. It was always some insufficiency, malfunctioning or autocracy of executive that created chances for army intervention.

On October 12th, 1999 there was again military take over and ousted the civil government. The military intervention in this case again challenged before the superior court in Constitutional case entitled, "Zafar Ali Shah and General Pervaz Musharaf Chief Executive of Pakistan". In this case the Doctrine of State Necessity was invoked again to justify the military intervention. However, the restrictions were imposed that General Elections should be held within three years and transferred the power to the elected representatives of the masses. It was also ordered that the salient features of the Constitution of 1973 would not be changed by utilizing any tactics.

An overview: Role of Judiciary and its Impacts (1947-1977

| Sr. # | Name of the Case | Main Issue | Decision | Role & Impacts |
|--------------|--------------------------------|--|--|-----------------------------|
| 1 | Maulvi Tamizuddin Khan Case. | Dissolution of Assembly. | Decided in favour of Government. | Negative |
| 2 | Usif Patel's Case. | Consent of Governor General essential or not for the sanction of the Bill. | Consent is necessary for the approval of every Bill. | Both positive and Negative. |
| 3 | Reference by Governor General. | Court Opine about the Legislative Powers of Governor Genera. | Retrospective effect was given to laws. | Both Positive and Negative. |
| 4 | Dosso Case. | Imposition of Martial Law is valid or not. | Decided in favour of Government. | Prevailing was Negative. |
| 5 | Asma Jilani's Case. | Imposition of Martial Law is valid or not. | Decided in favour of Government. | Both Positive and Negative. |

Role of Army and Judiciary under 1973 Constitution

The preambles of all regular constitutions of Pakistan (1956, 1962 and 1973) assign sovereignty all over the universe to God Almighty. The people exercise this authority as a sacred trust within the limits prescribed by Him. This exercise of power and authority is to be done through the chosen representatives (Rizvi, 2012).

This means that authority and power of the state is located in the elected parliament, making it the salient institution as compared to the bureaucracy, the military and the judiciary, although these institutions have their domains of authority under the constitution and law (Rizvi, 2012). Army take over is much criticized for the denouncement of democracy but here there are some grim examples under civilian rules which cause degeneration in development of democratic values in the country. Political stability is an essential ingredient for democratization. Unfortunately the political institutions could not be flourished due to dissolution of assemblies repeatedly. After the enforcement of 1973 Constitution there was only Bhutto government that

Role of Judiciary in the Evolvement of Democracy in Pakistan

could complete its tenure. The Constitutional petitions were filed before the Supreme Court of Pakistan at the time of every dissolution of assembly in the pray to restore them. However the common charged for dissolution of assemblies were corruption, hors-trading and nepotism etc.

Interestingly enough General Zia-ul-Haq being the CMLA and President of Pakistan get the Article 58(2) (b) passed by the Junejo assembly and acquired protection to all presidential ordinances passed subsequent to this article. This power was used for the 1st time under said Article by Mr. Zia against the same assembly when it was dissolved in 1988 (Khan, 2003: 200-250). The validity of dissolution of this very assembly was too challenged before the Superior Courts in the case entitled, "Federation of Pakistan Vs Hajji Muhammad Saif Ullah Khan". The court gave the verdict that although the dissolution of assembly was unconstitutional and illegal yet as the schedule of elections had been announced, therefore assembly could not be restored. Add to it, the court equated the dissolved as dead one that could be not given life again. This verdict of court was also challenged before the Supreme Court of Pakistan. The apex court after scrutinizing it upheld the order the Lahore High Court's verdict. A question which inspire one's mind whether judiciary declare the dissolution of assembly as unconstitutional if the same petition filed in the life of Mr. Zia or not? Moreover, was the court's denial to grant relief undermine the very spirit to declare dissolution as unconstitutional? In spite of these question the overall impact and role of judiciary towards democratization was positive and constructive.

Article 58 (2) (b) proved fatal for all elected assemblies. Under the same article The National Assembly headed by Miss Benazir was again dissolved by the President Ghulam Ishaq Khan. This order of the dissolution of assembly was challenged by Khawaja Ahmed Tariq Rahim before the Lahore High Court. A full bench of Lahore High Court upheld the order of dissolution of assembly by the then President after taking into considerations the background of whole case and the contentions. An appeal was then filed before the apex court in the case entitled "Khawaja Tariq Rahim Vs Federation of Pakistan". This appeal was heard by full bench and announced its verdict on 1st November 1991. In its verdict The Supreme Court upheld decision taken by the Lahore High and dismissed the petitions. Although the court justified the circumstances under which the National Assembly headed by Miss Benazir Bhutto was dissolved yet it created instability for the democratic institutions.

In 1993 Nawaz Sharif administration came in power. This assembly was too dissolved in 1993 by the then President Mr. Ghulam Ishaq Khan under Article 58(2) (b) of the Constitution. The order of dissolution of assembly was directly challenged by Mr. Nawaz Sharif under Art 184 (3) of the Constitution before the Supreme Court of Pakistan entitled the case "Nawaz Sharif Vs Federation of Pakistan". The court restored the National Assembly on the grounds that were no such critical circumstances under which assembly could be dissolved. It was pointed out that other remedial measures could be

taken to resolve the issue instead of dissolution of assembly. The court's verdict in Nawaz Sharif Case is one of the most pivotal landmark, unprecedented and having magnificent place in the political and legal circle of Pakistan. This decision was a ray of hope for the revival of democracy in Pakistan. It was deemed as a check on the powers of President of dissolve the assemblies without solid grounds. The role of this judgment was positive and an attempt on the part of judiciary to contribute its services for democratization. However it was irony of fate that such circumstances were created after the restoration of National Assembly that Mr. Nawaz Sharif the then Prime Minister had to resign even within two months.

Benazir's second administration in 1993 faced the same fate and assembly was once again dissolved by Mr. Farooq Ahmed Laghari the then President under 'Article' Article 58(2) (b)' of the Constitution. The main allegations were worst law and order situation, corruption, mal practices, misuse and wastage of public fund etc (Bhutto, 2007: 140-150).

The dissolution of aforementioned assembly too challenged before the apex court in the case entitled, "Benazir Bhutto Vs President of Pakistan". The Supreme Court of Pakistan in the decision on 29th January 1996 was upheld the order of dissolution of assembly and dismissed the petitions whereas Zia Mahmood Mirza was the sole dissenter and gave his opine to restore the dissolved assembly. The impact of this decision was again resulted into instability of democratic institutions. It was deemed inside and outside the country that no assembly can complete its legal duration and always remain under the threat of dissolution under 'Article 58(2) (b)' of the Constitution, it was opined by the politicians and legal experts that powers under 'Article 58(2) (b)' might be withdrawn for the stability of democratic institutions. It is tragic to assert that the role of this judgment did not prove effective for democratization rather negative and unappreciable.

Nawaz Sharif's second term started in 1997. Again this administration has to face the wrath of army. In 1999 General Musharraf had taken the charge. Immediately after the military's takeover of power in 1999 Proclamation of Emergency was declared, the constitution was put in abeyance. President issued Provisional Constitutional Order (PCO) to provide a temporary governing framework. With this arrangement General Musharraf assumed the office of the Chief Executive (Ahmed, 2010: 1-6; Qureshi, 2003: 153-160).

Judges were forced to take new oath of the office under PCO. This action was taken as result of Supreme Court's challenge to military coup in January 2000. Supreme Court judges posed defiance to this act.

Six out of a total of thirteen judges of the Supreme Court refused to take the oath and resigned from the bench, including then Chief Justice Saeduzzaman Siddiqui and Justice (R) Wajih-ud-Din Ahmad. The court granted virtually unlimited powers to the military regime, including the power

Role of Judiciary in the Evolvement of Democracy in Pakistan

to amend the constitution. In the Pakistan Lawyers Forum case (2005) the Supreme Court validated both the Seventeenth Amendment and the PHAA, based on an extension of the doctrine of state necessity. In legitimizing the power of the military and executive over the Parliament, this case further strengthened the popular perception of the subservience of the Supreme Court to the military regime. Here in case of democrization, it can be safely deduced that the role of judiciary was not in favour of constitution and democracy (Malik, 2010: 1-10; Baxter, 2004: 53-60).

The activism in judiciary came after the appointment of Justice Iftikhar Muhammad Chaudhary in 2005. CJP began to exercise the court's suo moto judicial review powers. Suo moto, means "on its own motion". In November 2007, President Musharraf announced he would introduce a constitutional amendment to withdraw the Supreme Court's suo moto powers under the authority of his Provisional Constitutional Order (PCO). Two cases pursued by the Supreme Court in the latter part of 2006 became a source of significant unease within government circles. Both cases were of immense significance. In first case the Supreme Court invalidated the privatization of the Pakistan Steel Mills. It rendered a judgment that painted a grim picture of economic mismanagement, failure to abide by rules and patronage of businessmen implicated in securities fraud. This judgment was source of discomfort within the government circles.

In the second case, the Supreme Court began to pursue habeas corpus petitions. This petition was brought by the relatives of the 'missing persons'. These missing persons had allegedly been held by intelligence agencies without legal process. The Supreme Court's decisions in these cases were preceded by several cases decided by the High Courts, which had challenged the abuse of powers by the executive. It was an open challenge to the high handedness of the executive. Surprisingly, General Musharraf, suspended the CJP from office declaring him to be 'non-functional' on March 9, 2007. General Musharraf moved a reference for the CJP's accountability before the Supreme Judicial Council (SJC) under Article 209 of the Constitution. The court invalidated the suspension of the CJP and reinstated him to his position. This case considerably enhanced the powers and the prestige of the position of the Chief Justice of Pakistan.

18th Amendment and Role of Judiciary in the Evolvement of Democracy in Pakistan

The 18th Amendment is a detailed and significant document that makes several changes in the constitution and removes the distortions caused by two military rulers, i.e. Generals Zia-ul-Haq and Pervez Musharraf. It is comparable to the 8th and 17th constitutional amendments of 1985 and 2003 respectively. These amendments introduced far-reaching changes in the constitution. However, there is one key difference between these amendments. The 8th and 17th constitutional amendments were meant to

civilianize military rule and provide constitutional and legal cover to the actions and policies of the military regimes. The 18th Amendment represents the triumph of the democratic political forces because they joined together to promulgate an amendment that has made the constitution more democratic, shifted the balance of power in favour of the prime minister and parliament and expanded the scope of provincial autonomy (Rizvi, 2010).” It may also be pointed out that the 18th Amendment has also restricted the power of the judiciary to legitimise military takeover or any unconstitutional change of government. A new clause has been added to Article 6 of the constitution that stipulates that any “act of high treason” as defined in Section 1 and 2 of Article 6 “shall not be validated by any court including the Supreme Court and a High Court.” This clearly covers the question of validation of any military takeover (Rizvi, 2012).

There is important clause 175 A ,which gives the procedures that provide for sharing the power of appointment of judges of the superior courts by the judiciary and the executive. The discretion of the executive varies from country to country but it is not bound to accept the recommendations of the chief justice. The 18th amendment eliminates the “Concurrent List,” an enumeration of areas where both federal and provincial governments may legislate but federal law prevails. Laws governing marriage, contracts, firearms possession, labor, educational curriculums, environmental pollution, bankruptcy, and 40 other diverse areas will now devolve to the provinces with the list eliminated, and each provincial assembly will be responsible for drafting its own laws on the issues. Reformers have touted this measure as a necessary shift for a more federal system, but there are some concerns about the ability of provincial governments to assume effective regulatory authority in these areas, which they are now bound to do by June 30, 2011.

Pakistan’s parliament has institutionalized a new political consensus on the country’s legal and political framework with the 18th amendment’s passage. It gives the parliament, prime minister, judiciary, and the provincial governments’ greater autonomy under the constitution. While these changes represent an opportunity for Pakistan’s political parties to begin seriously addressing the country’s critical economic and security problems, the full impact of the amendment’s many.

An Assessment

Democracy is a coherent way of government. In a democracy, judiciary, civil and military establishments represent a state. These institutions allow ruling political party to run routine affairs of the country as per its party manifesto. However, demands for protecting authority of chief executive and failure to show equal respect for other state institutions are hypocritical. If there is disharmony in these institutions then it is considered as a threat to democracy, democratic institutions and the state. There is a dire need to get rid of this authoritarian and autocratic culture of double standards to boost democracy in Pakistan. Judiciary needs to be expanded and strengthened to

Role of Judiciary in the Evolvement of Democracy in Pakistan

reinforce democracy at the grassroots. It is a noticeable fact that the number of courts has not increased in Pakistan since its independence. No democracy can serve its people or grow stronger unless it is ready to ensure justice and support independent judiciary. Along with other institutions it is equally important to pay attention to this organ as well.

In current scenario two things are greatly affecting the system and society of Pakistan. One is growing expectations regarding judiciary and the other is dependence on media. The process of filtration is totally missing in the flow of Information which is casting negative impact on both state and society. This very fact is causing confusion and misunderstanding. There are many issues regarding the defence of the state which are required to be kept in secret. Converting such matters of institutions into a public debate, that are vital for the defence and the consolidation of the state, is not an appropriate direction. As far as growing expectations from judiciary are concerned, constitutional amendments can only convert the judiciary into a strong institution. Unless the entire aspects of political process are brought together and unless the course of army intrusion into politics cannot be halted, the judiciary cannot gain strength. Judiciary cannot remain aloof from the influence of these two factors. There are so many strategic compulsions on system and the army. The way external powers and internal elements are exerting pressures on the army; this can only create conflicts rather than bringing them down. To look towards judiciary to halt the way of army's involvement in the politics, is not possible unless the system develop traditions like; to keep within the prescribed jurisdictions, rule of law and coherent policy by all institutions.

As political and constitutional history of the state is analyzed, it is observed that authoritarian rule of army might crush the very institution of judiciary on a single controversial decision. Probably under these circumstances judiciary deems it appropriate to heed less to democratization. There were some serious and grave troubles which this institution had to face. These problems badly affect its role and efficiency for democratization. At the same place it is also observed that whenever the judiciary considered that the circumstances were appropriate, it played its conducive and contributory role for upholding the democratic values. The core reason which the judiciary had to face was related to its very independences. As a matter of fact, no judiciary can play its effective role towards democratization in the absence of judicial independences. A strong institution of judiciary is inevitable for democratization.

18th amendment in this regard has contributed a lot in the strength of the system. It has provided considerable autonomy to the judiciary. Again, democracy is a conditional way of government. It need certain prerequisites for its survival and continuity. There are few instruments which are required for its viable survival and they are;

- Continuity of political process

- Rule of law
- Implementation of judicial decisions
- To keep prescribed institutional jurisdictions.
- Civilian institutions have to perform
- The security profile may be re evaluated.

These elements will not only revive the public trust but by practicing them the way of army intervention into politics will also be halted. To be very honest, these constitutional amendments are just one element, they are not an absolute elucidation. It is because thinking without practice is just futile. Time frame is another important factor. Considerable time is needed for the political leadership to establish reliance on judiciary. There is a strong possibility that this over speeding can put this nation and its institutions into a yet another trial.

The judiciary was supportive of the military's expanded role in the past. It endorsed the direct assumption of power by the military on all four occasions. Since the restoration of the present Chief Justice and other judges in 2009, the Supreme Court and the High Courts have engaged in a high pace judicial activism and have built pressure on the elected parliament and the elected federal government. The comments of the judges, as published in the media, have political implications in the politically divided political context. The Chief Justice has argued more than once that the parliament is not the supreme institutions and that the Supreme Court has an overriding power with reference to constitution. This has created uncertainty about what the parliament can or cannot do, especially after one prime minister was convicted by the Supreme Court on contempt of court and sent home. The key issue is that democracy requires institutional balance and restraint rather than one state institution dominating all others, especially the elected ones. The confrontation between the elected executive and non-elected judiciary is not a good omen for democracy (Rizvi, 2012).

Keeping in view all these factors, one can safely deduce that despite the rising difficulties the current Judiciary-Executive confrontation does not seem to pose a direct threat toward the possible derailment of the present democratic set up. The real threat faced by the government still remains the popular resentment over governance weaknesses and corruption, a possible military takeover, and the increasing differences between the government and its political allies. These elements are not novel. It has always been this situation which let the army to grab ruling opportunity. The federal government's poor performance in governance and socio-economic development is undeniable. Some of its problems like the memo issue or political (mis) handling of the president's illness reflect serious management problems with the federal government and the PPP. However, the circumstantial factors and the political and military dynamics can keep it floating, although it will drift from crisis to crisis (Rizvi, 2011).

Role of Judiciary in the Evolvement of Democracy in Pakistan

Pakistan's present judiciary has not been imposed by the establishment but was brought into office due to a popular movement in the urban areas of Pakistan. An active judicial role exercised by an independent Judiciary can be a democratic and constitutionally legitimate means to strengthen a developing democratic system. As a guardian of constitution and the custodian of the rights of people there is a significant role for judiciary to play in this regard. But the condition is that all political and state institutions need to work together within a democratic constitutional framework to address and to manage the difficulties in their way.

End Notes

Ahmad, Manzoor and Ghaus, Khalida. (1999). *Pakistan Prospects and Perspectives*. Karachi: Laureate Packages.

Ahmad, Mushtaq. *Government And Politics In Pakistan*. Karachi: Zaki Sons Printers.

Ahmed, Khaled. (2010). *The Musharraf Years – Vol1 Political Developments in Pakistan – 1999-2008*. Lahore: Maktaba Jadeed Press, Vanguard Books (Pvt.) Ltd.

Azam, K. M. (2002). *Pakistan Economy, Politics, Philosophy & Religion*. Karachi: Royal Book Company.

Aziz, Sartaj. (2009). *Between Dreams and Realities: Some Milestones in Pakistan's History*. Karachi: Oxford University Press.

Baxter, Craig. (2004). *Pakistan on the Brink Politics, Economics, and Society*. Karachi: Oxford University Press.

Bhutto, Benazir. (2007). *Whiter Pakistan: Dictatorship or Democracy?*. Lahore: Al-Hamd Publications.

Callard, Keith. (1968). *Pakistan: A Political Study*. Karachi: Oxford University Press.

Cohen, Stephen P. and others. (2012). *Pakistan: Arrival and Departure*. In. Stephen P. Cohen (Eds.). *The Future of Pakistan*. Lahore: Maktaba Jadeed Press, Vanguard Books (Pvt.) Ltd.

Hague, Rod & Harrop, Martin. (2001). *Comparative Govt. and Politics: An Introduction*. New York: Pealgrave Hond. Mills, Besingstoke, Hampshire.

John, Wilson. (2008). *Pakistan Four Scenarios*. New Delhi: Pentagon Press.

Jones, Owen Bennett. (2002). *Pakistan Eye of the Storm*. Lahore: Vanguard Books, Banquet Printing Press.

Khan, Hamid. (2003). *Constitutional and Political History of Pakistan*. Karachi: Mas Printers.

Mahmud, Prof. Khalid. (1990). *Pakistan's Political Scene (1984-1990) Reflections of a Journalist*. Lahore: Rhots Books.

Malik, Anas. (2011). *Political Survival in Pakistan Beyond Ideology*. New York: Routledge.

Role of Judiciary in the Evolvement of Democracy in Pakistan

Parry, Graint & Mora, Michael. (1994). *Democracy and Democratization*. New York: Routledge Publisher.

Qadeer, Mohammad A. (2011). *Pakistan Social and Cultural Transformations in a Muslim Nation*. Lahore: Banquet Printing Press, Vanguard Books (Pvt.) Ltd.

Qureshi, Colonel (R) H. U. (2003). *The Future Savior of Pakistan?*. Lahore: Ferozsons (Pvt.) Ltd.

Rahman, H. (1958). *Introduction to Pakistan Constitution*. East Pakistan: Narayan Machine Press.

Rizvi, Dr. Hasan Askari. (2010). Judicial Appointments And Constitutional Amendments. *Daily Times*, May, 16.

Rizvi, Dr. Hassan Askari. (2011). Will Democracy Survive?. *Pakistan Today*, 20 December. Retrieved from: <http://www.pakistantoday.com.pk/2011/12/20/comment/columns/will-democracy-survive/>

Rizvi, Dr. Hassan Askari. (2012). Competition for Power. *Pakistan Today*, 31 January. Retrieved from: <http://www.pakistantoday.com.pk/2012/01/31/comment/columns/competition-for-power/>

Rizvi, Dr. Hassan Askari. (2012). Democracy's Uncertain Future. *Pakistan Today*, 25 July. Retrieved from: <http://www.pakistantoday.com.pk/2012/07/25/comment/columns/democracys-uncertain-future/>

Rizvi, Dr. Hassan Askari. (2012). Who is Sovereign in Pakistan?. *Pakistan Today*, 1 August. Retrieved from: <http://www.pakistantoday.com.pk/2012/08/01/comment/columns/who-is-sovereign-in-pakistan/>

Roberts, Geogrey K. (1971). *A Dictionary of Political Analysis*. Great Britain: Hazell Watson & Viney Ltd.

Sayeed, Khalid B. (1980). *Politics In Pakistan*. New York: Praeger Publishers.

Sayeed, Khalid B. (1983). *The Political System of Pakistan*. Lahore: National Book Service.

Shafqat, Saeed. (2007). *New Perspectives on Pakistan: Visions for the Future*. Karachi: Oxford University Press.

Syed, Anwar. (2007). *Issues and Realities of Pakistani Politics*. Lahore: Izharsons Printers.

Yusuf, Hamid. (1998). *Pakistan: A Study of Political Developments 1947-97*. Lahore: Maktaba Jadeed Press.