

Judicial Institutions and Leaders on Rise of Separatism in Pakistan (1947-1971)

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Abstract

Pakistan's bifurcation in 1971 was the culmination of a Bengali Movement. The paper compares the role of judiciary as one of the institutions of the state with the impact of the leadership of the country in respect of the disintegration of the state. The independence of the judiciary in the period when the Bengali Movement strengthened has been examined. Then the actions or verdicts of the judiciary regarding the issues linked with the separatism have been assessed. It was observed that judiciary itself was dominated and steered by some personalities whose influence confirmed the significance of the leaders in directing not only the institution but also the state. One of a few leading judges, Justice Munir, then through partial injustice supported the leaders of Pakistan in their mistakes and slip-ups regarding the obstruction of the separatism oriented Bengali Movement.

Key Words: Leadership, Independent Judiciary, Separatist Movement, Executive, Injustice, Judicial Verdicts

1. Introduction

Judiciary, being an important component of modern state as strengthening of legal institutions is crucial to the viability of new political systems, (Braibanti, 1999, p. 113) indeed an equalizer and balance-maker between various institutions and different units of the state, could play an important role in maintaining the unity of Pakistan. In executive-dominated Pakistan the superior courts, observes Paula R. Newberg (1995, p. 2), "have played unusually important parts in determining the country's political fate.... Courts engage in rituals of recreation: they interpret the constitution of the day, and read political history and constitutional language to establish new understanding of political community."

But despite this contribution in the development of the state, the role of higher judiciary, joined with the leadership, in maintaining the unity of the state can be observed in answering these supplementary issues; whether the judiciary was free to leave an impact on the decisions of the leadership?, how the judiciary, when it was asked, answered and solved the issues which directly or indirectly affected the separatism?, and if there were any relationship between the leadership of the country and higher judges in dealing with the matters confronting to the integrity of the country?

2. Independence of the Judiciary

As far as the independence of the judiciary is concerned, it enjoyed a considerable independence before the imposition of martial law in 1958.

Suhrawardy (1957, p. 429) expressed satisfaction on the independence of judiciary in the words that, “the judiciary has been vested with power to issue prerogative writs – an authority enabling the courts to act on their own initiative to ensure the rule of law.” During Ayub regime, however, judicial appointments were vetted for political propriety and the legal profession was regulated through the Bar Council Order. Although the regime allowed civil courts to function (Shah, 1986, p. 29) the state controlled the law and its relations with civil society. (Newberg, 1995, p. 82)

Due to the martial law regulations the courts had no jurisdiction to review all of the decisions of the state. The presence of the military courts, parallel to the existing mechanism of the judiciary, decreased the importance of the later. The independence of the judiciary, during the initial years of the martial law, was so much affected and was considered so important a matter that Z. A. Lari, representing the lawyers' community on 14 May 1960, demanded independent judiciary separate from administration and the fundamental rights enforceable through the courts as the foremost elements of the proposed constitution. The same views were expressed by Mahmud Ali Kasuri who represented Pakistan Bar Council. He said that vindication of the rights of the citizens could only be solved on the assumption that the courts were allowed to function as the ultimate and free arbiters. (UKHC, 1960)

The abrogation of the constitution limited judicial powers. Rulings during the decade of Ayub regime showed just how much the courts depended on flexible constitution. Only when justifiable rights were allowed after 1964 were the superior courts institutionally emboldened to challenge the edicts of the presidential state and even then, their reach was restricted by the president. (Newberg, 1995, p. 31) The powers of courts were greatly curtailed under the constitution of 1962. The courts were denied the power of issuing writs *Habeas corpus*, *Mandamus* etc. against the government. They had no authority to enforce the fundamental rights and then did not enjoy the usual powers of judicial review, a characteristic of federalism. (Akanda, 1978, p. 77)

The Yahya regime continued this practice and curtailed the powers of the courts after a judgement of a Full Bench of West Pakistan High court on the 30th of June 1969 in the case "Mir Hasan and other v. the State" which declared about a specific Martial Law Regulation that it was without jurisdiction and of no legal effect. Court found that the action of any authority including Martial Law Authority, if had not the backing of a constitutional provision, was not immune from being struck down by the Courts. In reaction to this judgement Chief Martial Law Administrator (CMLA) promptly promulgated an Order known as jurisdiction of Courts (Removal of Doubts) Order of 1969. It took away the jurisdiction of superior Courts. It held the field until the fall of Yahya Khan. (Mahmood, 1992, p. 31)

Judiciary was also affected through the procedure of appointment of the judges. Ayub started the insulting practice to take interviews of the regular judges before their appointment in the High Courts. Formerly the judges were finalized from among the nominees of the judiciary. This practice went on until General Yahya discontinued the practice. During Yahya regime, as Justice Dorab Patel (1999, p. 360) comments, “the Government departed from the convention of confirming or dropping an additional judge after two years.”

3. Judiciary's Contribution on Testing Times

The discussion above testifies that judiciary was not free enough to leave an impact on the leadership of the country altogether during the period after Martial Law of 1958. Before this period and just after the imposition of martial law the higher judiciary was put into test through four cases which had profound effect on the constitutional developments in Pakistan. In fact, they retarded the constitutional progress (Mahmood, 1992, p. 31) which was a vital cause of the dissatisfaction in the separatist elements in East Pakistan.

3.1. Tamizuddin Case and Governor General's Reference

The first testing time came on the dissolution of first Constituent Assembly of Pakistan (CAP). Its president Maulvi Tamizuddin challenged the action and invoked the writ jurisdiction of the then Chief Court of Sindh. The final battle was fought in the then federal Court of Pakistan. Soon thereafter a very important question arose before the Federal Court in *Yusuf Patel's case* regarding the powers and jurisdiction of the Governor General (GG). This eventually culminated in GG's *Reference* No. 1 of 1955. The answer to the Reference returned by the Federal Court is a milestone in the chequered history of Pakistan. Thirdly the supreme court of Pakistan decided upon the legality and validity of the Martial Law 1958 in the well-known *Dosso Case*.

In order to benefit the ruling leader, leaving the dissolution issue undecided, (Dawn, 1955) on which issue judges could reach a decision only by an undesirably narrow majority of perhaps three to two, the Federal Court with the majority of four to one (UKHC, 1955) gave judgement in Tamizuddin Khan Case that the assent of the GG was necessary to all legislation by the Legislature. (Jennings, 1957, p. 160) Thus the GG's power to dissolve the Assembly could not be ended with the passage of bill by the CAP. This judgment in Tamizuddin Case confirmed the superiority of one-man executive to the institution of legislature and involved a departure from the past practice of the English courts, which for centuries had not assumed the right to invalidate a statute of Parliament, recognizing that Parliament was the sovereign power of the state. (McGrath, 1996, p. 199)

In the long run this judgement proved fatal for the integrity of Pakistan as well as deadly for democratic in the face of personal rule notwithstanding at the time of judgement there was conflict in the legal and political views on the verdict. The legal-intellectual elite considered the action of Federal Court to be all wrong and were unhappy about this decadence of the rule of law. But there was political problem of an ineffective CAP. It is said that the legal Suhrawardy wanted to appear in the case, but the political Suhrawardy was persuaded not to. (Khan, 1989, p. 156) Later the politicians too criticised it calling it the most perverse judgement in the history of the Law which even the Star Court Judges had refused to pronounce against the sovereign and had resigned instead. (Hayat, 1995, pp. 241-42) Amir-ul-Islam, a former chief whip of the Awami League (AL) went to the extent of saying that Pakistan was destroyed at the very moment when the CAP was dissolved and Pakistan's Federal Court was responsible for this. (Matinuddin, 1994, p. 62)

One possibility of the verdict of the Federal Court, if it were against Governor General, was that the verdict would restore the CAP to its pre-dissolution position and result in the dismissal of the non-Member Ministers. The Court could request the CAP to pass the Constitution by a certain date not extending beyond December 31, 1955. Meanwhile all executive actions taken could have been protected against any legal /technical mischief. In this way, the image of the sovereign CAP and the country could have been saved, the country could have had a Constitution by January 1, 1956, and the court action would have set at rest the Executive's craze for establishing superiority over the legislature. (Khan, 1989, p.155)

Judicial leadership could direct the situation in right direction but the executive and political leadership would not support it and the decision of the court in favour of Tamizuddin could be of little value. Main political protagonists were supporting the GG and also the ministers were fully prepared to meet the contingency by taking the power to carry on the government in the name of the GG through declaration of state of emergency. (Symon, 1955) Even then the court should not have expedited the judicial value over political one.

3.2. Usif Patel Case

On the second time the apex court of Pakistan judged the *Usif Patel Case* and the *Reference* and contributed in answering four problems put before the Federal Court: the powers of the GG's before the legislature's action; the proper means to validate prior laws; whether the GG had "rightly dissolved" the CAP; and the competency of the proposed Constituent Convention. The court gave judgment that the correct name of the Constituent Convention was Constituent Assembly, the GG's right to dissolve the CAP could only be derived from the Indian Independence Act, the GG could bring into existence a representative CAP by nominating the electorate and not members, and lastly but importantly the GG had power under the common law of civil or state necessity of validating the laws listed in the Schedule to the Emergency Ordinance, 1955. (Jennings, 1957, p. 264) Thus Federal Court sided with the Chief Executive and helped him in controlling the state.

3.3. Dosso Case

On the third time in the *State v. Dosso* and another, the Supreme Court sanctioned a military *coup d'état*. Fearful that the chaos of popular politics would threaten the existence of the state, the court rearticulated principles of necessity and efficacy and established a jurisprudential basis for army rulers. The court gave the military rulers opportunity to restructure the state. It was observed that a 'victorious revolution' or successful coup was an internationally recognized method of changing a constitution. (Newberg, 1995, p. 11)

Thus in four important constitutional cases during the period of the challenge of East Pakistan and when the courts were free, by supporting chief executive the courts validated the authority of the leaders in contrary to the institutions.

These decisions were so controversial that the standpoint in these judgements was reversed later in the judgement in Asma Jilani's case and overruled the decision given in Dosso's case. (Dawood, 1994, pp. 1-2) The CJ Hamood-ur-Rehman observed that the assumptions in Dosso's case and Kelson's theory, on which Justice Munir had relied, were "not justified". (Mahmood, 1992, p. 29) Justice Yaqoob viewed that the judgements in *Tamizuddin Khan's Case*, the 1955 Reference and *Dosso's case* had made "a perfectly good country ... into a laughing stock," and converted country into "autocracy and eventually ... into military dictatorship." He pointedly criticized the abrogation of the 1956 Constitution, observing that "The cessation [sic] of East Pakistan thirteen years later directly attributable to this tragic incident." (Newberg, 1995, p. 121)

4. Leader Centred Judiciary and Separatism in East Pakistan

During this whole critical and fateful period when judiciary was justifying a few personalities for the rule over the destiny of the country despite lone dissenter in the appeal, Justice A.R. Cornelius, offered equally forceful alternative notions of popular sovereignty and constitutional government (Newberg, 1995, p. 45) the institution itself was headed and influenced by only one personality, Justice Muhammad Munir, who remained Chief Justice (CJ) of the apex court from 1954 to 1960.

Justice Munir affected the fate of Pakistan directly and Bengali Movement indirectly through his four judgments; three arising from the dissolution of the first CAP and the fourth dealing with the validity of martial law. He claims that his decisions were institutional unless it be assumed or presumed that he influenced the other judges like Justice Cornelius and S. A. Rahman. (Munir, 1978, p. 205) McGrath mentions the process in which through transfer of judges and composition of Federal Court the majority in the court for partial decision of Justice Munir was eased by the GG. (McGrath, 1996, pp. 197-98) The assertion of Justice Munir, (1978, p. 205) to refute the allegation of influence over judges, that none of the judgments was informally discussed by the judges among themselves discards itself by the fact that the judges formally discuss often cases among themselves and through discussions minimise the chances of partiality of other judges and maximise the possibility of balanced final decision of court's chief. He afterwards admitted that he was constrained to uphold the dissolution of first CAP, though he felt it was unconstitutional. (Newman, 1962, p. 357) There is also a strongly held belief that Justice Munir 'assured the Government in advance that he would upset...[the Sindh High Court's] judgement when it went before him...'(Mazari, 2001, p. 67) Despite those verdicts, like dissolution of CA, were accepted by the Bengalis generally, their partiality and autocracy-supporting impacts intensely damaged Pakistan's democracy as well as unity.

As the CJ apex Court he had such close associations with Chief Executive Iskandar Mirza and C-in-C Ayub that he joined intimate hunting excursions with them while being conscious of wrong for a judge to be so close with executive and army. On the basis of Munir's narratives in *Pakistan Times* in 1968 (Chaudhri, 1973, pp. 87-89) and Ayub Khan's narrative in *Friends Not Masters* it appears that the former played the role of a collaborator to Mirza and Ayub in consolidating their rule that created discontent in Bengalis. Asghar Khan (1983, p. 7) too recalls that Justice Munir attended the meeting of cabinet of Ayub soon after Martial Law and suggested Ayub to get constitution approved by public acclaim, which resulted in the discontent of Bengalis from constitutional set-up under Ayub. It is certain that the CJ Munir also knew well in advance about the intentions of Iskandar Mirza, the then president, who had hatched up the conspiracy to take over the country through martial law. The CJ having associated himself with the drafting of the Laws (Continuance in Force) Order also presided over the Bench of the Supreme Court which pronounced upon its validity. This, to say the least, was mockery of judicial propriety and independence. (Mahmood, 1992, pp. 16-18)

Justice Munir controlled and dominated the apex court of Pakistan during the critical times when court had to decide very significant cases which chalked out the nature of government that was altogether unacceptable for Bengalis. Mazari (2001, p. 67) called him, "blight on our legal system," and held him responsible for the ills which affected the independence of judiciary, which is a guarantee to appease the differences and discontent in a federation. "If a man ever rightly deserved to be tried, said Mazari (2001, p. 67), "for contempt of court (for his blatant disrespect for the independence of our judicial system) it was CJ Munir." His position in the *Tamizuddin* case, in contrary to other judges, has been discussed above. The same was the situation with Case of Special Reference, which was supplementary to *Tamizuddin* Case. The *Dosso* Case too was heard by Justice Munir, Justice Shahabuddin, Justice Cornelius and Amiruddin. Here Justice Munir wrote the leading judgment. (Munir, 1978, p. 219)

Justice Munir, the single personality who was making the judicial ground for a few leaders of Pakistan and thus was paving the way for dissatisfaction of democratic Bengalis, considered himself justified on the ground that at the time of decision of Tamizuddin Case the possibility of the Court's order not being obeyed was present to the mind of all judges and at moments like those imposition of Martial Law was not to be found in the books; it lay elsewhere. "Where the enforcement of the law is opposed by the sovereign power the issue becomes political or military which has to be fought out by other means and the courts espousing the cause of one party against the other merely prepare the ground for bloodshed." (Chaudhri, 1973, p. 22)

Considering the problems with Justice Munir and the court described above and that, "judgements are not concerned with promoting or suppressing revolutions;" (Munir, 1978, p. 220) and also avoiding judicial controversy Justice Munir's judgement can be ignored in the context of separatist movement in East Pakistan. But his close relationships with Iskandar Mirza and Ayub, at the time of need for legal legitimacy to Ayub and his outright favour to Ayub regime in Dosso Case dented the integrity of Pakistan. He did not consider the conditions of East Pakistan and the possible impact of personal governments of Mirza and Ayub over the Bengalis. Though these were not legal questions before him but he could draw any framework for the end of personal rule as was done later by Supreme Court in 2003. The verdict might not be accepted by the rulers but rejection of the verdict left no legitimacy for them.

The actions of Justice Munir which harmed the unity of Pakistan were not limited to his judicial verdicts. He continued supporting Ayub's detrimental regime even when he was not a judge. Two years after retirement, in 1962, he agreed to join Ayub's Cabinet as Minister though he himself looked it rather odd for a retired CJ to take a seat in the Cabinet. (Chaudhri, 1973, pp. iii-iv) His expressions reflected his inverse views to the Bengali aspirations for autonomy. In the crisis of 1971 he viewed that if Pakistan had to survive as one State, this autonomy cannot be taken to the extent that the two wings should in substance be no more than a confederation or such a loose federation as virtually makes the two wings independent of the Centre. (Chaudhri, 1973, p. 145)

Summarising the role of Justice Munir for the rise of separatist movement in East Pakistan it is concluded that his legitimising support to authoritarian, autocratic and unpopular regimes of Ghulam Muhammad, Iskandar Mirza and Ayub Khan strengthened the position of these leaders who in turn could not only do anything to appease the Bengali Movement but also watered the tree of separatism through their mistakes. They could not accomplish their misdeeds without active collaboration of Justice Munir.

It was result of such repressive restrictions on the judiciary of Pakistan – whether they were in the form of Martial Law Regulations or in the shape of the effect of a few partial judges – that the growing distance between East and West Pakistan reflected in disputes between the Dhaka High Court and the Supreme Court, was not solved by the federal court's assertions of national interest. Judicial rhetoric could not mask either the inequities between wings that Ayub Khan chose not to correct, or the growing perception in East Pakistan that its rights might not ever be respected. The court's belief in the common good thus put off its exact definition for determination under more pliable circumstances. (Newberg, 1995, p. 105)

When, at last, higher judiciary remained silent on the military action. There is one reaction on the record and interestingly that was also from one personality and not from the bench. This was the refusal of the CJ of Dhaka High Court to take the oath from Tikka Khan, new appointed Governor on first March. This action was also shrouded in the pretext of the illness and not on the grounds of legal or judicial unfairness of the action. It appears that the courts in East Pakistan were forced to be silent. It is evident from the fact that when CJ refused to take oath, his substitute was not from East Pakistan High Court but flown from Rawalpindi.

5. Conclusion

This discussion confirms that during the fateful history of Pakistan from 1947 to 1971 the apex court of Pakistan was free only in the period when it was influenced and headed by a single personality. He, along with his companion judges, at the time of imperative judgements, putting aside the hegemony of the institutions of judiciary and legislature, supported only a few personalities who were all-in-all in the affairs of the state, thus making these leaders responsible for every benefit and loss to the integrity, solidarity and unity of Pakistan.

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