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*Quo Vadis*¹ Pakistan? Yet It Keeps Moving!

The recent ruling of the Supreme Court in Pakistan to disqualify Prime Minister Nawaz Sharif has brought about cascading changes in the political system of the country. Some view these to be damaging to democratic norms. However, in reality, these could actually buttress democratic practices and strengthen rather than weaken positive governance values. On these lines, this paper traces the role of the judiciary in the shaping of Pakistan's political tradition and its somewhat tricky relationship with the executive through the nation's history.

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Introduction

The ousting from office of Prime Minister Nawaz Sharif by the Supreme Court of Pakistan on 28 July 2017 was one of the more predictable events in Pakistan's political horizon. When the Joint Investigation Team, which comprised two representatives from the military intelligence community, submitted its report that the assets of Nawaz Sharif and his children were incompatible with their known sources of income, it was obvious on which side the "deep state" stood. Thereafter, for anyone with any shroud of political sense to put money on the

¹ *Quo vadis* is a Latin phrase which means "Where are you going?"

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prime minister's survivability would have been a very unwise act. The foregone conclusion was that he would have to go, and so he did.

Soon it became clear however, as it was always suspected by the wise observer, Nawaz's departure did not mean that of the Sharifs. Those who may have crowed about the fact that the Court's ruling had turned the "Lion of Punjab" into a cat, the name of Imran Khan of Tehreek-e-Insaaf comes to mind, now can draw little solace from the dictum that the cat has nine lives, or several at any rate! For the Sharif family's rule seemed all but certain to continue, in the Centre through Nawaz's brother, Shahbaz Sharif, and in Punjab, through his nephew, Shahbaz's son, Hamza.

Judges and Generals

There is a history of judicial interventions in Pakistan. Some have been seen as impeding the development of an essentially democratic culture. These have coincided sufficiently with the perceived interests and predilections of the existing military brass to arouse suspicions of collusion, or at least an alliance in opposition to the elected representatives in particular, and politicians in general. The first and the most important of its kind happened as early as in 1954, less than a decade after the creation of Pakistan through the Partition from India in August 1947.

In 1953, the Governor General in Pakistan, representing the Queen of Great Britain, was Ghulam Mohammed, a crusted former bureaucrat from Punjab. In April that year, over differences with the Prime Minister Sir Khwaja Nazimuddin, a scion of the Nawab family of Dhaka in East Bengal, the Governor General dismissed the latter. This was contrary to all the norms and practices of the Westminster model of parliamentary system of government that Pakistan had chosen to follow. This was particularly so when the prime minister had, only a fortnight earlier, won a vote of confidence in the Constituent Assembly. There was already reason to believe that the Governor General's actions had the backing of the Commander-in-Chief of the Army (a post that was separate from that of the Head of State, later changed to Chief of Army Staff in 1973), General (later Field Marshal) Mohammed Ayub Khan. If there were any suspicions to the contrary these were removed when Ayub unequivocally admitted in

1964, according to a declassified United States intelligence source, that there was, at that time, a dispute between the Governor General and the prime minister, and he had sided with the former.³

A series of related events followed that clearly indicated judicial interventionism, in line with the aspirations of then establishment. In order to bring practices in Pakistan consonance with the parliamentary model, on 21 September 1954, the Constituent Assembly amended the Government of India Act 1935, the template to-date, to ensure that the Governor General acts only on the advice of the ministers. Piqued, the Governor General dissolved the Constituent Assembly, just as it was about to adopt the Constitution, after years of complex deliberations. The Speaker, Maulvi Tamizuddin Khan, went with a complaint to the Sind High Court which ruled in his favour but it was overturned by the Supreme Court which ruled in favour of the Governor General.

In his judgment, upholding the Governor General's actions, Justice Munir was of the view that the independence of Pakistan was restricted by the prerogative rights of the English Crown. He agreed with the argument of Lord Diplock presented in the Court that Pakistan did not actually become independent in 1947 and had the same status as other senior Dominions. This finding was opposed in a minority dissenting opinion by Justice Cornelius, in whose opinion Pakistan had a clearly different status from other senior Dominions in that it was completely independent. In propounding his views, Justice Munir drew upon the writings of the medieval jurist Henry de Bracton's maxim that, "[That] which is otherwise not lawful is made lawful by necessity", the so-called 'Doctrine of Necessity'. The principle is to be read with the Latin maxim *Salus Populi Suprema Lex* (The well-being of the people is supreme law) embodied in the philosopher John Locke's 'Second Treatise of Government', endorsed by Hobbes in Chapter 30 of his 'Leviathan' and by Spinoza in Chapter 19 of his 'Theological-Political Treatise'. The reverberations of Justice Munir's decision were to be felt on Pakistan's political matrix for decades to come. This has, thereafter, also been cited as grounds for extra-legal actions by authorities in countries as varied as Grenada (1985) and Nigeria (2010).

³ For a more recent analyses of the events involved, please see Mazhar Aziz, *Military Control in Pakistan: The Parallel State*, Routledge, London and New York, 2008.

The ‘Doctrine of Necessity’ and the Dosso versus State Case

The ‘Doctrine of Necessity’ received a further boost in Pakistan in yet another judgment by Justice Munir after the Martial Law proclaimed by President Iskander Mirza and General Mohammed Ayub Khan in October 1958. In a case entitled ‘Dosso versus State’ that year, he ruled in effect that the imposition of Martial Law is a kind of revolution, a peaceful one to which there is no opposition by the common people, which renders it legal. What flowed rationally was that a successful coup d’état is an internal legal method of changing governments and constitutions.

The ‘Doctrine of Necessity’ continued to be a useful tool employed by subsequent military rulers in Pakistan, though the Courts have also ruled army takeovers as illegal, but only after the main perpetrator had died, as General Zia ul Huq in 1988. These post-facto judgments lacked bite and validity, as did the one on 31 July 2009 when Chief Justice Iftikhar Muhammed Chaudhry issued a landmark ruling that the ‘Doctrine of Necessity’ had been buried forever, and that no judge can offer any support to the acquisition of power in any manner by any unconstitutional functionary through modes other than envisaged in the constitution.

The doctrine, however, is unlikely to remain interred forever and, if the past is any judge, it is likely to resurrect again in one form or another. Those who argue that a modicum of judicial overreach is embedded in the Court’s decision in the case of Nawaz would see the application of the principle in a morphed mode. The Courts see themselves as arbiters of what is good for the people. What is otherwise fair can become foul, if the influence of any interested segment of the community becomes a determinant.

The Gillani Episode

The Supreme Court of Pakistan had brought yet another civilian prime minister down in 2012. He was Syed Yousuf Raza Gillani of the Pakistan Peoples’ Party during the presidency of Asif Zardari. Gillani’s relationship with the top brass of the army had soured over a series of issues. Following some differences with the Court, on 26 April 2012, Gillani became the first ever prime minister to be convicted while in office on the charge of contempt of Court, and

sentenced to be held till the rising of the Court which barely lasted 30 seconds. Unfortunately, the fall-out lasted much longer. On that occasion, the prime minister did not resign, protected by the Speaker of the Parliament who tried to shield him by “putting the matter to rest” by a ruling.

Further petitions to the Supreme Court were moved, heard by a three-member bench chaired by Chief Justice Iftikhar Chaudhry. Stating that “the fate of the people (of Pakistan) was in the hands of a man who had been convicted by the Supreme Court” (harking back to the maxim seen earlier that the well-being of the people is supreme law), the bench retroactively disqualified the prime minister as of 26 April 2012, the date of the previous ruling, declaring all orders from him since then as “null and void”.⁴ This time, it was the Court which was “putting the matter to rest” by unequivocally disqualifying the prime minister.

Other Regional Comparisons

It would be interesting to compare the Pakistani Supreme Court’s role with that of such institution in another South Asian country, Bangladesh – all the more because the territory was a part of Pakistan for the first quarter century since the Partition of 1947, which was also the period from which some examples of rulings have been cited. Moreover, the legal traditions, based on the English customary law, have much in common. In Bangladesh, while the Courts have also been perceived as having been ‘friendly’ to the executive branch during military as well as civilian rules, it is increasingly seeing itself as the vanguard of some of the nation’s fundamental values, including secularism.

Of late, there had been a modicum of falling out between the Court and the government, which among other things, forced the relocation of a statue modelled on an ancient Greek figure, devoted to justice, within the premises of the Court. The government was seen to be under pressure from some religious-oriented elements, which, with elections just beyond the rim of the saucer, it might have felt the need to placate. These had led the two branches, the executive

⁴ For the judgement, please see http://www.supremecourt.gov.pk/web/user_files/File/Const.P.40of2012-DetailJudgment-dt-3.7.2012.pdf.

and the judiciary, to be at odds with each other, in public and in private. Unhappiness about the judiciary caused some parliamentarians to make negative remarks.⁵

In the end (if it is the end), on 2 August 2017, the full bench of the Supreme Court, headed by Chief Justice S K Sinha, reached a unanimous landmark ruling by which it scrapped the power of the Parliament, and thereby of the government, to remove judges from office. It declared the 16th amendment to the constitution, that enabled the Parliament to do so, null and void, and actually reverted to a military era provision that allowed only a Supreme Judicial Council, headed by the Chief Justice, to exercise that power. Liberal jurists saw this as boosting the independence of the judges, shoring up of secularism by insulating the Court from political imperatives and obviating the need for judges to be submissive to the government. Of course, on the flip-side of the coin, there were theoretical purists who bemoaned the erosion of parliamentary sovereignty.

While the Courts under the English Common Law system, as also those in South Asia, do have a tendency to draw oxygen from precedence that can be cited from other similar milieu, it is too soon to say if the Pakistani Court will also seek to buttress its position in a similar fashion. It is noteworthy that Justice Chaudhry was removed by an executive order of President Pervez Musharraf of Pakistan. Be that as it may, the Pakistani Court is not alone in South Asia as seeming to have major differences with the powers that be.

Quo Vadis Pakistan?

As such, what are the immediate ramifications of the Pakistani Supreme Court verdict? First, the argument that democracy has been stabbed in the back (or front) by the judiciary seems a tad exaggerated. In effect, the change only reflected the difference between tweedledum and tweedledee. With regard to the Nawaz Sharif-led government, Nawaz departed, but not the Sharifs. Indeed, if the son of his brother and eventual successor, Shahbaz Sharif (who is expected to take over as prime minister after the seat having been kept warm for a couple of months by a loyalist Shahid Khaqan Abbasi) becomes the Chief Minister of Punjab, as some predict, then the ruling would have had the inadvertent result of inducting yet another Sharif

⁵ Ibid.

into the political fold. Second, it might have brought the irrepressible Imran Khan his momentary sweet moment, but not any closer to the seat of power. Third, the allegation of collusion with the army of the judges lacked metrics for validation, particularly when it was unclear what it would gain by the change of one Sharif for another.

The whole episode could actually be rendered positive towards democracy by the assertion of two core principles. First, while few politicians in Pakistan can claim the untainted virtue of Caesar's wife, the law is no respecter of high office. Second, justice was, as it ought to be, blind, and the removal of the prime minister was effected without any thought of external considerations of impact on politics. The judges thought they were punishing the guilty and showed confidence that the political system was mature enough to absorb the consequences. The smooth transition that followed should be seen to reflect strengthened democracy rather than a weakened one. The two principles cited above would not be necessarily be negatively impacted upon, even if the President of the Republic, who is from the ruling Pakistan Muslim League (Nawaz) [PML(N)] Party, emboldened by a yet greater electoral victory for the PML(N) at the polls next year, accord the former prime minister a pardon.

Legend has it that when Christians were being severely persecuted in ancient Rome, the saintly Peter was escaping the city to save himself, on the counsel of his well-wishers. On the road, he suddenly saw Jesus Christ approach from the opposite side. Peter fell on his knees, *Domine, quo vadis?*, he asked. "*Lord, whither goest Thou?*" Jesus' calm response was, "To Rome, to be crucified again!" Ashamed of his cowardly act of fleeing, Peter returned to Rome, took up the cudgels on behalf of his faith, and finally established the Church. Peter can be seen as a metaphor for democracy in Pakistan. Rather than flee any unsavoury circumstances, democracy in Pakistan should strive to restore itself, and given supreme commitment, the effort will not fail.

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