Preserving National Security within the Rule of Law Framework in Pakistan

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Abstract

The maintenance of national security is a vital function of the State, performed through the use of all available resources including the defense forces, economic/financial resources and the art of diplomacy. But the preservation of rule of law is of no less significance, it being a key element of constitutional governance and democratic dispensation. In extraordinary circumstances with real and present threat to national security/integrity, the Government can strike a balance between the needs to protect State/society and preserve individual freedom. Under the Constitution of Pakistan, the proclamation of Emergency and/or deployment of armed forces (Article 245), in aid of civil power, entail the abridgement of certain fundamental rights/freedoms. The 21st Amendment however travels beyond the prescribed limits and disturbs the delicate balance by taking away the constitutional safeguards of fair trial. The defects/shortcomings in criminal justice system cannot be a pretext for its substitution by an alien system, untenable under the law/Constitution.

Keywords: National Security, Rule of Law, 21st Amendment, Emergency, Legal/Judicial Reforms

1. National Security

The term 'national security' is employed to refer to the defense of the realm, in the face of foreign invasion or insurgency or insurrection; a task usually assigned to the armed forces. The phrase thus remains associated with the military might/prowess to protect the Sate and maintain national harmony and peace. But this is a conventional narration, which does not apply to present-day realities. In the modern world, the military apparatus has gone so advanced and sophisticated that conventional warfare through uniformed battalions as well as tanks and cannons, is no match.

The use of drones and precision-bombing, conducted from distant locations, has rendered the fighter/bomber aircrafts obsolete. This was amply demonstrated by the US operation to target Bin Laden. Such advances have transformed the war scenario altogether. The maintenance of large forces and heavy artillery have become questionable - indeed, a waste of resources - because as against advanced technology, they could not detect violation of airspace and/or operation on the ground, much less to offer resistance or defend the State. The acquisition of nuclear capability/defense further raises questions as regard maintaining huge military establishment.

Further, the lessons learnt from the two World Wars and several armed conflicts in the recent past, amply demonstrate that modern warfare is no longer the sole concern of the defense forces. War is total, in the sense, that it has to be fought by the nation as a whole, and not just its armed forces. The nation must show resilience through internal unity/cohesion, economic/financial strength and offering sacrifices. The dissolution of USSR proved that even the strongest military, having the best of equipment - even weapons of mass-destruction - could not prevent the collapse of the Union, much less to offer defense against foreign invasion or local insurrection. History is replete with examples that in an armed conflict between democracy and dictatorship, the democracy triumphs. Thus, Georges Clemenceau, the French statesman and Prime Minister (1906-9 & 1917-20) rightly said, "War is too important to be left to the Generals". In short, the meaning and scope of national security have undergone tremendous transformation. The preservation of national security is no longer the sole preserve/prerogative of the military establishment.

Definition and Scope

In the contemporary world, the term 'national security' is an expanding concept, hence defies definition. Important US documents on national security like National Security Strategy and National Homeland Security Policy, formulated in the aftermath of 9−11, do not attempt to fix the contours of national security. This is due to the ever-evolving context and ever-changing aspects of national security in the fast-changing world.

The modern writers and scholars however identify few broad components of national security in the present-day national/international environment; together with the nature of threats posed and strategies needed to combat or avert it. An important and generally agreed definition is offered by Wolfers, saying, "security points to some degree of protection of values previously acquired"[i]. A similar definition by Berkowitz says, "National Security can be most fruitfully defined as the ability of the nation to protect its internal values from external threats"[ii]. Such definitions no longer confine national security within the straightjacket of defending the territorial integrity of a state with military hardware. In the words of McNamara, "We are not playing a semantic game with these words; the trouble is that we have been lost in a semantic jungle for too long and have come to identify security with exclusively military phenomena and most particularly with military hardware. It just isn't so"[iii]. Security involves not only the defense of the realm but also the protection/preservation of core national values and assets, entailing preventive and preemptive strikes (military, diplomatic, financial) to thwart any possible future threat. In the words of Hermann, "When we speak of protection, we are talking of freedom from any obstruction or obstacle or enjoyment of the value outcomes we hold in high regard"[iv].

Thus, there emerge, two broad elements of national security: first, in the context of military defense to protect territorial integrity against foreign aggression; and second, the protection of core values including the preservation of liberal democratic traditions, fundamental rights/freedoms, access to justice, social security, etc. In short, the term national security connotes a broad range of elements, most of which travel beyond the traditional i.e. military preparedness, and encompass societal norms/values, economic security, energy security, environmental security, cyber security and preservation of natural resources. Others would add to the list, the elements of fundamental rights/freedoms including cherished right to life, liberty, security, dignity and freedom of thought, expression, belief, assembly and association, etc. The list goes on and on to embrace taking remedial measures to fight against crime, poverty, ignorance, corruption, social evils and taking measures for emancipation/empowerment of women, protection of minorities and redress of grievances through fair and

expeditious dispensation of justice, following the principles of rule of law and due process. In the words of Harold Brown, US Secretary of Defense (1977-81), the scope of national security has enlarged to include also the elements of economic and environmental security. He stated, "National security then is the ability to preserve the nation's physical integrity and territory; to maintain its economic relations with the rest of the world on reasonable terms; to preserve its nature, institution, and governance from disruption from outside; and to control its borders"[v]. This view is also endorsed by the declaration in a Seminar at the National Defense College, India, thus: "National security is an appropriate and aggressive blend of political resilience and maturity, human resources, economic structure and capacity, technological competence, industrial base and availability of natural resources and finally the military might"[vi]. It thus becomes abundantly clear that the term national security means and implies a wide range of aspects/elements, including military capability and the preservation of national values and achievements in the socio-economic, political and scientific fields. The lesson learnt from global history is, that economic development and scientific/technological advancement are achieved by nations having stable democratic system, following legal/constitutional norms, adhering to the principle of rule of law and ensuring good government.

2. Rule of Law

The term rule of law is a popular idiom in the contemporary word, used by all - democrats and dictators alike. The rhetoric makes it a public singsong of the present-day world. The term is the product of, and has close affinity with democratic dispensation. It is the bedrock of constitutional system of governance, following the principles of "separation of powers" (between legislatures, executive and judiciary), "division of powers" (between Centre and States under federal polity), enjoyment of fundamental rights/freedoms and dispensation of free, fair and quick justice by an independent judiciary.

The concept of rule of law originated in the British traditions of Common Law and travelled hand-in-hand with other norms/principles like representative system of governance, no taxation without representation,

human rights i.e. right to life, liberty, freedom, equality, etc. Important constitutional developments like Magna Carta (1215), Petition of Rights (1628) and Bill of Rights (1689) contributed to its growth and refinement. Prof. Dicey prescribedits salient features,meaning supremacy of law, equality before law and sanctity of fundamental rights[vii]. In the modern times, the term rule of law means the supremacy of law, in the sense that the Government is carried out under the constitution/law, which provides for the "separation of powers" between the legislation, executive and judiciary, linked with the system of "checks and balances". The concept has since transformed into a principle or doctrine, and is commonly adhered to by civilized nations, governed under democratic system of governance.

Application in Pakistan

Rule of law is tailored in our legal system through several provisions of our Constitution and the law, including the distribution of powers between the Federation and provincial governments, separation of powers between the legislature, executive and judiciary and the fundamental rights/freedoms, enforced by an independent judicature. The principle finds special mention in Art 4 (right of individual to be dealt with in accordance with the law), Art 25 (equality before law and equal protection of law), Art 10 (safeguards against arbitrary arrest/detention) and Art 10-A (rights to fair trial and due process). The rule of law is also enforced through elaborate provisions contained in the other substantive and procedural statutes e.g. the Code of Criminal Procedure 1998, Qanoon-e-Shahadat Order 1984 and precedents set by the superior courts.

3. Declaration of Emergency

States − democratic or dictatorial – may face extraordinary situation due to foreign invasion or local upheaval or natural or man-made disaster, which call for extraordinary measures to combat. In such eventuality, a common response is the proclamation of emergency, which operates, *inter alia*, as a check on the exercise of certain fundamental rights/freedoms by individuals. Emergency entails abridgment of individual freedoms in all legal systems − international and municipal – thus, making an exception for such eventuality. Extraordinary situation warrants exceptional measures, to save the state/society and ensure the safety/security of citizens. Thus,

international human rights instruments provide for the suspension of human rights or derogation therefrom, when a government declares the state of emergency. The International Covenant on Civil and Political Rights 1966, European Convention of Human Rights 1950 and Inter-American Convention of Human Rights 1989, provide for suspension of human rights during the period of emergency.

The United Kingdom passed statutes (Defence of the Realm Consolidation Act 1914 and Emergency Powers (Defence) Act 1939) during the First and Second World War, whereunder restrictions were imposed on the liberty/freedom of individuals; and such restrictions were validated by the House of Lords[viii]. Similarly, during the Indo-Pakistan armed conflicts, the Defence of Pakistan Ordinance 1965 and the Defence of Pakistan Ordinance 1971, were promulgated, thereby imposing restrictions on the individual liberty/freedoms.

Art 232-233 of the Constitution provide for the proclamation of emergency and suspension of certain fundamental rights e.g. right to property, freedom of speech, movement, assembly, association, trade, business or profession. Further, Art 245 permits the deployment of military in aid of civil power in the disturbed areas, and in such eventuality, the jurisdiction of High Court under Art 199 remains suspended. Such provision empowers the State to strike a balance between the need for protecting itself or securing national security vis-a-vis the rights/freedoms of individual. The extent to which restrictions can be imposed on individual liberty in an emergency, can be reviewed by the judiciary to maintain the delicate balance between the requirements of state necessity and welfare of the individual. Even the most advanced democracies like UK and USA, when confronted with the threat of terrorism, imposed restrictions on individual freedoms. In the UK, the Justice and Security Act 2013 provides for "secret courts" for the trial of a person who constitutes a threat to the national security. The US passed the Patriot Act 2001 to deal with terrorist threats, thereby permitting wiretaps, checking business/financial record, conducting surveillance, etc.

21st Amendment

The 21st Amendment to the Constitution was the nation's unanimous response to the menace of terrorism and the wanton destruction of national assets/ installations, suicide killings, brutalities against minorities and increasing trend of violence in society. The gruesome attack on Army Public School, Peshawar gave sufficient justification for taking extraordinary measures against the terrorists/militants. The Government responded by launching the National Plan of Action and empowering the Armed Forces to pursue and eliminate the terrorists. The extraordinary situation, faced by the nation, is acknowledged in the very Preamble of the 21st Amendment, saying, "there exists grave and unprecedented threat to the integrity and objectives set-out in the Preamble to the Constitution…from terrorist groups by raising of arms or from the foreign and locally funded anti-State elements".

Harsh measures were undoubtedly called for, but the Amendment, in its present form, transgresses the well-recognized constitutional principles of "separation of powers" and power of "judicial review". It also flouts the well-established norms of international human rights conventions, fundamental rights guaranteed by the Constitution, legal norms and precedents set by the superior courts. In a drastic way, the Amendment provided for the trial of militants by Military Courts and exempted such Courts from the application of Art 175(3) i.e. separation of judiciary from executive as well as Art 8, which states that laws inconsistent with or in derogation of fundamental rights, are void.

The Amendment was undoubtedly made in haste and passed without much debate/discussion − perhaps an emotional response to a horrendous crime of slaughter of 142 persons, mostly students in the Army Public School, by the Taliban. Thus, it is hard to conceive that the Amendment reflects a well-considered decision, and the proverbial collective "wisdom of Parliament".

The Amendment has serious implications for norms/principles set by international law and Constitution of Pakistan. It is contrary to the principle of rule of law. Regrettably, there is no concrete evidence to suggest that the Anti-terrorism Courts were ineffective or had failed to deliver. There might have been weaknesses or shortcomings in the judicial

system, but nothing serious to dislodge the existing apparatus and replace it by a new one.

Rule of law, quite naturally, is a major casualty of the 21st Amendment and consequential amendments to the Army Act 1952. Rule of law, not only strengthens democratic values of constitutional norms/principles, but also supports political development and good governance for socio-economic growth and prosperity, which are the key elements of national security. The best guarantee for rule of law is an effective and efficient judicial system. The functioning of judiciary can be improved through increase in resources and reform of the legal system.

4. Legal/Judicial Reforms:

Systematic reform of laws and trial procedure is a must to keep the system relevant and focused on getting results. The process of reform is however slow and tardy. A perennial problem faced by the judiciary is the under-resourcing. To illustrate, in the financial year 2014-15, this 3rd pillar of the State, received less than 1% (to be exact .568%) of the Federal/provincial budgets, as against 12.7% of allocation made for Defense Services. Quite naturally then, the judiciary is ill-equipped to deal with the huge backlog of cases, pending before it. The anomalies in resource allocation has to be addressed and resolved. In the following lines, few legal/judicial reform proposals are given:

i. Separating Judiciary from Executive: Separation of judiciary from the executive is a constitutional requirement [Art 175 (3)], and following the Supreme Court verdict in the Sharaf Faridi case (PLD 1994 SC 105), separation has largely been effected, through the separation of executive and judicial powers of Magistrates. However, the constitutional requirement is not yet fully realized. There exist administrative courts/tribunals, set up under Art 212 of the Constitution, and special courts/tribunals, established under various federal/provincial statutes[ix].Such courts/tribunals are constituted and the judges/presiding officers, appointed by the Executive, who exercise administrative/financial control over them. The relevant Secretary of the federal/provincial Division/Department, writes the PERs of the judges/presiding officers. There is thus, a question mark as regards

independence/impartiality of such forums and a dire need to take out such courts/tribunals from the Executive control and place them under the supervision of the High Courts. The courts/tribunals at the federal level can be placed under the control of Islamabad High Court, whereas the provincial courts/tribunals can be placed under the supervision of the respective High Court. This measure, besides strengthening the principle of independence of judiciary, will help improve their performance/functioning, through effective supervision by the High Courts. This proposal is in line with the constitutional mandate, which provides for judicial independence and free, fair, impartial, inexpensive and expeditious dispensation of justice[x].

Needless to say, the measure will also help reduce the workload of the Supreme Court of Pakistan by taking out the appeals filed against the judgments of federal/provincial service tribunals. It will enable this Court to focus on hearing appeals and petitions filed under Art 184(3) of the Constitution. The Court will further be enabled to give more time and greater attention to cases involving the interpretation of law/Constitution, so as to render quality judgments and develop new jurisprudence. On the other hand, the strength of judges in the provincial High Courts was recently enhanced(in 2008) and such courts are currently working in full strength, therefore, would be able to carry the added load[xi]. The strength of Islamabad High Court, however, requires increase, in proportion to the cases pending before it.

ii. **Curtailing Backlog and Delay:** The Judiciary is confronted with a major challenge of clearing the pending backlog of cases and quick/expeditious dispensation of justice. The problem is more acute in the area of civil litigation. The advanced countries however have managed to minimize it through continuous reforms, use of methods of alternative dispute resolution (ADR) and imposition of cost, etc.In Pakistan, to deal with the twin problems of backlog and delays, the National Judicial Policy was launched in 2009. As a result, some improvement was made; however, following opposition from the Bar, the Policy was not pursued vigorously, and later abandoned. Thus,

backlog and delay in litigation continue to haunt the courts. It is a grave reproach and serious blemish on the face of justice sector.

iii. **Reducing Number of Appeals:** The delay in litigation is also because of the prolongation of cases through interim orders and appeals/revisions. In advanced countries, multiplicity of litigation is impermissible. Thus, provided that fair trial is ensured, the number of appeals can be reduced. One appeal may be allowed and second appeal to a high forum e.g. High Court or Supreme Court permissible only on "special leave" to appeal. Second appeal may be permissible when the issue in appeal involves the interpretation of law. There should be no second appeal even by "special appeal", against the judgments of High Court, affirming an acquittal judgment of the trial court.

At present, the Karachi Bench of the High Court of Sindh and Islamabad High Court exercise original jurisdiction in civil cases of the value exceeding rupees fifteen million and rupees one hundred million, respectively. This is unique, because elsewhere in the country, the court of Civil Judge 1st Class exercises unlimited pecuniary jurisdiction. Thus, the exercise of original jurisdiction of Karachi Bench and Islamabad High Court is an anomaly, which should be removed. This will enable these High Courts to concentrate on appeals and writ jurisdiction under Art 199 of the Constitution; huge piles of such cases are pending in each such Court.

iv. **Award of Cost:** Under S. 35 of the Code of Civil Procedure 1908 (CPC), the court may award the cost of litigation to a party to the suit. It is to compensate the successful party for the actual cost incurred on litigation. The law also permits awarding compensatory cost (S. 35 A, CPC), in respect of false/vexatious claims or defense. Such compensatory cost is capped at the maximum of rupees twenty five thousand only. The limit was fixed in 1994. In keeping with the rate of inflation, the amount should be increased to rupees one hundred thousand. The Indian law (S 35 B of the Indian CPC) also provides for cost to be imposed on a party causing delay by absenting or seeking adjournment. Such cost is paid to the other party to reimburse it for the expenses incurred on attending the court. The law makes the payment

of such cost a condition precedent to continue the trial by the plaintiff or defendant. A similar provision can be added to the CPC in Pakistan.

The Supreme Court of Pakistan, under the Constitution as well as Supreme Court Rules 1980, can impose incidental cost in proceedings[xii]. Further, where a case cannot be processed by reason of neglect of the Advocate-on-Record, the Court is empowered to impose cost on such Advocate to compensate parties to the suit[xiii]. The High Courts possess ample powers to impose cost on a party, who approaches the Court with ulterior motives or conceal material facts. This power is available both under the CPC as well as Art 199 of the Constitution. Similar power is available under the Supreme Court Rules 1980 (inherent powers) to prevent the abuse of process of the Court[xiv]. The courts should impose the cost to prevent the filing of false/frivolous claims and avoid delays in litigation.

A party with a weak case attempts to drag the court proceedings to avoid final determination. Such a party, therefore, seeks frequent adjournments through the Counsel. The CPC provides for imposition of cost on the pleader/lawyer in the case of minor, when such minor is not represented by a next-friend or guardian[xv]. It is, therefore, recommended that in cases where the party is represented by a lawyer, the cost should be imposed on such lawyer to compensate the other party for expenses incurred while attending court proceedings.

The courts should also avoid granting adjournments in routine manner or in a mechanical fashion. Only exceptional circumstances and valid reasons, and subject to imposition of cost, may adjourned be allowed. No adjournment be granted on the plea that the Counsel is not present. The Counsel must be present personally or make arrangements for presentation of the case.

v. **Amicable Settlement of Disputes:** Amicable settlement of disputes through arbitration, mediation or conciliation, etc., is a useful tool for reducing backlog and quick/inexpensive dispensation of justice. Notwithstanding the Arbitration Act 1940, the law is seldom used. S. 89-A was added to the CPC, enabling the court to resort to ADR by

persuading the litigant parties to have out-of-court settlement of disputes. There is also the Small Claims and Minor Offences Courts Ordinance 2001, which provides for the use of ADR in settling cases involving small claims and minor offences. Conciliation proceedings are also provided under the Family Court Act 1964. Notwithstanding the plethora of enabling provisions, the ADR is seldom used. This is partly due to the lack of orientation/training and commitment of judges, opposition from the bar, and absence of facilitation from professional mediators/conciliators. It is, therefore, proposed that the enabling provisions should be strictly imposed and further additions made to law to empower the courts to impose cost on a party, which unreasonably avoids/refuses to avail the ADR mechanism. The Government should also encourage the establishment of ADR centers where skilled staff is available to offer professional services. Resort to ADR may also be made obligatory before filing proceedings in a court of law. ADR is also strongly favoured by Islamic injunctions, hence earnest efforts be made to use/utilise this mechanism for inexpensive and expeditious resolution of conflicts/disputes.

Endnotes

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[vii] A.V. Dicey, An Introduction to the Study of the Law of the Constitution (1885), 10th Ed, Macmillan Ltd (1959).

[viii] Liversidge v Anderson (1942) AC 206.

[ix] As provided by Art 70, 142 and 4th Schedule of the Constitution.

[x] Preamble, Art 2-A, Art 10-A, Art 37(d) and Art 175 of the Constitution.

[xi] The sanctioned strength of superior courts is:

i. Supreme Court of Pakistan: 17
ii. Federal Shariat Court: 8
iii. Lahore High Court: 60
iv. High Court of Sindh: 40
v. Peshawar High Court: 20
vi. Islamabad High Court: 7

[xii] Order XXVIII.

[xiii] Order XXIII, Rule 2

[xiv] Order XXXIII

[xv] Order XXXII, Rule 5

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