

A LEGAL PARADOX : PAKISTAN'S CONSTITUTION, MARTIAL LAW AND STATE NECESSITY

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ABSTRACT

There have been a sequence of governments in Pakistan that have suspended the due process and restricted judicial review of administrative action. The operational device is the Article 58 (2) adopted from the Government of India Act 1935 which was the country first constitution at its inception in 1947. It created a Head of State with de facto powers that augmented his de jure powers as the head of the government. This has been an instrument for arbitrary rule that has been challenged in the courts repeatedly. In the latest such episode General Musharaff's government ruled by decree on two separate occasions declaring an emergency when it tried to justify taking extra constitutional measures. Its authority was proclaimed by Provisional Constitutional Orders which allowed the enforcement of Legal Framework Orders that sanctioned the emergency regulations. In 2007 the military government was rocked by the lawyers movement that came in the aftermath of the suspension of the Chief Justice of the country. The Supreme Court restored him, but when he was dismissed again along with the upper echelons of the judiciary to pave the way for the General's election as a civilian President the momentum was for the restoration of civilian rule in the country. Empirical investigation reveals that the doctrine of State Necessity which the military has prayed in aid to justify its intervention is a consequence of an over-formal approach of judges who have set this as precedence. It can be rebutted by rejecting Kelsen's approach that has emphasised an abstract definition of law depriving the rule of law of its true spirit.

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