

# **Study of the Emergency Rule in Pakistan, 2007**

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## **Abstract**

Some of the steps of public interest litigation that the judiciary took in 2007 were considered as a threat to the military government of Pervez Musharraf. He dismissed the Chief Justice of Pakistan, Iftikhar Muhammad Chaudhry, on the charges of corruption. This presidential move was not against the chief justice of Pakistan but against the judiciary. The executive intent to tarnish and erode judiciary's image, integrity and authority was countered by a countrywide movement for the restoration of judiciary. A consolidated struggle of the bar and the bench lead to judicial revivalism in Pakistan.

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## **Historical background**

Authoritarianism as a colonial legacy was incorporated in the political system of both Pakistan and India. From the very beginning India quite successfully tried to democratise itself. There 'the rule of law was ever bent to subserve either executive action in the administration or the will of dominant elements of society'. On the other hand, Pakistan failed to make a worthwhile change to democratic rule after emerging from the debris of British colonialism. The colonial state was quickly replaced by authoritarian rulers, whether civilian or military.

History of Pakistan has been defined by uneasy relationships between state institutions and civil society. In its executive-dominated state, the superior courts in particular have played unusually important part in determining the country's political fate.<sup>1</sup> The conflict between Pakistan's executive orders and judicial authorities dates back to the era of Liaquat Ali Khan when the country was in its teething years. Although, throughout the course of its political history, judiciary has

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<sup>1</sup> Paula R. Newberg, *Judging the State Courts and Constitutional Politics in Pakistan* (United Kingdom: Cambridge University Press, 1995), p.2.

played an integral role in the development of the country. However, according to public opinion, judiciary in Pakistan has been more inclined towards the military command and has favoured it often.<sup>2</sup>

The long gestation period of Pakistan's first constitution was marked by tensions and conflicts between the executive and legislature, represented by the governor general, on the one hand, and the Constituent Assembly, on the other. The Constituent Assembly made the governor general powerless in matters pertaining to dismissal of his ministers; they would instead be individually and collectively responsible to the federal legislature. The amendment was, however, made in such a haste that it could be termed as 'constitutional coup'.<sup>3</sup> On 24 October 1954, Ghulam Muhammad dissolved the Constitution Assembly of Pakistan on the grounds that it has lost the confidence of the people and took unduly long period in framing a constitution. As the assembly was no longer the representative of the people, the governor general decided to arrange elections for a new assembly.<sup>4</sup> The court held Section 2 of the ordinance issued by governor general as *ultra vires*. The power of the federal court to make any provision to the constitution of the country was not granted by the law on anybody except the Constitution Assembly whose continuing legal status was recognized.<sup>5</sup>

The second Constituent Assembly drafted the first constitution, which came into force in 1956.<sup>6</sup> The life of the 1956 constitution was too short. President Iskander Mirza imposed martial law, abrogated the 1956 constitution and invited Ayub Khan, the then army chief, to rule the country. General Ayub Khan in his address to the nation, on 8<sup>th</sup> October 1958, explained that the army entered politics 'with great reluctance but with the fullest conviction that there was no alternative to it except the disintegration and complete ruination of the country'. This was the first phase of martial law.<sup>7</sup> Ayub was sworn in as the first elected President of Pakistan on 17 February 1960 and on the same day he announced the

<sup>2</sup> Dawn, Islamabad, 07 February 2012. Reference: [www.dawn.com](http://www.dawn.com)

<sup>3</sup> G.W. Chaudhry, *Constitutional Development in Pakistan* (London: Longman Group Ltd., 1969), p.143.

<sup>4</sup> Syed Noor Ahmad, *From Martial Law to Martial Law, Politics in Punjab 1919-1958* (Lahore: Vanguard, 1985), p.345.

<sup>5</sup> Paula R. Newberg, *op.cit.*, p.63.

<sup>6</sup> Dr Sultan Khan, *Pakistan Past, Present and Future* (Lahore: Alameen, 1998), p.227.

<sup>7</sup> Hasan Askari Rizvi, *The Military and Politics in Pakistan 1947-1999* (Lahore: Sang-e-Meel Publication, 2000).

appointment of the constitution commission.<sup>8</sup> Ayub Khan framed the 1962 constitution with presidential form of government. It provided for independent judiciary, consisting of a Supreme Court and two High Courts. The judiciary had full power to pass judgment over the acts of legislature. The constitution had also maintained the judicial control over the executive. The courts had the power of 'judicial review' of executive action.<sup>9</sup>

General Yahya Khan assumed the power of Chief Martial Law Administrator (CMCA) in March 1969 and President of Pakistan without facing any opposition. He followed Ayub Khan's course very closely.<sup>10</sup> He assumed complete control and abrogated the 1962 constitution.<sup>11</sup>

Bhutto moved over to prime ministership on 14 August 1973 when parliamentary system was introduced under the 1973 constitution.<sup>12</sup> On 5 July 1977, no one could foresee that the martial law imposed by General Zia-ul-Haq, Chief of Army Staff, would mark the beginning of the longest period of military rule which the country had yet known. Although he gave the impression of a reluctant coup maker, General Zia held on to power with a tenacity which belied his declaration about the limited purpose of his action. He wielded absolute power from 1977 to 1985 as a Chief Martial Law Administrator and President.<sup>13</sup>

For a decade there were elected civilian governments of Pakistan People's Party (PPP) led by Benazir Bhutto and the Pakistan Muslim League (PML) led by Mian Nawaz Sharif. During their rule, military influence once again increased in politics and the military backed presidential use of Article 58(2) (b) to dissolve the government. Presidents of Pakistan usually justified the dissolution of the government on corruption charges against the political leaders. The Supreme Court mostly upheld the dissolution. Only once it invalidated the presidential action, and restored Prime Minister Mian Nawaz Sharif in 1993.<sup>14</sup>

Benazir Bhutto and Nawaz Sharif had adverse relations with the judiciary and their governments attempted to undermine its independence. In this regard the most important issue was Benazir

<sup>8</sup> Hamid Yousuf, *Pakistan: A Study of Political Developments 1947-99* (Lahore: Sang-e-Meel Publication, 1999), p.73.

<sup>9</sup> Dr Sultan Khan, *op.cit.*, p.292.

<sup>10</sup> Hasan Askari Rizvi, *op.cit.*, p.181.

<sup>11</sup> See Hamid Yousuf, *op.cit.*, p.111.

<sup>12</sup> Hassan Askari Rizvi, *op.cit.*, p.208.

<sup>13</sup> Hamid Yousuf, *op.cit.*, pp.171-72.

<sup>14</sup> Dr. Richard Blue and Richard Hoffman, *Pakistan Rule of Law Assessment Final Report* (Pakistan: USAID, 2008), p.2.

Bhutto's appointment of Justice Sajjad Ali Shah as the Chief Justice of the Supreme Court, superseding two senior judges. This led to the *Al-Jehad Trust* case (1996) in which the Supreme Court elaborated key principles for the appointment process of the High Court and Supreme Court judges, enhancing the power of the chief justice and bolstering the independence of the judiciary. In practice, these principles have not been consistently followed and the judiciary remained subject to pressure and manipulation.<sup>15</sup>

### **Dismissal of the chief justice and the legal battle**

What happened in Pakistan from 9 March to November 2007, was no small change.<sup>16</sup> General Pervez Musharraf, acting in his capacity as army chief, suspended the constitution and declared a state of emergency, replacing the constitution with a Provisional Constitution Order (PCO). He in his televised address to the nation announced:

There is visible ascendancy in the activities of extremists and incidents of terrorist attacks, including suicide bombings,... rocket firing and bomb explosions and the banding together of some militant groups have taken such activities to an unprecedented level of violent intensity posing a grave threat to the life and property of the citizens of Pakistan.... I, General Pervez Musharraf, Chief of Army Staff, proclaim emergency throughout Pakistan. I hereby order and proclaim that the Constitution of the Islamic Republic of Pakistan shall remain in abeyance.<sup>17</sup>

Some of the charges were listed by Naeem Bukhari, an advocate, against the chief justice of Pakistan, in a letter written to him. This letter was widely circulated, several weeks before the reference of the president. The lawyers' community felt that the chief justice was targeted for his judicial activism and especially in cases involving violation of human

<sup>15</sup> *Ibid.*

<sup>16</sup> Azmat Abbas and Saima Jasam, *A Ray of Hope: The Case of Lawyers' Movement in Pakistan* (Pakistan: Heinrich-Boll-Stiftung, in the publication series on promoting Democracy under Conditions of State Fragility, 2009), p.3.

<sup>17</sup> Human Rights Watch Report, *Pakistan destroying legality, Pakistan cracks down on lawyers and judges*, New York, 19:19 (2007). Also see [www.hrw.org](http://www.hrw.org)

rights, particularly the cases of political and public significance.<sup>18</sup> The chief justice heard other cases of national, political and constitutional importance as well. One of the important case that came before the Supreme Court was the upcoming presidential elections and the legality of the president retaining his position as the army chief. The Chaudhry court challenged the legitimacy of Musharraf as he was not eligible for another presidential election.<sup>19</sup> In the name of fighting terrorism and Islamist extremism, Musharraf instead mounted to what was effectively a coup against Pakistan's judiciary. Targets of the crackdown included lawyers, judges, human rights activists, opposition political party members, journalists, students, and academics.<sup>20</sup>

Upon the chief justice's refusal to resign, Musharraf ordered that 'The President does hereby restrain Mr. Justice Iftikhar Muhammad Chaudry to act as Chief Justice of Pakistan and a Judge of the Supreme Court, as he is unable to perform the functions of his office due to facts narrated in a reference having been made against him by the Supreme Judicial Council'. While the chief justice was still being held at Army House, Musharraf appointed Justice Javed Iqbal as the Acting Chief Justice under Article 180 of the constitution.<sup>21</sup> Justice Abdul Hameed Dogar administered the oath of office to him. The appointment of Justice Javed Iqbal was made in the absence of the senior most judge of the apex court — Justice Rana Bhagwandas — who was in India at that time and temporarily absent from Pakistan.<sup>22</sup> The entire exercise of suspending the chief justice of Pakistan by General Pervez Musharraf was to replace him by another judge who may be friendly to his regime. The government, at that time, was anticipating numerous litigations in the Supreme Court involving several legal questions including:

- (i) Was General Pervez Musharraf qualified to remain Chief of Army Staff as well as President of Pakistan?

<sup>18</sup> International Bar Association, 'The Struggle to Maintain an Independent Judiciary a Report on the attempt to Remove the Chief Justice of Pakistan', United Kingdom, July 2007.

<sup>19</sup> Dr. Richard Blue and Dr. Richard Hoffman, *op.cit.*, 2008.

<sup>20</sup> *Ibid.*

<sup>21</sup> According to Article 180 of the Constitution of 1973 of Pakistan, when the office of the chief justice becomes vacant or the chief justice is unable to perform his duty or due to any other reason the president shall appoint senior most judge of the Supreme Court as the chief justice of Pakistan.

<sup>22</sup> Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi: Oxford University Press, 2009), p.511.

- (ii) Whether the Parliament, whose tenure was expiring in the month of September 2007, was constitutionally competent to re-elect President Musharraf as president for next five years?<sup>23</sup>

According to the Constitution of 1973 of the Islamic Republic of Pakistan, the chief justice is not answerable to the prime minister or the president. He is only answerable to the Supreme Judicial Council and his peer judges and, of course, in the court of public opinion. The way the chief justice was blamed to answer false allegations by the president and the prime minister was deliberately intended to insult and undermine the his office. None of Musharraf's two offices gave him the right to summon the chief justice of Pakistan let alone suspend him.<sup>24</sup>

It is also interesting to note why Musharraf had called the chief justice in his capacity as president? And why he chose Army House, Rawalpindi (the so-called 'presidency camp office') for the meeting? Constitutionally, if he wanted to talk to the chief justice in his capacity as president, he should have worn civilian dress and called the chief justice of Pakistan to *Aiwan-e-Sadr* (President House). The fact that the chief justice of Pakistan was called to the Army House for his meeting with Musharraf meant that his position was weak. Musharraf once again used the card of Chief of the Army Staff to undermine, intimidate and threaten an important civilian institution. The chief justice was under immense pressure to resign. The presence of Prime Minister Shaukat Aziz in the Army House also added fuel to fire. It showed that the chief justice (head of the judicial branch) was answerable to the prime minister (head of the executive branch), which was not legitimate.<sup>25</sup>

General Musharraf and his legal team forgot that growing judicial activism would become a direct threat for them and their so-called 'genuine democracy'. They had transferred the reins of judiciary to such a person whose tenure was too long — up to 2013. When the chief justice was suspended and made 'non-functional', the government tried its level best to give a constitutional cover to the unconstitutional and shameful exercise of raw power. Initially, it was claimed by the government that the president had filed a reference against the chief

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<sup>23</sup> Justice (Retd) Rasheed A. Razvi, 'Testing time for Judiciary in Pakistan', published on the Internet: [http://www.upiasiaonline.com/politics/2007/08/08/commentary\\_testing\\_time\\_for\\_pakistans\\_judiciary/](http://www.upiasiaonline.com/politics/2007/08/08/commentary_testing_time_for_pakistans_judiciary/)

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

justice under Article 209 of the Constitution of Pakistan, 1973.<sup>26</sup> On 15 March 2007, President Musharraf issued another order which provided:

The President, In terms of Article 2(1) of the Judges (Compulsory Leave) Order 1970 (p.o.no.27 of 1970), Is pleased to order that Mr. Justice Iftikhar Muhammad Chaudhry, Chief Justice and Judge Of the Supreme Court of Pakistan shall be on compulsory leave with effect from 9 March 2007, till submission of the report by the Supreme Judicial Council and the President's order thereon.<sup>27</sup>

This action was taken by Musharraf in repose to public criticism that there was no legal basis for the president's order of 9 March 2007 for suspending the chief justice. However, the same criticism was also extended to the order of 15 March 2007.<sup>28</sup>

### **Chaudhry's writ petition and restoration**

On 18 April 2007, the deposed Chief Justice, Iftikhar Muhammad Chaudhry, filed a constitutional petition in the Supreme Court. He challenged Musharraf for filing of the reference against him. A Supreme Court bench of three judges was already hearing similar petitions filed by various bar associations. The chief justice's petition raised Judicial Council to hold a trial of the chief justice and the action taken by the executive against him. Musharraf's move itself was unconstitutional because:

- (i) The president had suspended the chief justice which he could not do under any provision of the constitution. There is no constitutional provision empowering the president to declare a judge to be 'non-functional' before sending the reference to the Supreme Judicial Council under Article 209 of the constitution.
- (ii) Under Article 209, the president does not have the power to remove or suspend the chief justice without the recommendation of the Supreme Judicial Council.
- (iii) The president can only send a reference to the Supreme Judicial Council against a judge. The Supreme Judicial Council then conducts hearing into the allegations and, after inquiry, submits its recommendations to the president. Only in the event that the Supreme Judicial Council reports to the president that a judge is

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<sup>26</sup> Arshad Mehmood vs the Government of Punjab PLD 2005 SC 193.

<sup>27</sup> Cited from Hamid Khan, *op.cit.*, p.512.

<sup>28</sup> *Ibid.*

guilty of misconduct the president can proceed against that judge by removing him.

- (iv) The constitution of the Supreme Judicial Council itself was unconstitutional. Justice Javed Iqbal had been appointed as acting Chief Justice whereas Justice Rana Bhagwandas was the senior most judge. So the constitution of Supreme Judicial Council was a *forum non judice*.<sup>29</sup>

The chief justice denied the charges leveled against him in the reference and called for an open public trial by an impartial, unbiased and legally competent forum, as well as ample opportunity to obtain the records required for his defense. The respondent's reply denied the above contentions and asserted the legality of all actions carried out on 9 March and thereafter.<sup>30</sup> On 7 May 2007, a bench of five members decided that, due to the unprecedented constitutional and legal issues involved in the cases, the full court would hear the petition of the chief justice and 22 similar petitions. The bench also decided to withhold the proceedings of the council until the case was heard by the full bench of the Supreme Court. This bench excluded the judges who were members of the Supreme Judicial Council. One other judge reclused himself and, from 14 May 2007, a thirteen member bench of the Supreme Court heard the petitions of the chief justice. On 11 June 2007, the Supreme Court deferred its ruling on the maintainability of the petition against the presidential reference and commenced regular hearings on the merits of the petition of the chief justice.<sup>31</sup>

Public support for the deposed chief justice increased. The courts were over-crowded at the time of hearings of Iftikhar Chaudhri. This gave weightage to him. This agitation was really a challenge for Musharraf. On 16 July 2007, the government lawyers issued a detailed report against the deposed chief justice.<sup>32</sup> After four days, on 20 July 2007, a thirteen member bench of the Supreme Court of Pakistan restored the deposed Chief Justice Iftikhar Chaudhry. There was a consensus among the judges that the president's action was ultra vires of the constitution and was passed without a lawful authority. The reinstatement of chief justice by a full bench of the Supreme Court was particularly significant in terms of its contribution to Pakistan's

<sup>29</sup> Article 209 of the Constitution of 1973 of the Islamic Republic of Pakistan

<sup>30</sup> Rai Muhammad Saleh Azam, 'Assault on Judiciary', *The Daily Nation*, Islamabad, 13 March 2007.

<sup>31</sup> Hamid Khan, *op.cit.*, p.514.

<sup>32</sup> Azmat Abbas and Saima Jasam, *op.cit.*, p.14.



constitutional jurisprudence, fight for the independence of the judiciary, and instillation of fresh hope into the withered soul of the nation.<sup>33</sup>

### **The emergency rule of 3 November 2007**

Musharraf had stated that some external elements were involved in derailing the ongoing political process of the country but he was determined to go ahead, irrespective of what the Supreme Court decided. He proclaimed emergency in Pakistan on 3 November 2007. The chief justice was deposed, the Constitution of 1973 was suspended, and all the judges of the Supreme Court were removed. Judges of that court, however, declared his act illegal. Lawyers, politicians and human rights activists were arrested, private TV channels were banned and restrictions were imposed on anti-government reports. Thousands of people were sent to jails, journalists were threatened and lawyers who participated in anti-government rallies were suppressed. Musharraf's motive was to retain his power to legitimize his martial law and replace dissenting judges with hand-picked appointed judges. The international community, however, reacted adversely. It demanded rule of law, restoration of independent judiciary, release of political prisoners, immediate restoration of constitutional order, and the appointment of an impartial caretaker government to oversee free and fair elections.<sup>34</sup>

Musharraf justified emergency rule on three points: First, terrorist attacks on agencies and state infrastructure; second, judicial reference that demoralized the police, challenged the government policies, undermined efforts to tackle militancy and affected economic growth, third, judges misused their power and humiliated officials.<sup>35</sup> He claimed to hold general elections before 9 January 2008 and to take off his military uniform before his oath for a new presidential term. But he could not fulfil his promise as no proper elections were possible under martial law; Election Commission was under his control and judiciary

<sup>33</sup> Tahir Wasti Zaidi, 'A New Supreme Court: the Contribution of Chief Justice Iftikhar Muhammad Chaudhry', in Moeen H Cheema and Ijaz Shafi Gilani (eds.), *The Politics and Jurisprudence of the Chaudhry Court 2005-2013* (Karachi: Oxford University Press), p.14.

<sup>34</sup> Policy Briefing, International Crisis Group report: *Winding Back Martial Law in Pakistan*, Asia Briefing N°70 Islamabad/Brussels, 12 November 2007.

<sup>35</sup> Oxford Analytica, Musharraf bid for survival may prove costly: Global Strategic Analysis North America, 5 November 2007, p.1. Available at <http://www.belfercenter.org/sites/default/files/files/publication/OA%20-%20Pakistan%20Emergency.pdf>

had been picked by the military. On the other hand, some political leaders were in jail and others were unable to contest, yet he claimed that he would restore his so-called 'real democracy'. Musharraf disingenuously said that he had not imposed martial law, and it was a 'state of emergency' that is provided in the 1973 constitution, which can be imposed by the president if the country faces a grave external threat or internal disturbance. When emergency was proclaimed on 3 November 2007, some articles of the constitution had been suspended and the constitution was held in 'abeyance'. The general's proclamation was made in his capacity as army chief, not as president which was unconstitutional. In his capacity as army chief, he also issued a Provisional Constitutional Order (PCO). Thus direct military rule had started replacing constitutionalism and rule of law. The emergency proclamation clearly stated:

A situation has arisen where the Government of the country cannot be carried on in accordance with the Constitution and as the Constitution provides no solution for this situation, there is no way out except through emergent and extraordinary measures.<sup>36</sup>

Any executive order can be challenged in the Supreme Court for being unconstitutional. The court has the constitutional power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it. It also has the power to consider a question of public importance with reference to the enforcement of any of the Fundamental Rights.<sup>37</sup>

Under the PCO the judges were required to take a new oath of office. When Musharraf came into power in 1999 through a military coup by suspending the constitution, many judges took such an oath. This time they refused to do so. Some of the judges were as a result removed from their respective positions. At least 60 judges out of 97 of the superior courts were removed. Some of the judges were kept under house arrest. They not only lost their security and protection, but received threats from different sides. They were also threatened with the loss of their government residence and pensions as well.<sup>38</sup>

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<sup>36</sup> For the text of the Provisional Constitutional Order see, *Daily News*, Islamabad, 4 November 2007.

<sup>37</sup> *Ibid.*

<sup>38</sup> Human Rights Watch Report 2007, *op.cit.*, p.6.

Under the PCO no court, including the Supreme Court, had ‘the power to issue any order against the president’. Nor the ‘Proclamation of Emergency’ order or any order made in pursuance thereof could be questioned. It also stated that the federal and provincial assemblies will remain intact with normal routines. Under the PCO President Musharraf had assumed all powers for himself. He was also empowered to amend the constitution, as ‘deemed expedient’. As it was stated in the PCO that no ‘judgment, decree, writ, order or process whatsoever [can] be made or issued by any court or tribunal against the President or any authority designated by the President’. Yet the chief justice and six further judges of the Supreme Court declared it as illegal and unconstitutional. As a result they were humiliated and kept under house arrest. Legal experts of Pakistan were of the opinion that the PCO has no legal status and the removal of the judges from their respective positions had no legal foundations. This action was based on Musharraf’s personal interest to retain his dual positions as head of the army and President. On 15 November 2007, Musharraf’s term as President was due to expire, parliamentary approval for his dual responsibilities was required. The Supreme Court in its judgment on the legality of his presidential election had criticized him on two grounds: Firstly, it was illegal for him to hold both offices and secondly, he was bound by the bar on senior military officers standing for public office until they have been retired for two years.<sup>39</sup>

In previous coups, including Musharraf’s in 1999, primary target was to overthrow political leadership, but the situation was different in 2007. This time the judiciary was the key target. Judiciary challenged military’s legitimacy since it threatened the military regime’s survival. The proclamation of emergency blamed the judiciary for ‘constant interference in executive functions’ and ‘overstepping the limits of judicial authority’ by taking over ‘executive and legislative functions’.<sup>40</sup> The first task of military rule consequently focused on subverting judicial independence. Judges were forced to step down for refusing to take an oath of allegiance to military rule (i.e., the PCO), instead of the 1973 constitution.<sup>41</sup> Senior-most amongst them, Justice Abdul Hameed Dogar was sworn in as the new Chief Justice under the PCO. Three other judges of the Supreme Court who took oath under the PCO were Muhammad Nawaz Abbasi, Faqir Muhammad Khokhar and M. Javed

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<sup>39</sup> International Crisis Group Report, *op.cit.*, 2007.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

Buttar. The following day, one more judge Syed Saeed Ashhad took oath, raising the total strength of the Supreme Court judges to five. However, about 72 per cent of the judges of the Supreme Court showed exceptional courage, conviction and commitment. A large majority of judges refused to comply.<sup>42</sup> The others, including Chief Justice Chaudhry, had been dismissed, most of them were placed under house arrest. Scores of judges in the Punjab, Sindh and Peshawar High Courts also refused, including the chief justices of the Sindh and Peshawar High Courts. Musharraf had moved quickly to appoint loyal judges as chief justices of the Supreme and High Courts because, without them ‘free and fair elections, were impossible.’<sup>43</sup>

### **Amendments to laws under emergency rule**

As part of his effort to institutionalize the military’s power, Musharraf amended the 1952 Army Act to allow the military to try civilians for a wide range of offenses previously under the purview of the country’s civilian judiciary. Under the amended Army Act, civilians could be tried in military courts for acts of treason, sedition and less specific offenses such as ‘giving statements conducive to public mischief’.<sup>44</sup>

In his capacity as army chief, Musharraf amended the constitution on 21 November and again on 14 December 2007, through executive orders to provide blanket indemnity for all actions that were taken while the constitution remained suspended. The orders included a number of amendments that would normally require a two-thirds majority in parliament to become a law. Crucially, he withdrew the power of judicial review by Pakistan’s courts of all actions taken under the Provisional Constitution Order. The 21 November order stated:

All proclamations, President’s orders, ordinances, Chief of Army Staff orders, laws, regulations, enactments, including amendments to the Constitution, notifications, rules, orders or bye-laws in force immediately before the date on which the emergency was revoked, will continue in force until altered, repealed, or amended by the ‘competent authority.

In effect, Musharraf has given his arbitrary tampering of the constitution the force of law, and placed it beyond judicial review or the need for

<sup>42</sup> Hamid Khan, *op.cit.*, p.521.

<sup>43</sup> Crisis Group Report, *op.cit.*, 2007.

<sup>44</sup> Constitution (Amendment) Order, 2007, [http://www.app.com.pk/en/index.php?option=com\\_Content](http://www.app.com.pk/en/index.php?option=com_Content&task=view&id=21447&Itemid=1) &task =view&id=21447&Itemid=1 accessed 16 December 2015.

parliamentary approval.<sup>45</sup> Even after the restoration of the constitution and the end state of the emergency, all the regulations rushed through 3 November were to continue unless opposition parties, after winning two-thirds majority in the parliament, repealed them. Given the length that Musharraf had gone to in order to impose changes in the basic law by suspending the constitution itself, it was unlikely that Musharraf would allow such a situation to arise.<sup>46</sup>

Musharraf also amended the Legal Practitioners and Bar Councils Act on 24 November 2007. Effectively, this amendment allowed the government, at its discretion, to revoke any lawyer's professional license to practice. It also provided the courts that were heavily politicized by Musharraf's dismissals of justices of the Supreme Court, the power to do the same.<sup>47</sup>

### **Emergency and PCO challenged**

The Supreme Court of Pakistan, headed by Justice Abdul Hameed Dogar, affirmed and validated the state of emergency, imposed by Pervez Musharraf as an army chief. However, the court demanded for the revocation of emergency as soon as possible. The seven members bench presided over by Dogar announced the hearing of petition against the emergency and PCO. This gave the army chief the first formal and legal permission and power to impose emergency and govern through his own PCO. Many lawyers and judges were not surprised by the decision because they already knew that the judges, who have taken oath under PCO, basically have agreed to accept all the actions of the army chief.<sup>48</sup> The things that surprised the lawyers was emphasis on judicial activism as a reason for imposing emergency.<sup>49</sup>

The Supreme Court disposed-off two identical petitions of Mr. Tikka Iqbal Khan and Zafarullah Khan, Chairman of Watan Party, who challenged the imposition of emergency rule, the PCO, removal of superior courts judges and limitation on media, under Article 184(3) of

<sup>45</sup> Wajuhuddin Ahmad vs. Chief Election Commissioner, PLD 2008 S.C. 25. Also see Hamid Khan, *op.cit.*, p.522.

<sup>46</sup> Human Rights Watch Report, *op.cit.* Also see [www.hrw.org](http://www.hrw.org).

<sup>47</sup> Ordinance No. LXIX of 2007, Legal Practitioners and Bar Councils (Amendment) Ordinance, also available [http://www.app.com.pk/en/index.php?option=com\\_content&task=view&id=21729&Itemid=38](http://www.app.com.pk/en/index.php?option=com_content&task=view&id=21729&Itemid=38) (accessed 16 December 2007).

<sup>48</sup> Nasir Iqbal, 'Supreme Court validated Emergency and PCO', *Dawn*, 24 November 2007.

<sup>49</sup> *Ibid.*

the constitution. For disposing of the petition the court stated that the situations was such that following the constitution was impossible. The judges were of the view that the situation was the same as that on 5 July 1977 and 12 October 1999, warranting for the proclamation of emergency. The Chief Justice, Abdul Hameed Dogar, ordered the president, the federal government and the Election Commission to ensure free, fair and transparent elections.<sup>50</sup> The Attorney General, Malik Muhammad Qayum, remarked on the decision in the court room that ‘the court has given an independent and balanced judgment’. Regarding the violation of fundamental rights, he remarked, ‘The constitution has been declared the supreme law of the land’. A prominent lawyer, Fakhruddin G Ibrahim, stated on the judgment, that the judges were present to protect the PCO rather than the constitution. The Pakistan Bar Council, through a resolution appealed to the lawyers, the political parties’ members, the professionals, the civil society members and the general public to participate in a campaign against Musharraf and in favor of restoration of the pre-3 November 2007 judiciary.<sup>51</sup> The so-called... independent Supreme Court, after hearing Mr. Zafarullah Khan of the Watan party for a while, announced: ‘since the old legal order has not been completely suppressed or destroyed, therefore this is a case of constitutional period’. It added that the constitutional amendments could only be used when the constitution failed to provide a solution for the attainment of the declared objectives of the chief of the army staff. Justice Abdul Hameed Dogar and some other judges, in Tikka Iqbal Khan case, reported as PLD 2008 SC 178, and the review petition reported as PLD 2008 SC 615, validated on the touchstone of the law of necessity and the principle of *salus populi suprema ast lex* (welfare of the people was the supreme law) the proclamation of emergency as well as other unconstitutional instruments of the 3<sup>rd</sup> November 2007 and the action taken there under, including amendments made in the constitution and insertion of Article 270 AAA, whereby validation was purported to be given to all such acts.

The judicial crisis, which had erupted with the actions of 3 November 2007, continued to deepen with every passing moment. The power of Judicial Review, given to the courts, empowered them to review the actions of the army chief or the president, notwithstanding the ouster of their jurisdiction by the extra-constitutional measures. It added that the chief justice and other judges of the superior courts were subject

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<sup>50</sup> PLD 2008 SC 178 and the Review petition reported as PLD 2008 SC 615

<sup>51</sup> *Ibid.*

to accountability only before the Supreme Judicial Council under Article 209 of the constitution.<sup>52</sup>

The chief justice and the judges of the superior courts, who have not taken oath under the oath of office order 2007, ceased to hold their respective titles and offices. Their cases could not be reopened due to being hit by the doctrine of past and closed transaction.<sup>53</sup>

The order said:

The proclamation of emergency could be revoked by the president or the chief of the army staff so that the period of constitution deviation was brought to an end. However the Supreme Court retained its power to re-examine at any stage the continuation of the state of emergency if the circumstances so warranted.

The 1973 constitution remained the supreme law of the land still, except some parts that were in abeyance for the better interest of the people of Pakistan.<sup>54</sup> It added:

The extra constitutional steps of proclamation of emergency of November 3, the PCO no 1 of 2007, the PCO amendment order 2007, the oath of office order 2007 and the president order No 5 of 2007 are hereby declared to have been validly made by COAS/president, subject to the condition that the country should be governed in accordance with the constitution as much as possible. All act and actions taken for the orderly running of the state and for the advancement and welfare of the people are also validated.<sup>55</sup>

In the non-existence of the effective parliament, the order gave the General Musharraf the power and authority to amend the constitution as and when required for the larger interest, safety and betterment of the people of Pakistan under the principle of *salus populi suprema lex* (welfare of the people to be supreme law). Thus General Musharraf had been given the permission by the Supreme Court to do anything whether according to or against the constitution for the betterment of Pakistani people.<sup>56</sup>

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<sup>52</sup> PLD 2008 Tikka Iqbal Khan v. General Pervez Musharraf, SC. 6

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> Nasir Iqbal, *op.cit.*

<sup>56</sup> *Ibid.*

### **Musharraf quits as COAS and emergency lifted**

A writ petition against Musharraf's election was filed in the Supreme Court by Qazi Hussain Ahmad, Imran Khan and others. They challenged President General Pervez Musharraf's re-election. The nine member bench of the Supreme Court announced, by a 'six three' majority, that the constitutional petitions were 'not maintainable'. This was a technical victory for Musharraf because, at the same time, lawyers were of the view that Musharraf should not be re-elected as president. Hamid Khan, a prominent lawyer, stated that President Musharraf's holding of two offices were unconstitutional and the act shows that he was holding it forcefully. Sharifuddin Pirzada argued, 'To take control of the country was easy for a military ruler, but the time to depart was very difficult because he changed everything into ash. Therefore, any transition from military to civilian rule was a difficult task'.<sup>57</sup>

Before re-election General Pervez Musharraf had initially decided to doff his uniform but later on he changed his intention. Attorney General Justice Malik Qayum, S.M. Zafar and Makhdoom Ali Khan were the legal experts who were consulted by the president on the matter. Malik Qayum suggested that General Musharraf may take new oath for the next term as civilian president under the 1973 constitution and not under the PCO. Also he was of the view that General Musharraf should doff uniform before taking the oath.<sup>58</sup>

On 28 November 2007 Musharraf handed over his charge as the commander of the army to General Ashfaq Parvez Kayani. On 29 November 2007 he took oath as civilian President of Pakistan. After taking oath, in his address to the nation, he declared lifting emergency on 16 December 2007 and also withdrawal of the PCO. He promised for holding of general elections on 8 January 2008. He announced that the constitution would be revived on 15 December 2007 subject to Article 270 AAA and other amendments purportedly made by Musharraf.<sup>59</sup>

On 14 December 2007 Musharraf introduced six more amendments in the constitution through executive orders: Article 41(3) was amended to undo the requirement that Musharraf could only run for the office of president after completion of his term on 15 November 2007; Article 44(2) was amended allowing Musharraf to seek re-election for a fresh term of five years; not withstanding any bar in the

<sup>57</sup> Dr. Noorul Haq and Miss. Farhat Akram, 'Presidential Elections 2007', *Institute of Policy and Research Institute factfile*, Islamabad, 2007.

<sup>58</sup> *Ibid.*, p.106.

<sup>59</sup> *The Daily News*, Islamabad, 29 November 2007.



constitution; Article 270-C was amended to provide that judges who had not taken oath on and after 3 November had ceased to hold office; Article 175 was amended for providing the establishment of High Court for the Islamabad Capital Territory; Article 193 and 194 were amended deleting the requirement of consultation with the governor for appointment of judges for the Islamabad High court because there was no such office in Islamabad, and Article 193 was amended reducing the minimum age requirement for appointment of a High Court judge for 45 to 40 years.<sup>60</sup>

After the assassination of Benazir Bhutto, in December 2007, elections were held in a very tense atmosphere. Due to violence, street protests and demonstrations throughout Pakistan, elections were postponed to 17 February 2008. PPP which became more stronger with the Benazir Bhutto's assassination got 125 seats, while PML (N) got only 91 seats. These two parties formed a 'government of national consensus'.<sup>61</sup> Pakistan People Party (PPP) nominated Syed Yousaf Raza Gilani for the post of prime ministership on 22 March 2008. He was elected as a Prime Minister of Pakistan against Pervez Elahi of PML (Q), with a vote of 246 to 42.<sup>62</sup> On 24 March 2008, he ordered to release the detained judges. The authorities immediately acted upon his order and released judges jailed since 3 November 2007.<sup>63</sup> Prime Minister Gilani, on 16 March 2009, addressing the nation, announced that the Chief Justice Chaudhry would be restored on 21 March 2009, the day when the Dogar was due to retire. It was a compromise deal supported by US and UK to avert chaos. Chudhry resumed his duties on 23 March 2009.<sup>64</sup>

## Conclusion

In 2007 the military and judiciary were at crossroads. The year opened a new chapter in the judicial history of Pakistan: the growing activism of Chaudhry's court obstructed constitutional deviation and direct military intervention in the superior judiciary of Pakistan. Indeed, the growing

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<sup>60</sup> Constitution Second Amendment Order 2007, President Order 6 of 2007. PLD 2008 Federal Statutes 117. Also see Hamid Khan, p.524

<sup>61</sup> 'PANORAMA of Parliamentary elections', An Annual publication of the Inter-Parliamentary Union (IPU) Grand-Saconnex (Geneva, Switzerland, 2009), p.3.

<sup>62</sup> *Ibid.*

<sup>63</sup> *The Daily News*, 30 March 2008.

<sup>64</sup> International Bar Association, 'A Long March to Justice: A report on judicial independence and integrity in Pakistan,' United Kingdom, September 2009.

influence of judiciary threatened the military regime's survival. In these circumstances the military led government was in search of a person to legalize its illegalities and a reference against the chief justice was thus filed for this purpose. A legal battle started between the executive and the judiciary. Some charges were listed against the chief justice of Pakistan. The dismissal of the Chief Justice, Iftikhar Chaudhry, however, further weakened the position of President Musharraf; ultimately he resigned, bringing an end to his era of military dictatorship.