

Executive-Judiciary Interaction and Movement for Independent Judiciary: 2007-09.

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ABSTRACT

Pakistan, since independence has become a laboratory for constitutional experiments with judiciary playing the most controversial role. Under the theory of necessity, the superior judiciary has legalized military takeovers. Although controversial as a judge of the Supreme Court of Pakistan, Iftexhar Muhammad Chaudhry was found to be a changed person the moment he took his seat as a Chief Justice of Pakistan. Since his appointment as CJP, he was more eager to assert his authority to maintain rule of law. However, the situation was not conducive for any action that went against the will of the military ruler. But the Judge-Bench collaboration supported by the entire civil society initiated a movement to negate and nullify the dictates of a dictator. The movement led by Black Coats community extended over years, bearing hardships of all kinds. The movement was successful in forcing General Musharraf to uphold the provisions of constitution and rules of established law of the land. The entire nation emerged victorious in upholding what is called rule of law.

KEY WORDS: Judiciary, Supreme Court, Chief Justice of Pakistan, Rule of Law, Army.

INTRODUCTION

“Why should a judge be removed for an action which is legal under the constitution?” There are apprehensions of judges being dismissed because governments dislike what they lawfully say or do in a polity where democracy has yet find grounds.¹ This defines the situation the best in Pakistan when judiciary and executive arms of the state came eyeball to eyeball in the year 2007, making crisis like circumstances. On 9th March, 2007, after years of powerful executive role, General Parvaiz Musharraf summoned what Tayyab Ahmed Qureshi terms as proactive Chief Justice of Pakistan to the army house and ordered him to resign.² When the Chief Justice refused, he was held incommunicado at Army House for approximately five hours. The President of the country in uniform then issued an Order restraining the Chief Justice from carrying out his functions as Chief Justice of Pakistan due to the allegations narrated in a Reference to the Supreme Judicial Council.³ Since then Iftexhar Muhammad Choudhry has become a brand name for independence of Judiciary in a society where historically Judges-Generals have worked together for the repeated subversion of country’s constitution, derailing democratic process.

Judicial independence as often perceived is neither an all-or-nothing concept nor an end in itself but may be a mean to an end. However with the return of civilian rule in Pakistan, a series of confrontations between Parliament and the Supreme Court on the one hand and executive and judiciary on the other has raised concerns that the same judiciary celebrated for challenging the military rule—while invoking exactly the same perceived notion of judicial independence—might now be asserting autonomy from weak civilian institutions in a manner that undermines Pakistan’s efforts to consolidate its fragile democracy and constitutional supremacy.⁴ This is never desirable. Importantly, democracy is all about cooperation and coordination among the three pillars of the state, but troubles emerge when one institution tries to interfere in other’s domain to show its dominance. If such a situation happens to occur, extra responsibility falls over the shoulders of judiciary which has played a controversial role by making decisions contrary to the established norms of democracy. Pakistan constitutional history is witness to the fact that there are times when judiciary has given approval to the high handedness of executive, mostly military executive by thrashing what is known as the established law of the land. History has no good lessons to learn from.

¹ Robertson, Extract of the report on the impeachment of Sri Lanka’s chief justice, Torture, Asian and Global Perspective, article 2, Dec 2012 to Mar 2013 Vol. 11, No. 4 - Vol. 12, No. 1.

² Taiyyaba, A. Qureshi, “State of Emergency: General Parvaiz Musharraf’s Executive Assault on Judicial Independence in Pakistan”, North Carolina Journal of International Law and Commercial Regulation, Vol. XXXV, 2010.

³ International Bar Association Human Rights Institute” The struggle to maintain an independent judiciary: a report on the attempt to remove the Chief Justice of Pakistan”, July, 2007.

⁴ Anil, Kalhan, “Gray Zone, Constitutionalism and the Dilemma of Judicial Independence in Pakistan”, Vanderbilt Journal of Transnational Law, VOLUME 46 JANUARY 2013.

Since its very inception as a nation state in August, 1947, Pakistan has had troubled constitutional memories.⁵ Judiciary, being the protector and guarantee of the constitution has never been found up to the task by legitimizing extra constitutional adventures. Ironically, this judges-generals honeymoon since independence has given the later enough courage and confidence to do away with people's mandate and abrogate or suspend the constitution time and again in the name of bringing order into the society. Military takeover negates rule of law. But what has hurt Pakistan's polity the most when judiciary has legalized what has no place in the books of democracy and constitutionalism.

Judiciary and Military Rule: A history with controversies.

Earlier when the struggle for supremacy started between executive authority and legislature which assumed the form of conflict⁶, judiciary being the arbitrator failed to come up to the popular expectations by making decisions contrary to the established law of the land. Pakistan was plunged into a Constitutional crisis in 1954 when the Governor General dissolved the Constituent Assembly. This first major subversion of the constitutional process was challenged before the Sindh High Court. The court after hearing the case declared the dissolution to be illegal and unconstitutional. The reason recorded by the Bench says that the Constituent Assembly was an independent body aimed at making constitution for the country and could not be dissolved so long as that objective is not met.⁷ The decision of the Sindh High Court was challenged in the Federal Court which overruled the decision of the former and validated the dissolution of the assembly in the Moulvi Tamizuddin Khan case (1955).⁸ One is surprised over the decision of the last court of appeal as what legal and constitutional ground could be provided for a decision that subsequently guided the constitutional and judicial proceedings of the country.

The first constitution of the country enacted in March, 1956 remained intact for almost two years when it was abrogated through the first military takeover in October, 1958. The validity of this action was challenged in the apex court of the country. The Supreme Court of Pakistan headed by Justice Muhammad Munir delivered a judgment on 27th October 1958, legalizing Ayub Khan's proclamation of martial law on the pretext that a victorious revolution was an internationally recognized method of changing a legal order.⁹ The decision made is perhaps the most controversial of all, given the legal reason cited for the martial law. A country's legal matters are guided by what is stated in the constitutional provisions which take precedence over any other law, be that regional or international. Unfortunately the country which had come into being to nourish democratic ideals was converted into autocracy soon and judiciary carries the burden of blame for helping it happen so. The foundation stone had been laid for more extra constitutional evils to unfold.

Asma Jillani, a human right activist challenged Yahya Khan's martial law in the Supreme Court of Pakistan. The learned court declared the martial law to be illegal and dubbed the Chief Martial Law Administrator as a usurper. The court went further by stating that earlier Kelsenian Theory had been wrongly applied; that no valid law comes into force from the foul breath or smeared pen of a person guilty of treason against the national order. Ironically since then the superior judiciary has legitimized Zia ul Haq July, 1977's and Pervez Musharraf October, 1999's martial laws under the theory of state of necessity besides empowering them to go on with amending even the constitution of Pakistan. This was no omen for democratic institutions standing on fragile foundations. However one must not forget the prevalent peculiar political parameters of that particular era courts were working in to understand properly the rationale of these decisions. The judges were well aware that an opinion which ran contrary to the interest of the establishment would not be acceptable. If they delivered a judgment which was not likely to be implemented, its defiance would be detrimental to the prestige of the judiciary.¹⁰ The absence of organized public opinion and vigilant press further strengthened these apprehensions in judges' minds.

The judiciary in Pakistan is the creature of constitution. Whenever Pakistan has been ruled by the constitution with executive authority in the hands of civilian head of the government, the judiciary as an institution has been prompt to uphold the supremacy of constitution and rule of law. A series of judgments passed by Supreme Court upholding the right of political parties to participate in the elections, removal of restriction imposed on the allocation of a common election symbol to candidates of a political party besides ensuring the separation of Judiciary from Executive are worth mentioning here. These judgments paved the way for successful working of a

⁵ Richard, Blue and Richard, Hoffman, PAKISTAN RULE OF LAW ASSESSMENT – FINAL REPORT, USAID/Pakistan, November, 2008, http://pdf.usaid.gov/pdf_docs/PNADO130.pdf

⁶ Javed, Iqbal, "The judiciary and constitutional crisis in Pakistan", Pakistan Founder Aspirations and Today's Realities, Oxford University Press, Karachi, 2001.

⁷ GW Choudhry book

⁸ Richard, Blue and Richard, Hoffman, Pakistan Rule of Law Assessment as cited above.

⁹ Javed, Iqbal, "The judiciary and Constitutional Crisis in Pakistan" as cited above.

¹⁰ Ibid.

parliamentary form of democracy in the country. These were followed by judgments in the Nawaz Sharif's case and the Judges 'case, which are watersheds in the judicial history of Pakistan. With these judgments, the constitutional role of judiciary has been institutionalized.¹¹

2007-09: Years of controversies.

However, favours given to military executives from time to time at the cost of judicial independence made the former strong enough to feel unbridled and it was now time to make onslaughts on judiciary. However unlike the past, the superior judiciary was acting on its own. Moved by his dictatorial mindset, General Musharraf authored a reference for the CJP's accountability before the Supreme Judicial Council (SJC) under Article 209 of the Constitution.¹² The CJP was primarily accused for misusing authority for personal gains, to secure the induction of his son, Dr. Arsalan into the police services, the misuse of his office to secure protocol he was not entitled to under the law. This gross misconduct is enough to justify his removal from office.¹³ However, it is important to go into the background of how the mistrust between executive and judiciary developed to a point of confrontation that polluted the entire political climate of the country.

It is indeed encouraging to note that the Supreme Court lately had opened its doors to public interest litigation, particularly through judicial activism under its suo moto jurisdiction to put pressure as well as make the government answerable for its wrong doings.¹⁴ Two of such cases caused serious rift between General Musharraf led federal government and Supreme Court under Iftekhar Muhammad Chaudhary. The government of Prime Minister Shaukat Aziz advertised the privatization sale of the Pakistan Steel Mill in 2006. In an unprecedented act of defiance, the Supreme Court of Pakistan nullified the sale of the Steel Mill and alleged the Prime Minister for approving the underpriced sale of major national asset.¹⁵ In another case, the Supreme Court started hearing petitions in the missing persons case brought by Human Right Organizations. Since Pakistan's participation in the war against terror, people had started going missing and then were often found dead in some unidentified places after sometime. To have such people located, the apex court started questioning the officials of the intelligence agencies in the open court room. The issue was too sensitive and the government wanted this matter not to be taken up by any other institution including judiciary. However, Iftekhar Muhammad Chaudhry was adamant and wanted those responsible to be brought to justice. Given such a situation, the government as a party was certain to respond with an iron hand by now.

On March 9, 2007, as already noted, Musharraf summoned Chief Justice Chaudhry to his office and effectively dismissed him for alleged "misuse of office."¹⁶ This was the worst of all actions taken ever by a military government. Through his popular decisions, Iftekhar Chaudhry had already won much of the public good will to his credit. Everywhere if the government was found short of performing to the expectations of the people, Supreme Court interfered to fill the vacuum. Under the Public Interest Litigation, the apex court had taken up cases purely falling in the executive's domain of authority as the later had been found short of any real response to the genuine grievances of the masses. In most of these cases, even the victims had been compensated by the judiciary one way or the other besides exposing serious loopholes and weaknesses in governmental mechanism. Without caring for the legal aspects of these cases, the overall impacts of such petitions were quite positive on people's minds. Moreover, the mishandling of CJP and mishandling of the emerging constitutional crisis by executive authorities worked to the advantage of Iftekhar Choudhry, making his case stronger against the Government and raising his stature in people's eyes.

As the situation worsened, things started unfolding in a different direction. Over the years, people had hardly cared about any unconstitutional and unlawful act of the ruling junta. Resultantly, executive had found it easy even to do away with the constitution of the country and scrape it without any hindrance. However, with the emergence of Iftekhar Muhammad Chaudhry as the Chief Justice of Pakistan, people's perception of the judicial system had changed. They were now more aware and vigilant of what is right and what is wrong as far as constitutional provisions and obligations were concerned. People in large number poured into the streets of the country in support of the CJP. They demanded the immediate restoration of the Chief Justice to ensure the restoration of rule of law. Although lawyers in black coats played the most dominant role in the movement to bring

¹¹ Ibid.

¹²Iram, Khalid, "Role of Judiciary in the Evolvement of Democracy in Pakistan", *Journal of Political Studies*, Vol. 19, Issue - 2, 2012, 125:142.

¹³Shahid, Hamid, "The Judicial Crises, March-July 2007", *Pakistan Institute of Legislative Development and Transparency*, December, 2007, www.PILDAT.org.

¹⁴Khan, Faqir, Fakhru, Islam and Shahid, H. Rizvi, "THE LAWYERS MOVEMENT FOR JUDICIAL INDEPENDENCE IN PAKISTAN: A STUDY OF MUSHARRAF REGIME", *ASIAN JOURNAL OF SOCIAL SCIENCES & HUMANITIES*, Vol 2, No 2, May, 2013.

¹⁵Taiyyaba, A. Quoreshi, "State of Emergency: General Parvaiz Musharraf's Executive Assault on Judicial Independence in Pakistan" as cited above.

¹⁶Khan, Faqir, Fakhru, Islam and Shahid, H. Rizvi, "THE LAWYERS MOVEMENT FOR JUDICIAL INDEPENDENCE IN PAKISTAN: A STUDY OF MUSHARRAF REGIME" as cited above.

constitutionalism back into the country, there is no denying the fact that every member of the society contributed more than what he was asked to. The solidarity shown by the civil society further added to the courage of the judges on bench.

On 8th May, 2007 a thirteen member bench of the Supreme Court headed by Justice Khalil urRehman Remday stayed the proceedings before the Supreme Judicial Council on a petition moved by Iftekhar Choudhry. The hearing commenced on May 15, 2007 and concluded on July 20, 2007.¹⁷ President Parvaiz Musharraf lost the legal battlefield when the Supreme Court declared Choudhry's dismissal as unconstitutional. Ten out of thirteen Judges of the bench called for Choudhry's reinstatement.¹⁸ The four months long popular movement led by black coats community helped in having its judicial independence restored. The judgment nevertheless proved impetus for democratic culture to take roots and restored people's confidence in the judicial organ of the state. Above all rule of law prevailed over autocracy.

But it was not yet over as crisis of far bigger magnitude were in the offing, for the newly born independent judiciary positioned itself to uphold constitutional supremacy. Parviat Musharraf's next challenge was to be elected as President of Pakistan. The difficulty lay not in the votes but in the Constitution.¹⁹ The opposition parties challenged Musharraf's running for the presidency once more in the Supreme Court of Pakistan on the ground that it was unconstitutional for the Army Chief to hold a civilian office whatsoever simultaneously.

The Supreme Court's reaction to Musharraf's candidacy for and re-election to the Presidency in 2007 was the culmination of the continuous battles with the Judiciary. By now, Choudhry had made his impact; the Supreme Court had already shown that it was willing to continue challenging the Executive and the legal community had poured into the streets to support judicial independence.²⁰ However, Musharraf vowed to resign his military commission following re-election, but he would become even more politically vulnerable as a civilian president.²¹ The General won the presidential elections on 6th October, 2007 but the Election Commission of Pakistan's notification of election result was subject to the Writ Petition pending in the Apex Court. In a pre-emptive move, a state of Emergency was declared on November 3, 2007, by General Musharraf, perhaps fearing an unfavourable verdict on the holding of the dual office, thus sending the entire judiciary home.²²

Going through the text of Presidential Order, President Parvaiz Musharraf quoted two reasons for the imposition of emergency. First, the country was subject to worsening law and order situation and everyday there could be seen attacks on government installations. Terrorist activities were on rise, giving the President a strong reason to impose emergency. Second, General Musharraf categorically blamed the judiciary for working at cross purposes with executive and parliament. The apex court interfered in the affairs of other institutions, weakening governmental resolve to curb terrorism and extremism besides seriously damaging economic activities in the country. In such a situation, General Parvaiz Musharraf in his capacity as president proclaimed emergency throughout the country, putting the 1973 constitution in abeyance.²³ The judges of the apex courts were asked to take fresh oath under the PCO.

Data and facts analysis reveal very interesting and encouraging realities. Unlike the previous Martial Laws, 43 Judges of Supreme Court and High Court refused to take oath under the PCO, 2007. In the political sphere, unlike 1958, 1969, 1977 and 1999, for the first time in our political history, this imposition of martial law was actually resisted by the people through public mobilization. The lawyer's movement was at the forefront of the resistance against this martial law and for the furtherance of the democratic revolution of 2007-2008. The political consequences of this public resistance were obvious. Firstly, this was the shortest martial law in the history of Pakistan [i.e. it lasted for only 43 days].²⁴ Secondly, Musharraf military rule gave way to democratic dispensation in the face of popular uprising by taking off uniform. In the wake of judicial crisis, there emerged the concept of civil society which played leading role in the revival of rule of law to bring the country back to constitutionalism.

The movement for the restoration of judiciary bears particular importance in the history of judicial and constitutional re-making of Pakistan. When a principled stand is taken, the nation unites to face the evil forces in the

¹⁷Shahid, Hamid, "The Judicial Crisis March-July, 2007", Pakistan Institute of Legislative Development and Transparency, as cited above.

¹⁸Taiyyaba, A. Quorashi, "State of Emergency: General Parvaiz Musharraf's Executive Assault on Judicial Independence in Pakistan", as cited above.

¹⁹. ibid.

²⁰ Ibid.

²¹Alan, Kronstadt, "Pakistan's political Crises and state of Emergency", CRS Report for Congress, November, 2007.

²²Azmat, Abbas and Saima, Jassam, "Ray of Hope: The Case of Lawyers' Movement in Pakistan", This piece is an excerpt out of the forthcoming book of Heinrich-Boll-Stiftung (Nov 09) in the publication series on promoting Democracy under Conditions of State Fragility. Pakistan: Reality, Denial and the Complexity of its state.

²³Text of 'Proclamation of emergency', Associated Press of Pakistan, 3rd, November, 2007, <http://www.app.com.pk/en>.

²⁴Khan, Faqir, Fakhrul, Islam and Shahid, H. Rizvi, "THE LAWYERS MOVEMENT FOR JUDICIAL INDEPENDENCE IN PAKISTAN: A STUDY OF MUSHARRAF REGIME" as cited above.

midst of dark. Leading from the front, Iftekhar Chaudhry gave new direction and zeal to a community who traditionally had no respect for rule of law and constitutionalism. Every person whether young or old, male or female, literate or illiterate came out in solidarity with the deposed chief justice. As time went on, the movement spread to every corner of the country, tightening screws on the government. At the other end, in GHQ another five years of Musharraf's "military" presidency did not have a strong constituency in a military officer corps already demoralized by fighting "Washington's" unpopular anti-terror war on its own soil. Jealously protective of its institutional prestige and respect, now sullied by its close alliance with a detested and degraded military ruler who had become controversial in the eyes of people, the military as institution withheld its active support from Musharraf.²⁵ As usual, the popular uprising was making its way.

The PPP led coalition Government, formed in the aftermath of 2008 elections refusal to restore Judges stunned every one with surprise. The new President, Asif Ali Zardari, delayed reinstating the judges, perhaps out of fear that Choudhry would declare unconstitutional the National Reconciliation Ordinance (NRO), an executive order issued by General Musharraf in 2007 that gave Asif Ali Zardari and others immunity from corruption charges.²⁶ The situation took dramatic turn when the Supreme Court declared Sharif brothers ineligible to run for any public office. In response, the lawyers planned a massive protest in cooperation with Sharif and a number of opposition parties, promising to stage a sit-in in the capital until Choudhry was restored.²⁷ At last the Government succumbed to the public pressure and Iftekhar Muhammad Choudhry along with other deposed judges were restored on 21st March, 2009. And the rule of law made its way through years of executive judiciary confrontation.

CONCLUSION

The movement for restoration of judiciary went through every test of time. However, they have entered into another stage where they again would be tested for the responsibility put on their shoulder. Given the governance issues in Pakistan, people's expectations from independent judiciary have gone up. They want judiciary now to be more responsible in terms of constitutionalism and responsive where they traditionally have been found wanting. Their role today is more vital than other democracies around the world.

BIBLIOGRAPHY

- Abbas, AzmatandJasam, Saima. "A Ray of Hope: The Case of Lawyers' Movement in Pakistan in the publication seriesmon promoting Democracy under Conditions of State Fragility", Pakistan: Heinrich-Boll-Stiftung, 2009.
- Blue, Richard and Hoffman, Richard. PAKISTAN RULE OF LAW ASSESSMENT – FINAL REPORT,2008
- Faqir, khan, Islam, Fakhru&Rizwi, Hasan, Shahid. THE LAWYERS MOVEMENT FOR JUDICIAL INDEPENDENCE IN PAKISTAN: A STUDY OF MUSHARRAF REGIME, May 2013.
- Hamid, Shahid. The Judicial Crisis March-July 2007.Ismsabad: Pakistan Institute of Legislative Department and Transparency (PILDAT), December 2007.
- International Bar Association. The struggle to maintain an independent judiciary: a report on the attempt to remove the Chief Justice of Pakistan, London: London WIT IAT United Kingdom, July 2007.
- Iqbal,Javed. The judiciary and constitutional crisis in Pakistan, Pakistan Founder Aspirations and Today's Realities, Oxford University Press, Karachi, 2001.
- Kalhan, Anil."Gray Zone" Constitutionalism and the Dilemma of Judicial Independence in Pakistan, Vanderbilt Journal of Transnational Law, VOLUME 46 JANUARY 2013 NUMBER 1.
- Khalid, Iram. Role of Judiciary in the Evolvment of Democracy in Pakistan, a Journal of Political Studies, vol. 19, February 2012.

²⁵Aqil, Shah, "Constraining consolidation: military politics and democracy in Pakistan (2007–2013)", Democratization, DOI:10.1080/13510347.2013.781586.

²⁶ Pakistani Lawyer Movement, HARVARD LAW REVIEW,[Vol. 123, 195sio3cgvwr519n16t44azrb2yn.wpengine.netdna-cdn.com/.../vol123_p....

²⁷ Ibid.

Quoreshi, Tayyab, Ahmad. State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan, North Carolina Journal of International Law and Commercial Regulation, Vol. XXXV, 2010.

Robertson, Extract of the report on the impeachment of Sri Lanka's chief justice, Journal Torture, Asian and Global Perspective, article 2, Dec 2012 to Mar 2013 Vol. 11, No. 4 - Vol.12, No. 1

Shah, Amanullah, Khan, Iqbal, Muhammad & Mahsood, Mobina. SUPERIOR JUDGES' COMMITMENT TO JUDICIAL INDEPENDENCE IN PAKISTAN, Gomal University Journal of Research, 27(2). December, 2011

THE PAKISTANI LAWYERS' MOVEMENT AND THE POPULAR CURRENCY OF JUDICIAL POWER, HARVARD LAW REVIEW, Vol. 123. see www.harvardlawreview.org/.../vol123_pakistani_lawyers_movement..