Pakistan's Struggle for Judicial Independence

Jason D. MacLeod

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The Road to Conflict

Pakistan in 2007 was unlike any other year in Pakistan's modern history. It was a year in which the judiciary questioned the legitimacy of Gen. Musharraf's military regime and instigated a social movement to pronounce the importance of an independent judiciary and a constitutional democracy. 2007 was the year when Gen. Pervez Musharraf pressured Chief Justice Chaudhry to resign, when he declared a state of emergency that suspended the constitution and parliament, and when he required judges and Justices to swear an oath to his military government. Chief Justice Chaudhry played a pivotal role in 2007 by standing against Gen. Musharraf's military led government and standing for the constitution. This paper will examine Chief Justice Chaudhry's difficult and controversial public legal decision that placed him against Gen. Musharraf's ultimate goal — the legitimization of his rule in Pakistan. First, an explanation of the events that led to and resulted in, Chief Justice Chaudhry's "non-functional" status, and then an exploration the legality of the unprecedented move will follow. Second, Gen. Musharraf's Proclamation of Emergency, the Provisional Constitutional Order, the Oath of Judges, the judiciary's reaction, and the constitutional issues related to the state of emergency will be analyzed. Finally, some of the results that Chief Justice Chaudhry and Gen. Musharraf's actions had after their legal decisions in 2007 will be explored.

A brief historical and governmental overview is necessary to understand the underlying legal issues brought forth in this paper. Pakistan won its independence in 1947. A former British colony, its legal system is a mix of English law and Sharia; the former relating to commercial transaction, while the later personage status. [1] The constitution of the Islamic Republic of Pakistan provides for a federal parliamentary system with a president as head of state, and a popularly elected prime minister as head of government. [2] Since its establishment in 1947, the country has had four military rulers for significant periods. Gen. Musharraf came into power in 1999 in a bloodless military coup. As Chief of Army Staff he also held the position of president. Legislation enacted in 2004 enabled President Musharraf to continue to rule until 2007 while holding both positions, despite the constitutional requirement that only one position can be held concurrently. [3] The judiciary is a separate branch of government and has original and appellate jurisdiction. The Court currently has seventeen members resultant from an often-used court packing tactic. In 2007, nomination to the Court was done by the president on the recommendation of the Chief Justice. This process led to favoritism and has since been altered by the 18 th amendment, which requires a multi-person nomination process. [4] Chief Justice Chaudhry was elected to his position in 2005.

Chief Justice Chaudhry's Forced Resignation

While residing as the Chief Justice of the Supreme Court, Chaudhry began handing down controversial rulings that went against the government's wishes. Under him, the Supreme Court took its own initiative to question the government on the role of the military and instances of human injustice. He began hearing cases brought by the Human Rights Commission and required investigations into the "forced disappearances" arising out of the "War on Terror" in which the Pakistan military and Inter-Services Intelligence were found to have imprisoned hundreds without due process. [5] Later that year, Chaudhry used the power of judicial review to rule unconstitutional the sale of Pakistan's state owned steel mill to private investors; stating, the prime minister is under-selling a valuable state asset. [6] At the time, these rulings were very controversial and irregular of the judicial body. These rulings solidified his position as an independent Chief Justice, despite governmental pressure, and leader of the Supreme Court.

On March 9, 2007, with an election on the horizon, Pervez Musharraf went on the offensive and pressured Chief Justice Chaudhry to resign. [7] Gen. Musharraf preempted what he thought the Chief Justice Chaudhry would most likely do — rule against his eligibility to run in the upcoming election. After refusing to resign, Musharraf made Chief Justice Chaudhry "a non-functional Chief Justice" pursuant to Articles 180 and 209 of Pakistan's 1973 Constitution. [8] Article 180 states, "At any time when, the Chief Justice of Pakistan is absent or is unable to perform the functions of his office due to any other cause, the President shall appoint [the most senior of the Justices of the Supreme Court] to act as Chief Justice of Pakistan." . Article 209 states: (5) If, on information from any source, the Council or the President is of the opinion that a Judge of the Supreme Court or of a High Court- (a) may be incapable of property performing the duties of his office by reason of physical or mental incapacity; or (b) may have been guilty of misconduct, the President shall direct the Council to, or the Council may, on its own motion, inquire into the matter.

(6) If, after inquiring into the matter, the Council reports to the President that it is of the opinion,

(a) that the Judge is incapable of performing the duties of his office or has been guilty of misconduct, and

(b) that he should be removed from office,

the President may remove the Judge from office. [9]

Soon after Chaudhry's forced removal, an acting Chief Justice was sworn-in in a hastily arranged ceremony. The new Supreme Judicial Council, consisting of five Supreme Court Justices, ruled that he could not function as Chief Justice until the Supreme Judicial Council has ruled upon the charges. [10] One scholar noted, "[i]n Pakistan, where the military has dominated politics for sixty years and where generals demand a high degree of deference from legislative and judicial officials, the Chief Justice's refusal to resign represented a shockingly radical break from political and social norms and an extreme assertion of judicial independence." [11]

As the news of Chaudhry's treatment spread, there was a massive social movement consisting of lawyers, civil rights activists, educators, and the general public. This effort became known as the Lawyers Movement . Standing before the Supreme Court building surrounded by barbed wire, police, and tear gas — lawyer and activist Anis Jilani stated, "The legal community have picked up this issue mainly as an issue of the judiciary and an issue of prestige...They have felt that their chief justice and the institution was ridiculed." [12] Throughout Chaudrhy's hearing there were mostly non-violent protests by the Lawyers Movement in Islamabad, Karachi, and Quetta. [13] Chief Justice Chaudhry spoke in front of thousands of lawyers, judges, and opposition activists and declared, "nations and states which are based on dictatorship instead of the supremacy of the constitution, the rule of law, and protection of basic rights, get destroyed." [14] Chaudhry made the decision to champion the principles of the constitution despite overwhelming military dominance and governmental pressure. His leadership invoked protests of solidarity around the world. One rally, organized by the King County Bar Association, occurred with 200 lawyers demonstrating at the U.S. District Courthouse. [15]

The Constitution of Pakistan provides some insights into the (il)legality of Musharraf's actions. For example, the constitution provides security of tenure to the age of 65 and the preamble states "the independence of the judiciary shall be fully secured." [16] Under Articles 179 and 195, a judge of the Supreme Court can be removed from office only "in accordance with the Constitution." [17] Article 209, in particular, does not allow removal from office until the inquiry has been concluded. One scholar stated, "Neither Article 209 or any other article of the Constitution authorizes the President or any other institution or individual to suspend any judge or declare his judicial office dysfunctional pending the Supreme Judicial Council's inquiry." [18] The Constitutional validity of Musharraf's actions is tenuous at best.

July 20 th , 2009, over four months after Chaudrhy's suspension, the Supreme Judicial Council concluded their inquiry. The thirteen Justice panel unanimously reinstated the Chief Justice. In a second part of the verdict, the Council found, 10-3, that all charges against Chief Justice Chaudhry are dropped and called his suspension "illegal", and that any law that could send a judge on forced leave would be unconstitutional. [19] Prime Minister Aziz, Musharraf's ally, stated, "This is not the time to claim victory or defeat. The constitution and the law have prevailed and must prevail at all times." [20] It will only be four months until Musharraf challenges the constitution and Chief Justice Chaudhry again.

Gen. Musharraf's The State of Emergency

Gen. Musharraf positioned himself for the promised upcoming election in 2008 by seeking an indirect presidential election. In early September, six petitions contesting his eligibility to run for president were filed in the Supreme Court. The constitutional issues involved were whether Musharraf was eligible to be both president and chief of the army staff and whether he could run for office of the president while being the army chief. One of the petitioners was a former Supreme Court judge, Wajihuddin Ahmed, who resigned in 2000 in protest against being required to take a new oath of office under the 2000 PCO. Another petitioner was Makhdoom Amin Fahim, the vice chairman of the Pakistan People's Party (PPP), headed by the former Prime Minister Benazir Bhutto. [21] The challenge to Musharraf's eligibility was based on a violation of the constitutional provisions in Article 63(1)(d) and (k) which stipulate disqualifications for a person to be elected a member of the parliament and for the office of the president in the following terms: 63. Disqualifications for membership of Majlis-e-Shoora (Parliament).

(1) A person shall be disqualified from being elected or chosen as, and from being a member of the Majlis-e-Shoora (Parliament) if— (d) he holds an office of profit in the service of Pakistan other than an office declared by law not to disqualify its holder; or...

(k) he has been in the service of Pakistan or of any statutory body or any body which is owned or controlled by the Government or in which the Government has a controlling share or interest, unless a period of two years has elapsed since he ceased to be in such service. [22]

Therefore, Musharraf could not be in an election unless he did not hold the position of Chief of Army Staff for two years. On September 17 th , the Pakistan Election Commission stated it had made an amendment to the rule relating to the presidential election. The effect of the amendment was that Article 63 would not apply to the forthcoming election.

[23] The Supreme Court ruled that the Election Commission did not have the power to make such an amendment, but dismissed the petitions on technical grounds. The October 6 th election was to go forward. On October 2 nd , six petitions were filled and prayed for a grant of stay against the election. (Id). The Supreme Court ruled that the election could go forward, but that the Election Commission could not publish the results until the petitions were disposed of. [24] This meant the result of the election was in the hands of the Supreme Court. They could favor the petitioners and declare Musharraf as ineligible for the election, or they could favor Musharraf and allow the furtherance of his eight-year rule. In examining the actions of the Supreme Court in the last two years, Musharraf did not have much faith in their support.

On November 3, 2007, with the Supreme Court on the verge of ruling on the validity of Musharraf's election, Musharraf suspended the constitution and declared emergency rule. Gen. Musharraf cited the judiciary as being a threat to the State and stated, "on the one hand, Pakistan's sovereignty has been seriously challenged by terrorists, and on the other, the country's system is semi-paralysed due the judicial activism." [25] It is noteworthy that the President is empowered to issue a proclamation of emergency in exercise of his powers under Article 232 and 234 of the constitution. However, the proclamation did not indicate any constitutional provisions for his actions. Article 232 empowers the president to declare an emergency if the security of Pakistan, or any part thereof, is threatened by war or external aggressions, or by internal disturbance beyond control of a Provincial Government. [26] Under Article 234 a declaration of emergency may be made if the President, upon receipt of a report from a Governor in a Province, is satisfied that a situation has arisen in which the Government of the Province cannot be carried on in accordance with the Provisions of the Constitution. [27] The 2007 Proclamation of Emergency lists eight grounds against the judiciary and three concerning worsening law and order in addition to extremists and terrorist activities. [28] What it does not mention are specific provinces that face threats or external aggression.

Shortly after Musharraf's proclamation, seven Supreme Court Justices, led by Chief Justice Chaudhry, declared the Proclamation of Emergency unconstitutional and restrained the Chief of Army Staff, corps commanders, staff officers, and other military officers from acting under the decree. [29] The Supreme Court noted that any judges who had been invited to take the new judicial oath and did so, could not exercise any judicial or executive power. Chief Justice Chaudhry stated, "We feel that the government has no ground or reason to take extra-constitutional steps, particularly for the reasons being published in newspapers that a high-profile case [eligibility of Musharraf's election] is pending and is not likely to be decided in favour of the government." [30] After refusing to take the new judicial oath, the seven Justices were put under house arrest.

The Provisional Constitutional Order and the Oath of Judges contain language that provides complete transfer of power to the President. If a Justice failed to take the oath, they would be relieved of their duties. The Oath of Judges required: A person…who has made Oath as required by these clauses shall be bound by the provisions of this Order, the Proclamation of Emergency of the 3rd day of November, 2007, the Provisional Constitutional Order No. 1 of 2007, and notwithstanding any judgment of any court, shall not call in question or permit to be called in question the validity of any of the provisions thereof. [31]

If the Provisional Constitutional Order and Proclamation of Emergency bound each judge, they would be bound to the following:

No judgment, decree, writ, order or process whatsoever shall be made or issued by any court or tribunal against the President or the Prime Minister or any authority designated by the President. [32]

This effectively removes any power of the judiciary and gives complete discretion to Musharraf's government. On December 5th, 2007 the Pakistan government formally dismissed three Supreme Court Justices, including Chief Justice Chaudhry, without retirement; and, twenty four High Court Justices with effect from Nov. 3rd, 2007, for failure to take the oath. Altogether sixty judges were removed. This number is equivalent to the majority of judges and Justices on the U.S. Supreme Court and Federal Circuit. [33] The effect of the date November 3rd, means, the Supreme Court's declaration of unconstitutionality did not take affect.

On 24 November 2007, a seven panel larger bench of the Supreme Court, headed by Chief Justice Abdul Hameed Dogor, directed the Chief Election Commissioner and the government to declare Pervez Musharraf President for a second term by December 1, and stated that President Musharraf shall relinquish the office of the Chief of Army Staff before taking oath as civilian president. [34] The Supreme Court also validated the imposition of emergency and the promulgation of the Provisional Constitution Order issued by the Chief of the Army Staff. [35] On November 28 th , Gen. Musharraf stepped down as the Chief of Army Staff and was sworn in as President. Growing international and national pressure mounted for Musharraf to end the state of emergency. According to one source, "[the] US. Deputy Secretary of State John Negroponte was deployed to pressure Musharraf to restore the constitution or risk a cut in U.S. aid, the

writing was on the wall." [36] Mushrraf ceased the state of emergency on Dec 15 th , 2007. On February 15, 2008, the Supreme Court delivered a detailed judgment that validated the Proclamation of Emergency, the Provisional Constitutional Order, and the Oath of Judges. [37] The Supreme Court's legalization of Musharraf's actions questioned the legitimacy of the new Court.

In response to Musharraf and the newly established members of the Supreme Court, deposed Chief Justice Chaudhry and other legal scholars galvanized the nation through their desire to see an independent judiciary. The legal community, politicians, and the people at large protested on the streets in the thousands. Chaudhry, who was under house arrest, used his cell phone to communicate to protesters, "[g]o to every corner of Pakistan and give the message that this is the time to sacrifice. Don't be afraid. God will help us and the day will come when you'll see the constitution supreme and no dictatorship for a long time." [38] Political opposition parties were often on combating terms in protests. In one instance, twelve were killed by a suicide bomber. [39] At another rally where Chaudhry was to speak, 33 were killed, 800 arrested, and over 15,000 police officers were deployed. [40] A year later, lawyers of the Karachi High Court Bar Association were jubilant when they heard their "mystery" speaker was Chaudhry speaking from his cell phone while under house arrest. Chaudhry said confidently, "The moment I am freed I will march to my office in the Supreme Court and assume my job." [41] Throughout this time the Supreme Court ordered the media not to cover any stories relating to the judiciary, and that any coverage or analysis would be treated as contempt of court. [42] Chuadhry's commitment to champion the constitution was a highly contentious process that would significantly affect the promised upcoming election.

Through the actions of the Musharraf government and the rising social movement in support of judicial independence, his popularity both domestically and internationally began to plummet. The results of a new election on Feb 19, 2008 were — the Pakistan Peoples Party had won 80 of the 242 contested seats; the Pakistan Muslim League-N, 66; and the pro-Musharraf party, 38. [43] With such an overwhelming majority, impeachment proceedings began. In August of 2008, Musharraf resigned from his post as President. This ended his almost 10 year military rule. This result was highly influenced by Chaudhry's decision to stand up to Musharraf and follow the rule of law. Chaudhry's commitment to the constitution of Pakistan guided his actions both on and off the Court. Even though Chaudhry never made the decision that Musharraf could not hold both offices, the result still manifested. Musharraf's fear of the judiciary emboldened him to act illegally. His actions, and the actions of Chaudhry, saw to the end of his reign.

The Road to Absolution

In the years following the state of emergency, Chaudhry's defiant stance came to be viewed as the correct legal decision. After almost two years, Chaudhry was reinstated to the position of Chief Justice on March 16, 2009. This was in response to thousands of people marching on the capital and forcing the authorities to back down in a standoff with opposition forces in the government that were questioning his reinstatement. [44] On July 31, 2009 Chief Justice Chaudhry declared the Provisional Constitutional Order, Proclamation of Emergency, and the Oath of Judges unconstitutional. [45] Furthermore, the Supreme Court termed as illegal and unconstitutional, the sacking of Chief Justice Chaudhry and the other higher judiciary, and any appointments of judges on and after November 3, 2007 under PCO as unconstitutional. [46] On April 19, 2010, the government passed the 18 th amendment, which holds "Any person who abrogates or subverts or suspends or holds in abeyance, or attempts or conspires to abrogate or subvert or suspend or hold in abeyance, the Constitution by use of force or show of force or by any other unconstitutional means shall be guilty of high treason." [47] As of February 21, 2011, the Supreme Court is hearing appeals brought forth by the judges who were found to be in contempt by taking the Oath of Judges on November 3, 2007. Chief Justice Chaudhry stated, "these honorable people not only took benefit of an illegal action taken by the dictator, they also violated the court verdict." [48] Chief Justice Chaudhry, in his commitment to the constitution, experienced vindication by ruling unconstitutional all actions during the state of emergency, but also ruling illegal the judges' appointments who once ruled against him.

Chief Justice Chaudhry stood in opposition to Musharraf's dictatorial rule since his appointment as Chief Justice in 2005. He ruled against military policy by requiring investigations of disappearances concerning the war on terror. He ruled against the privatization of Pakistan's largest state owned industrial sector. He refused to resign despite overwhelming pressure, and he ruled unconstitutional the Proclamation of Emergency, Provisional Constitutional Order, and the Oath of Judges. These decisions stemmed from his belief in the independence of the judiciary and the rule of law. His belief was so resilient, that Musharraf did not want him ruling on the constitutionality of his position as President and Chief of Army Staff, and Musharraf's actions — forcing Chief Justice Chaudhry to resign and declaring a state of emergency — proved this point. Chief Justice Chaudhry's underlying decision that Musharraf rule was unconstitutional created the decisive decisions that stood in opposition to Musharraf's complete rule. His decision inspired a nation, created powerful social movements and international solidarity, and played a large role in

Musharraf’s election loss and resignation. Chief Justice Chaudhry’s eventual reinstatement is a shining example of the possibility of justice and redemption in spite of a dictatorial rule.