

## **Efforts to restore the Sanctity of the Constitution in Islamic Republic of Pakistan: A Study in Context of General Musharraf's Emergency on 3<sup>rd</sup> November 2007**

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### **Abstract**

This article walks around the fight back to ignite the constitutional judicial power by the apex court of Pakistan and imposition of emergency to snub, dictate, and introduce loyal judges to guard political and extra-constitutional personal interests. The meeting points of this article based on two questions: first, what made the supreme court to go against the then-existing military dictator; second, what was 'irritating' and authority challenging decision in public litigation, constitutional and administrative domain; third, how did Musharraf tackle, de-seat, and house arrest the judges, and brought the PCO judges, and de facto supreme court by way of imposing emergency. It is also made clear how de facto Supreme Court accommodated and paid back Musharraf by letting him take over the office of President of Pakistan, legalizing all the illegal actions and orders made by Musharraf, and reversed all the orders made by the previous Supreme Court judges. During all this time, lawyers were very active for the sanctity of the Constitution, law, and democracy, so they, with the cooperation of civil society and political parties,

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did a great dent to Musharraf and all his efforts to remain in power failed and he had to resign to avoid impeachment.

**Keywords:** Constitution, Emergency, Supreme Court, Musharraf

### **Introduction:**

The rule of Musharraf is divided into two halves, the first got started from 12<sup>th</sup> October 1999 to 29<sup>th</sup> June 2005, and the second got started from 30<sup>th</sup> June 2005 to 20<sup>th</sup> August 2008. In the first leg of his rule, he was politically very strong and had a complete hold on power stations, and there no political party or any political leader who could oppose him or bring the public on the streets against him. In the second leg of his rule, Musharraf conflicted judiciary and faced great opposition from civil society, lawyers, media, and opposition political parties. When Musharraf saw that the Supreme Court is threatening and challenging his extra-constitutional powers and writ he imposed an extra-constitution emergency as an Army Chief. He suspended the constitution; house arrested more than 61 judges of the Superior judiciary and placed a new oath for the judges to induct his loyal judges to get the desired results and decisions.

### **Background**

General Musharraf had taken the government from Nawaz Sharif as a result of a military Coup in Pakistan on 12<sup>th</sup> October 1999. Musharraf in the bid to oust the judges of the superior judiciary who were inclined against him or doubted to have loyalties with Nawaz Sharif brought extra-constitutional Judges' oath. The Chief Justice of Supreme Court SaeeduzZaman Siddiqui along with 5 other judges refused to take a new

controversial oath because the new oath was an oath of loyalty with Musharraf instead constitution of Pakistan.<sup>3</sup> On 12<sup>th</sup> May 2000, the handpicked Supreme Court legalized Musharraf with the mandate to alter the constitution and hold fair and transparent elections in the next three years. Musharraf became the central figure of the Constitution and political system of Pakistan by winning Presidential Referendum in 2002, his King's Party PML (Q) won general elections 2002 with the aid of hidden powers, inducted different amendments in the constitution which took all the powers and given to President due to this parliamentary system of Pakistan almost converted into a presidential system. Finally, by different tactics, he got passed the 17<sup>th</sup> amendment by the parliament by which he got the legal cover to all the amendments which he had made without any consent of parliament.

The second phase of Musharraf rule got started when Justice Iftikhar took oath as Chief Justice of the Supreme Court on 29<sup>th</sup> June 2005. At that time Musharraf was all in all in the country. Justice Iftikhar came in to the public eye for using his *suomotu* powers under Article 184 (3) to administrate justice.<sup>4</sup> Right after taking the oath he established Human Rights Cell in Supreme Court and started a new era after taking consecutive *suomotu*. This cell received 3603 applications in the first year.<sup>5</sup> Justice Iftikhar disposed of 24 thousand pending cases till his suspension

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<sup>3</sup>Dr..Azam Chaudhary, *Pakistan Ka Ā'in* (Lahore: Farīd Publishers, 2008), 207.

<sup>4</sup> Hamid Khan, *Constitution of Pakistan*, (Karachi: Oxford Publishers, 2011), 510.

<sup>5</sup> S.M. Zafar, *Senator S.M. Zafar Kī Kahānī Un Kī Apnī Zubānī* (Lahore: Sāgar Publishers, 2015), 588.

in March 2007.<sup>6</sup> In Pakistani society, all the influential police officers, tribal heads, landlords, or bureaucrats all had to be accountable in Justice *Iftikhar's* court.<sup>7</sup>

Justice *Iftikhar* in all spheres of public interest litigations like Human Rights Cases, *Suo Motu* Cases, and Constitutional Petitions got the attention of the people of Pakistan. The Steel Mills Case first time made him in the public eye and which ultimately became a bone of contention between the Supreme Court and Musharraf. The details of Steel Mills *suo motu* are that Steel Mills was controversially privatized to selective ones on the price which was far low than the total assets of Steel Mills. Steel Mills which had a market value of 400 Arabs was being sold against 122 *Arbs*.<sup>8</sup> He declared the privation null and void and gave the judgment that the whole process of privatizations depicts irregularities and violation of the law because in this process of selling the profit and value of the property is knowingly ignored.<sup>9,10</sup> This was the first instance since Musharraf took over the government on 12<sup>th</sup> October 1999 that the

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<sup>6</sup>Sabt-e-Jamaal Patialvi, *Kursī Kī Surgozisht* (Lahore: Seventh Sky Publication, 2014), 349.

<sup>7</sup>Murtaza Anjum, *Adaliya Kay Tārīkhī Faisaley* (Lahore: U Publishers, 2008), 319, 320.

<sup>8</sup>Afzaal Mazhar Anjum, *Pervez Musharraf Yā Assembly: Pehly Kon Jāy Gā* (Lahore: Robi Publications, 2010), 22.

<sup>9</sup>Watan Party Vs. Federation of Pakistan, PLD 2006 S.C. 719.

<sup>10</sup> Chaudhry Noorul Hassan Tanvir, *Merā Quaid* (Karachi: Pakistan Publications, 2010) 204, 205.

Supreme Court played its real constitutional role which annoyed Musharraf and his handpicked PM Shaukat Aziz.

There were following other decisions which challenged the authority and writ of dummy government: An ex-minister was ordered to return 12.8 million rupees, Reference of Hasba Bill<sup>11</sup> *Suomotu* on harming to environment case, Kite flying *suomotu*,<sup>12</sup> Sales of kites *suomotu*, PIA's female flight crew *suomotu*, Sonia Naz Suo Motu Case,<sup>13</sup>The *suomotu* in Sheela Abduction Case, Suo Motu on Acquittal of Accused Persons in Mukhtaran Mai Gang Rape Case, Ambrin Mustafa Suo Motu Case, Suo Motu on Kidnapping of Two Brothers, Suo Motu on illegal Detention of Underage Children, Suo Motu in Mini-Golf Course Case, Suo Motu Cutting of plants Case, Suo Motu on the guardianship of two children, Government was ordered to pay the fines of poor Prisoners, Agencies and Missing persons case, Suo Motu in the allocation of Gwadar Land Case, scolding of Punjab Police, Scolding of Army about land, Judgment on disposing of Atomic waste and eradication of dishonesty in providing tractors on concessional rates.

### **Impact of Judicial Activism Regarding Matters of Fundamental Rights**

Chief Justice Iftikhar functioned as the CJP from 30<sup>th</sup> June 2005 to 9<sup>th</sup> of March 2007. In more or less 1 year 8 months and 9 days the CJP disposed

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<sup>11</sup> *Dawn*, July 15, 2005.

<sup>12</sup> Suo Motu Petition No. 11 of 2005.

<sup>13</sup> Retrieved on May 13, 2005 from [http://www. supremecourt. gov.pk/HR\\_Cases/11th%20final/SMC12of2005.pdf](http://www.supremecourt.gov.pk/HR_Cases/11th%20final/SMC12of2005.pdf).

of approximately six thousand cases, further regarding fundamental human rights' abuse he issued indispensable and significant orders:<sup>14</sup>

- I. Abolition of slavery labor.
- II. Safeguarded women by judgment from sexual harassment i.e. rape and gang rape.
- III. Made sure women's rights in the hereditary property.
- IV. Made an end to child exploitation as he restrained employing children to receive VVIP.
- V. Elimination of ban on the nurses in military hospitals and air hostesses to get married during their services.
- VI. Ruled out open executions of criminals.
- VII. Got made a traffic plan for Karachi to solve traffic jams.
- VIII. Brought into being legal representatives and Fundamental Rights Commissions to safeguard the rail users of Samjhauta Express<sup>15</sup> from the corruption of railway personnel.
- IX. Ordered the federal and provincial governments to give jobs strictly on merit.
- X. Issuing orders for violation of the constitution, law, fundamental rights, and freedom.

### **Chief Justice of Pakistan Placed under Suspension**

The growing power of the Supreme Court made Musharraf angry because his authority was being weakened so he had the desire to bar the

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<sup>14</sup>Sardar Ali Hassan, *Chief Justice (R) Iftikhar Muhammad Chaudhry* (Lahore : Saddiqu Publishers, 2014), 67.

<sup>15</sup> Rail that runs between Pakistan and India also called Friendship Express.

independence of the Supreme Court.<sup>16</sup> There was made a plan on the part of the government to get rid of JCP Iftikhar Chaudhary because interests of a particular faction were being struck. Advocate Supreme Court Mr. Naeem Bukhari was selected to malign the CJP Chaudhary so he got published a charge sheet in the shape of an open letter in the newspaper.<sup>17</sup> It was clear that it is not only an open letter but the intention was to let the CJP realize that the Musharraf government having substantial evidence against him. Musharraf felt a threat from the CJP because a review petition against Musharraf's uniform and holding the office of President was in waiting in CPC. The most alarming thing for Musharraf was that the interests of Chief Minister Punjab, Balochistan, and army generals were being struck.<sup>18</sup> Finally, Musharraf placed the CJP under suspension and filed a reference against him in SJC under Article 209 of the Constitution on 9<sup>th</sup> March 2007. The CJP was charged with undue favors, violation of judicial norms, and corruption in reference. Dangled Chief Justice decided to challenge the Presidential reference, members of the Supreme judicial council, and its biases so he filed a constitutional petition in the apex court. Acting Chief Justice Bhagvandas considered this application and form a five members' bench under Justice Javaid Buttar.

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<sup>16</sup> Lorne Neudorf, *The Dynamicis of Judicial Independence* (Cham:Springer Internationa, , 2017). 211.

<sup>17</sup> Kanwar Intizar Muhammad Khan, *Emaan Faroosh Judjon Kī Dāstān* (Multan: Justice Publications, 2017), 62.

<sup>18</sup> Muhammad Siddiqui Farooq, *Surkhro Kon?* (Lahore: Sagar Publishers, 2007), 349.

The lawyers of the government requested Chief Justice on 2<sup>nd</sup> May 2007 to form a full bench to hear this petition because this case is very significant. Chief Justice considered this request and formed a full bench comprising fourteen judges. Supreme Court after conducting several hearings restored the dangled Chief Justice by a 10 to 3 majority on 20<sup>th</sup> July 2007.

### **Lawyers' Movement: A Challenge to Government Authority**

People were surprised to hear the unexpected news of placing the CJP under suspension, the establishment of Supreme Judicial Council, and appointing Justice Javaid Iqbal as Acting Chief Justice. People went into stillness but soon this tranquility in lawyers exploded into a tempest.<sup>19</sup>

This movement of lawyers' attained the sympathies of opposition political parties. District and Tehsil Bar Associations announced a strike and did not appear in courts as a protest. The news channels began to invite constitutional law experts, lawyers, and politicians on their prime time current affairs programs to discuss the legality of reference, constitutional position, and political repercussions. All this was increasing pressure on Musharraf. Lawyers, political activists, journalists, and civil society had all the sympathies with dangled because he had become the symbol of justice. Resultantly, hatred turned against Musharraf so processions, strikes, agitation, rallies, and boycott of courts started across the country. Musharraf government was losing writ, authority, and most importantly its image in the world. So the government used police and all other law

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<sup>19</sup>Sohail Warraich, *Adaliya Kay 'Arūj-o-Zawāl Kī Kahānī* (Lahore: Sagar Publishers, 2007),19.

enforcing agencies to control the protesters and in this bit police were using severe coercion, torture, and other brutal methods. Government offer aired many news channels because they were giving live coverage of the force which police was using ruthlessly against lawyers. Further, all the news channels were given the instruction not to project lawyers' movement neither report the force used against the protesters. The CJP visited many Bar Associations on their request across Pakistan. Electronic media and print media even after legal restrictions imposed by Musharraf gave full coverage to the CJP's visits, travels, and speeches. Suspended the CJP became a great hero of lawyers, civil society, and journalists. By this government had gone on the back foot.

### **Supreme Court Witnessed crest of liberty and Judicial Activism**

Supreme Court's outlook and dynamics changed after the restoration of the CJP Iftikhar Chaudhary. Supreme Court began to play the role as per the law and constitution first time in the history of Pakistan. Supreme Court had become the centric point of attention and hope for the people of Pakistan.

The CJP gave remarks on 23<sup>rd</sup> of 2007 in the case of selling and buying kidneys that Ordinance is not issued regarding the transportation of human organs even after his directions a year has gone but on other hand Ordinances for personal interests are issued in an hour.<sup>20</sup> In the hearing of the illegal plazas case on 30<sup>th</sup> July, 2007 Supreme Court directed the concerned authorities to demolish the illegal plaza parts of the hospital

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<sup>20</sup>Tariq Javed Warraich Advocate & Ex-Vice Chairman Punjab Bar Council Punjab, Personal Communication January 12, 2019.

situated on the main road Ferozpur Lahore. The CJP directed the Chief Election Commissioner on the 10<sup>th</sup> of August 2007 that all eligible ones must be registered in voters' electoral rolls in the upcoming thirty days.<sup>21</sup> Supreme Court started contempt of court case against Director General National Accountability Bureau Balochistan Major General Mr. Shahid and further notices were served to twelve officers of Intelligence Agencies on 13<sup>th</sup> of August 2007.

A 5 members' bench of Supreme Court which was presided by the CJP on 20<sup>th</sup> of August 2007 while hearing the case of Missing Persons put question before DG Ranger why does he comply with illegal order and if the missed person is not put in the court in the stipulated time then DG FC would be sent in jail. In the continuation of the missing person case on 15<sup>th</sup> of October 2007, the CJP gave remarks that if agencies do not release all the missing persons then generals would be called in Supreme Court. Supreme Court while hearing a *suomotu* case about traffic jams in Karachi, ordered to remove all the hurdles and encroachments for the smooth running of traffic. Supreme Court on 30<sup>th</sup> August 2007, while hearing the *suomotu* case regarding the sixty-six federal secretaries who got plots by government and remarked on what basis they are given plots. Police brutally tortured journalists and advocates near the Election Commission Office in Islamabad. The CJP took *suomotu* and directed Chief Secretary to suspend Islamabad's IG, DIG, and SSP if you do not suspend them then you be put behind the bar.

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<sup>21</sup>Retrieved on May 24, 2019 from <https://www.reuters.com/article/us-pakistan-bhutto-idUSISL18463420070626>

The CJP took *suomotuon* the price hike of necessities and on 8<sup>th</sup> October 2007 directed the government to decrease the prices of sugar, pulses, and wheat by about 25%. Further loans of powerful persons must not be right off and cases against hoarders are registered.

### **Cases Which Created Escalated Relationship between President & Supreme Court**

The following cases were so significant for the political future of Musharraf that's why Musharraf felt the threat from the judiciary and reached to undesirable and unpopular decisions which bounced back.

#### **Musharraf' Dual Office challenged**

Musharraf was President as well as Chief of the Army Staff. His dual offices got challenged in Supreme Court on the 30<sup>th</sup> of July 2007 by Qazi Hussain who was MMA's head. He sought in his petition that constitutional protection to Musharraf is no longer remains so now neither he holds to offices nor indulges in politics under the spirit of the constitution. Afterward many petitions filed in the apex court against Musharraf's holding two offices and again going for presidential elections. In all the petitions, a plea was taken that Musharraf has become ineligible to contest presidential elections. Secondly, the current assemblies have elected him President for once and have completed their term so they can not elect Musharraf again as President. Supreme Court's nine members bench initiated hearings from 17<sup>th</sup> of September 2007. Both sides of Counsel gave very detailed arguments and justifications of the law and articles of the Constitution. Ultimately Supreme Court dismissed the petitions on technical grounds however judges dissented from the judgment.

### **National Reconciliation Ordinance Challenged in Apex Court**

Musharraf in the capacity of President promulgated the notorious Ordinance NRO dated 5<sup>th</sup> of October 2007. The motive behind this ordinance was settled power-sharing with PPP after general elections and in this bid all the cases i.e. thousand and forty from 1986 to the military coup of Musharraf 1999 were declared null and void. It must be noted that all four CMs were from PML (Q) and there was no immediate threat from PPP. NRO was promulgated just one day before the conduction of presidential elections to hold up the support of PPP for Musharraf. NRO was challenged by a petition in the Supreme Court violating Constitution's Article 2-A, 4, 8, and 25. The plea was taken that its political compromise and cases of a particular class are declared null and void which is against equality, law, and Constitution. The CJP directed the lower judiciary not to release anyone under this Ordinance unless a final decision is made. The CJP made a bench and adjourned the petition for 3 weeks but before the case could be heard Musharraf imposed an emergency in the Country.

### **Presidential Election**

Presidential elections were announced by ECP to be held on the 6<sup>th</sup> of October 2007. Soon after this announcement on the 1<sup>st</sup> of October 2007 Presidential Elections were challenged in Supreme Court to get stay orders. Supreme Court did not give stay orders rather directed the ECP to let the elections be held but do not announce official results unless the final decision is made by the Supreme Court. Musharraf won the elections with an overwhelming majority but now he was at the mercy of the apex court. He had fears that the court will not permit him to take the oath of

the President so he started thinking about how to remain alive in politics with extra-constitutional measures.

### **Candidature of Musharraf Challenged**

When Musharraf became a candidate for Presidency officially Justice (R) Wajihuddin also filed his nomination papers for the election of the president on the special request of the lawyer and certain politicians. The only purpose of bringing Mr. Wajihuddin was to challenge the candidature of Musharraf because only a candidate can challenge the candidature of another candidate under the constitution. So as per commitment, Wajihuddin filed a petition that existing Assemblies are completing their term this month so these assemblies have no right to elect the President and most importantly Musharraf is illegible to contest election under Constitution's Article 41 (3) if read with Article 62 and 63. Initially, the CJP formed ten members larger Bench to hear the case. Musharraf got the news from spy agencies that Supreme Court judges have made the mind on the guidance of the CJP to declare Musharraf not eligible to contest for Presidency on next hearing which was to be held on 5<sup>th</sup> of November 2007. In anticipation Musharraf declared an emergency in the country and imprisoned judges.

### **The imposition of Emergency and Promulgation of PCO & Oath of Office of Judges Order**

Musharraf started thinking about unannounced martial law on getting the news by spy agencies and judges that the Supreme Court has made the mind to declare Musharraf not eligible for contesting Presidential elections on the directions of Iftikhar Chaudhary. Musharraf did all the extra-constitutional actions based on this information that bias decision of the Supreme Court is

being announced against him. By the promulgation of the Provisional Constitutional Order, Musharraf endeavored to hold back the freedom which the judiciary gained by the restoration of Iftikhar Chaudhary.

Musharraf as a Chief of Army Staff inflicted an emergency under Constitution's Article 232 on the 3<sup>rd</sup> day of November 2007. He dangled the constitution, disseminated the PCO and Judges Oath Order. The most significant thing was Musharraf was doing all this as a COAS, not as a President of Pakistan. Musharraf as the COAS did another unprecedented move by giving all the powers to the President of Pakistan to amend the constitution. Musharraf disseminated by Oath of Judges Ordinance that all the judges have to fresh their oath if anyone negates and does not take the oath, he will not remain a judge. Musharraf placed all the fundamental rights given in the constitution under suspension. He not only inflicted emergency but also kicked out sixty-plus judges of High Courts and Supreme Court. All these judges were illegally arrested.

Musharraf under the emergency sacked the CJP Iftikhar Chaudhry but declared that PM, the federal cabinet, CMs along with their cabinets and all those who belonged to civil services of Pakistan would keep on performing their functions; further, senate, national assembly, and provincial assemblies will be functioning as they were not dissolved. It was categorically stated that neither the Supreme Court nor High Courts will have any power with regards to President or PM or any other person who is performing under them.<sup>22</sup> All the judges of the Supreme Court, Federal *Shari'at* Court, or High

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<sup>22</sup>Abrar Hasan, *Independency of Judiciary and Judicial Crisis* (Karachi: Khurshid Siddiqui, 2012), 229.

Courts who were performing as judges before the imposition of emergency now have to perform according to the Oath of Office (Judges) Order and as per the orders of the President. Further, no court including Supreme Court, High Court, tribunal, or any authority can ask or put a question regarding the Emergency or Oath of Office Judges Order 2007.<sup>23</sup> Furthermore, no judgment, order, or decree can be made against President, PM, or any person who is using delegated authority by the President or PM. Even after the suspension of certain provisions of the constitution, subject to the order of President other laws other than the constitution all other Rules, Ordinances, By-Laws, Notifications, Regulations and other legal instruments which are in force anywhere in Pakistan which are made by President or Governor will remain in force till they are amended or quashed by President or Governor. In the new oath of judges of Supreme Court, High Courts and Federal *Shari'at* Court it was written that any judge by taking the oath will pledge that he will perform his duties according to Proclamation of Emergency of 3<sup>rd</sup> November 2007 and PCO No. 1 of 2007.<sup>24</sup>

New Press Ordinance comprising over 37 pages was issued by which TV channels, landline, and mobile phones were jammed. Further Musharraf issued PEMRA's Amended Ordinance & Press News Papers, News Agencies, and Book Registration Amended Ordinance. Musharraf promulgated all these ordinances to silence the media so that truth may not be imparted to the people of Pakistan and PTV can spread the government's point of view. It is

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<sup>23</sup>Bilqees Rahat Advocate, *General Pervez Musharraf Kā Muqaddama Pas-i-Ayina* (Karachi: Shaikh Arshaad Rahat, 2016), 275.

<sup>24</sup> Retrieved on June 7, 2019 from <https://www.refworld.org/docid/485232452.html>

written in Sindh High Court Bar Association Vs Federation of Pakistan by the Supreme Court about emergency and its impact on the judiciary in these words:<sup>25</sup> "On 3<sup>rd</sup> November 2007, General Pervez Musharraf (retired) in the exercise of powers of COAS imposed so-called Emergency and once again suspended the constitution, issued Interim Constitutional Order 2007 and after this issued Oath of Office (Judges) Order, 2007, under this Order 61 judges of the superior judiciary including Chief Justice of Pakistan and Chief Justices of 3 Provincial High Courts were sacked because they did not take the oath or were not invited to take the oath. In these 61 judges: Supreme Court's 18 judges (17 permanent and 1 ad-hoc) including Chief Justice of Pakistan, Lahore High Court's 31 judges, Sindh High Court's 28 judges including Chief Justice of Sindh High Court, Peshawar High Court's 31 judges including Chief Justice of Peshawar High Court. Most painfully Balochistan High Court's all five judges including Chief Justice took oath under this Order." Supreme Court had anticipated the imposition of Emergency on 3<sup>rd</sup> November 2007 so 7 judges of Supreme Court including the CJP Iftikhar Chaudhry overturned the PCO earlier than the imposition of Emergency and PCO and restrained COAS, Corps Commanders, Staff Officers, and other civil and military officers from acting under Musharraf's orders under the decree.<sup>26</sup> The Supreme Court' judges restrained President Musharraf and PM Shaukat Aziz from taking actions against the freedom of judiciary and ordered the Supreme Court and High Courts judges along with

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<sup>25</sup> Sindh High Court Bar Association Vs. Federation of Pakistan, PLD 2009 Supreme Court 879.

<sup>26</sup> The Short Order is given in para 79 of Sindh High Court Bar Association Vs. Federation of Pakistan, PLD 2009 SC 879.

their Chief Justices neither to take oath under Provincial Constitutional Order nor follow any other extra-constitutional step.<sup>27</sup> This bench consisted of the CJP Iftikhar Chaudhry, Justice Javed Iqbal, Justice Rana Bhagwandas, Justice Nasirul Mulk, Justice Mian Shakirullah Jan, Justice Ghulam Rabbani, and Justice Raja Fayyaz gave 2 pages unanimous order.<sup>28</sup> Moreover, 5<sup>th</sup> November 2007 was fixed to hear the application in the full court.<sup>29</sup> General Musharraf ignored the stay order of the Supreme Court made on the same day and he imposed the Emergency as the COAS under Article 232 of the Constitution in the evening of 3<sup>rd</sup> November 2007 and further promulgated the PCO by which he suspended the constitution and selective judges of Supreme Court and High Courts were asked to take the new oath and be loyal to the new oath and the judges who would not take the oath would stand dismissed.<sup>30</sup> Musharraf sacked more than 60 judges by imposing the Emergency including the CJP Iftikhar Chaudhry.<sup>31</sup> Justice Abdul Hameed Dogar did not take care of interim orders of Supreme Court which was made same day: 3<sup>rd</sup> November 2007, which had restrained the judges to take oath under PCO but he took oath under PCO and became Chief Justice of Pakistan. As of 3<sup>rd</sup> November 2007, only four judges out of nineteen judges including Abdul

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<sup>27</sup>Dr. RizwanUllah Kokab, *Lawyers' Movement in Pakistan* (Lahore: Pakistan Study Centre University of The Punjab, 2013), 254.

<sup>28</sup>Inam R Sehri, *Judges & Generals In Pakistan* (Surrey :Grosvenor House Publishing, 2012),590.

<sup>29</sup>*Dawn*. November 4 ,2007.

<sup>30</sup>Inam R Sehri, *Judges & Generals In Pakistan*, Grosvenor House Publishing Limited, Surrey, 2012, P. 590, 591.

<sup>31</sup>Dr.Muhammad Azam Chaudhry, *Pakistan Kā Ayien*, 208.

Hameed Dogar liked to take oath under the controversial PCO. On the other hand, the Supreme Court's majority judges declined to take the new oath under Oath of Office (Judges) Order 2007.<sup>32</sup> Simultaneously it is also true that a majority of judges of the Supreme Court and High Courts either denied taking the new oath or they were not asked by Musharraf to take a new oath after the imposition of emergency and promulgation of PCO. All judges were not asked to take the new oath under PCO, only selective judges who were loyal and were willing to accommodate and give relief to Musharraf were asked to take the new oath under the Oath of Office Judges Order. It was the first time in Pakistan's constitutional, political, and judicial history that a large number of judges denied to bow under the Provisional Constitutional Order issued by a dictator as Musharraf had taken this extra-constitutional action to get rid of the CJP Iftikhar Chaudhry and certain other judges, but judiciary as a whole got united to defend the constitution as 60 judges of Supreme Court and High Courts collectively denied to take oath under PCO.<sup>33</sup> The judges who are 60 in the number who did not take the oath or were not asked to take the oath were house arrested. The judges of Supreme Court and High Courts who did not take oath on PCO and stood firm to their oath Musharraf addressed the nation on TV and gave the details about the imposition of Emergency plus actions as: <sup>34</sup> "Judicial interference has

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<sup>32</sup>Munir A. Malik, *The Pakistan Lawyers' Movement An Unfinished Agenda* (Lahore: Pakistan Law House, 2008), 239.

<sup>33</sup>Asad Saleem Sheikh, *Hamarī Dastorī Tārīkh: 1600 Se 2018 Tak* (Lahore: Fiction House, 2018), 581.

<sup>34</sup> Retrieved on June 8, 2019. from <https://www.geo.tv/latest/165828-10-years-of-general-rtd-musharrafs-emergency>

paralyzed the government, I have apprehension that if well-timed action is not initiated, Allah prohibits there is a severe danger to the sovereignty of Pakistan. I cannot allow this country to commit suicide. Judicial interference in the affairs of legislature and executive has increased due to which legislature and executive have paralyzed and in my view government system has been paralyzed as all the senior officers of government are being appeared in court and Supreme Court is penalizing them and they are being insulted so these officers are afraid to take decisions in the discharge of their functions. At this time one hundred *soumotu* are being heard by Supreme Court and it is heard that there are thousands of applications are in waiting. All the *soumotu* are against the government so the government system is paralyzed. Law enforcing agencies' morale has gone down as they have lost courage and they are disappointed because their officers are being penalized."

In an interview Musharraf admitted that he did extra-constitutional action on 3<sup>rd</sup> November 2007, first time, before this, he never did any extra-constitutional action.<sup>35</sup> An opinion about the emergency was given in a magazine in these words:<sup>36</sup> "Pakistani President Musharraf imposed emergency Saturday, citing growing militant attacks and interferences in government policy by members of the judiciary. But far from a solution to Pakistan's problems Musharraf's move to consolidate power has plunged the country into a deeper constitutional crisis. The emergency declaration came as Pakistan's Supreme Court was expected to rule in the next two weeks on

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<sup>35</sup> *The News*, November 28, 2007.

<sup>36</sup> *Time Magazine*, , November 3, 2007.

the legality of Musharraf's candidacy for another term as President. Chief Justice of Iftikhar Chaudhry a thorn in Musharraf's side since the President suspended the judge earlier this year only to see him reinstated after massive public protests were removed from his job and placed under house arrest."

On 6<sup>th</sup> November, the federal cabinet approved 3<sup>rd</sup> November actions made by President and Chief of Army Staff General Musharraf. Sabt-e-Jamal writes that the federal cabinet under the headship of Shaukat Aziz immediately approved Musharraf's actions of 3<sup>rd</sup> November 2007.<sup>37</sup> On 7<sup>th</sup> November 2007, the National Assembly of Pakistan validated the imposition of Emergency and PCO while PPP's members of parliament boycotted this validation.<sup>38</sup> On the other hand, it is important to note that the majority of opposition members had resigned before the 6<sup>th</sup> of October before the presidential elections as a protest but the PPP and MMA members of parliament did not resign by assigning different excuses.

On 21<sup>st</sup> of November Musharraf inserted Article 270AAA in the Constitution of Pakistan by which he validated, legalized, and confirmed all the actions which he made from 3<sup>rd</sup> of November to 20<sup>th</sup> November i.e. declaration of Emergency, Presidential Orders, all promulgated Orders, COAS Orders, PCO No.1 of 2007, Oath of Office Judges Order 2007 and further the day when Emergency is to be lifted anything which is in the constitution shall have the protection under Article 270AAA. Moreover, it was provided under Article 270AAA that neither any action nor any amendment made by Musharraf during this period i.e. from 3<sup>rd</sup> November to 20<sup>th</sup> November 2007 can be

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<sup>37</sup>Sabt-i-Jamal Patialvi, *Kursī Kī Surgozisht*, 355.

<sup>38</sup>Afzaal Mazhar Anjum, *Pervez Musharraf Yā Assembly*, 31.

challenged in any court or any other forum on any basis nor it can be discussed in any court. Further, it was provided that all the proclamations, Presidential Orders, Ordinances, COAS orders, enactments, laws, regulations, as well as all the amendments to 1973 Constitution of Pakistan, rules, notifications, orders or by-laws in force at once before the day on when the emergency is to be withdrawn, shall continue in force unless altered, repealed or amended by the competent authority.<sup>39</sup>

On 23<sup>rd</sup> November 2007, Supreme Court took back the stay order and direction which was given to the Election Commission on 6<sup>th</sup> October not to officially notify the results of presidential elections as a matter of eligibility of Musharraf was sub judice. Further, in same orders PCO<sup>40</sup> CJP Abdul Hameed Dogar ordered the Election Commission to issue the notification of Musharraf's winning presidential elections because Musharraf is fully qualified to contest elections as per the constitution.<sup>41</sup> In the same judgment, it was provided by PCO Supreme Court that Musharraf must step down from the office of COAS before taking the oath for 2<sup>nd</sup> term of presidency So Musharraf stepped down as COAS and General Ashfaq Pervez Kiyani was handed over the command of the army in the Change of Command ceremony held on 28<sup>th</sup> November 2007.<sup>42</sup> Musharraf took the oath of president for the

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<sup>39</sup> Retrieved on June 7, 2019 from <https://www.hrw.org/report/2007/12/18/destroying-legality/pakistans-crackdown-lawyers-and-judges>

<sup>40</sup> Provisional Constitutional Order

<sup>41</sup> Munir Ahmad, *Pervez Musharraf Faujī Āmriyat Say Jamhorī Āamriyat Tak* (Lahore: Takhliqat, 2009), 345.

<sup>42</sup> (2007, November 29). *Dawn*.

next five years on 29<sup>th</sup> November 2007, and the CJP Abdul Hameed Dogar administered the oath of the president.<sup>43</sup> On 5<sup>th</sup> December 2007, the government issued the notification of removal of all the judges who did not take oath as they denied to take the oath, secondly the judges who took oath on the PCO gave the judgment that all who have not taken the oath of Musharraf are no more judges so these judges of Supreme Court and High Courts are removed:<sup>44</sup>

### **Lifting of Emergency after Selective Amendments**

Just one day before lifting the emergency, Musharraf under Interim Constitutional Order NO.1 issued Constitution 2<sup>nd</sup> Amendment Order 2007 through Executive Order and brought 6 further amendments in Article 41, 44, 193, 194, 208 and 270 C of the constitution on 14<sup>th</sup> of December 2007.<sup>45</sup> By amending Article 270 C, it was provided that the judges who did not take oath on or after 3<sup>rd</sup> November 2007 have ceased to hold the office and the ones who took oath on PCO are constitutionally allowed to continue work. The judges of the Supreme Court who did not take the oath were declared to be entitled to draw pension and other benefits but the District and Session Judges who were appointed as judges of High Courts but they did not take oath on 3<sup>rd</sup> November 2007 will not

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<sup>43</sup>Retrieved on June 13, 2019. From [http://www .Aljazeera. com/news/asia /2007/11/200852512123464430.html](http://www.aljazeera.com/news/asia/2007/11/200852512123464430.html)

<sup>44</sup> Chaudhry Jameel Ahmad Sandhu, *Judges Kī Ma 'zūlī Par Mua 'shartī Radd-e- 'Amal* (Lahore: Committee, 2010), 147-149.

<sup>45</sup> PLD 2008 Federal Statute 117.

be entitled to pension and other benefits.<sup>46</sup> By amending Article 175, Federal High Court was established in Islamabad for federal territory.<sup>47</sup> All these amendments became the part of the constitution under Article 270 AAA as per the Amendment which was made on 21<sup>st</sup> of November 2007 in which it was provided that all the Amendments, Ordinances, laws, etc. which are made from 3<sup>rd</sup> of November 2007 to date when the emergency is to be lifted will be protected under Article 270 AAA.

Finally, Musharraf declared the end of the emergency and revoked the PCO on 15<sup>th</sup> December 2007 and restored the constitution after making all the changes and amendments which were made from 3<sup>rd</sup> of November 2007 to 15<sup>th</sup> December part of the constitution by presidential decrees.<sup>48</sup> Further, it was provided that all Chief Justices along with judges of Supreme Court, High Courts, and Federal Shariat Court have to undergo the oath again under the restored constitution.

Ex-Attorney General of Musharraf government Justice (retd) Malik Qayyum commented same day on the eve of the lifting of emergency that all actions of Musharraf have got constitutional and legal protection and Supreme Court has validated these actions as well so even now anyone having any issue or wants to amend the constitution, has to amend the constitution by 2/3 majority of parliament to pass the law against the actions of Musharraf.<sup>49</sup>

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<sup>46</sup> Supreme Court Judges (Pensionary Benefits) Order 2007.

<sup>47</sup> PLD 2008 Federal Statute 120.

<sup>48</sup> PLD 2008 Federal Statutes 126.

<sup>49</sup> December 16, 2007. *Nawā-e-Waqt*

## Conclusion

In Pakistan Supreme Court has been an instrumental tool throughout the history of Pakistan in the hands of governments, establishment, and military dictators. The supreme court of Pakistan has almost consistently legitimated authoritarian military takeovers. Supreme Court has always been used by military dictators to get legitimacy and legality. Civil governments were not supported by military dictators to use Supreme Court politically against their rival political parties and politicians. On the other hand, the judges of the Supreme Court were ever ready to serve governments to get their interests. In the history of the Supreme Court from 1947 to 2005 Constitutional judiciary never guarded the constitution and law rather kept on giving a decision on the theory of necessity. The people of Pakistan never supported the Constitutional judiciary to stand against military dictators nor ever agitated or condemned the decisions based on the theory of necessity or against the spirit of constitution or democracy. In 1981 the judges who denied taking oath on PCO were never appreciated publically rather they went into the darkness of history. The ideal period of the Supreme Court got started from 2005 to 2007 when the Supreme Court gave the decisions as per the constitution and law and became the guardian of the Constitution and fundamental rights. So this era became the era of judicial activism, suo motu, and public litigation. In this period Supreme Court used its Constitutional powers under Article 184 (3) so Musharraf firstly suspended the CJP Justice Iftikhar Chaudhry and when he restored Musharraf sacked more than 61 Judges of Supreme Court and High Courts including the CJP Iftikhar Chaudhry and installed his blue-eyed Justice Abdul Hameed Dogar as CJP after declaring

emergency and PCO to get the stay order removed to become 2<sup>nd</sup> term presidency and implementation on NRO to negotiate with PPP. The people of Pakistan, media, and lawyers fully supported Supreme Court, and when the first time the Chief Justice of Pakistan the CJP was suspended in March 2007 they jolted the whole of Pakistan and when the CJP along with other more than 60 judges was sacked lawyers, civil society, political parties, and media made these sacked judges hero and national voice so Musharraf lost legitimacy nationally and internationally so within one year of imposing emergency he had to resign.

Musharraf period comprised over two periods first 1999 to 2005 and second from 2005 to 2008. In the first half of the period, Musharraf was very strong, and as he was maneuvering and engineering the politics and power structure of Pakistan. In the first phase of Musharraf from 1999 to 2005, he was at his peak as he had all the powers and politically he was so strong that he kept on amending the Constitution according to his needs, and Supreme Court was there to legalize whatever he does. In the first half, the Supreme Court was nothing but a rubber stamp as it kept on validating and legalizing Musharraf and his actions of whatever nature referred to the Supreme Court. It was out of the question that the Supreme Court uses its constitutional powers like judicial review or powers under Article 184 (3).

In the second phase (2005-2008) the Supreme Court went out of Musharraf's control rather started to perform its constitutional duties with full dedication. In this half Supreme Court used all its powers mentioned in Constitution like *suomotu* on public issues, administrative wrongs, missing persons, and price hikes. To a surprise, the Supreme Court went

to the extent that it reversed the privatization of Steel Mills and used its judicial review with full force. Musharraf became defensive and under tremendous pressure from the Supreme Court and suspended Chief Justice but lawyers' movement weakened his political powers, image, and legitimacy. Musharraf tried to get rid of the CJP Iftikhar Chaudhry but the situation further deteriorated when he made the CJP non-functional and the reaction of lawyers, civil society, and media got the CJP restored. After being restored the CJP again started to perform his constitutional duties which halted the unfettered powers of Musharraf especially in Musharraf's candidature case Musharraf had full apprehension that Supreme Court is going to declare him ineligible for the post of a president so Musharraf declared an emergency, suspended the constitution, fundamental rights and imprisoned more than 61 judges of Supreme Court and High Courts and offered PCO oath to selective judges to reverse the decisions of deposed judges' of Supreme Court so PCO judges paid back Musharraf by legalizing emergency, PCO oath of 3<sup>rd</sup> November 2007 and allowing Musharraf to take the oath of Presidency for the second term. The lawyers' movement, media, civil society, and winning of 2008 elections by PPP had challenged the legitimacy of Musharraf so ultimately to avoid a vote of no confidence Musharraf opted to get out of power and resigned on 18<sup>th</sup> August 2008.