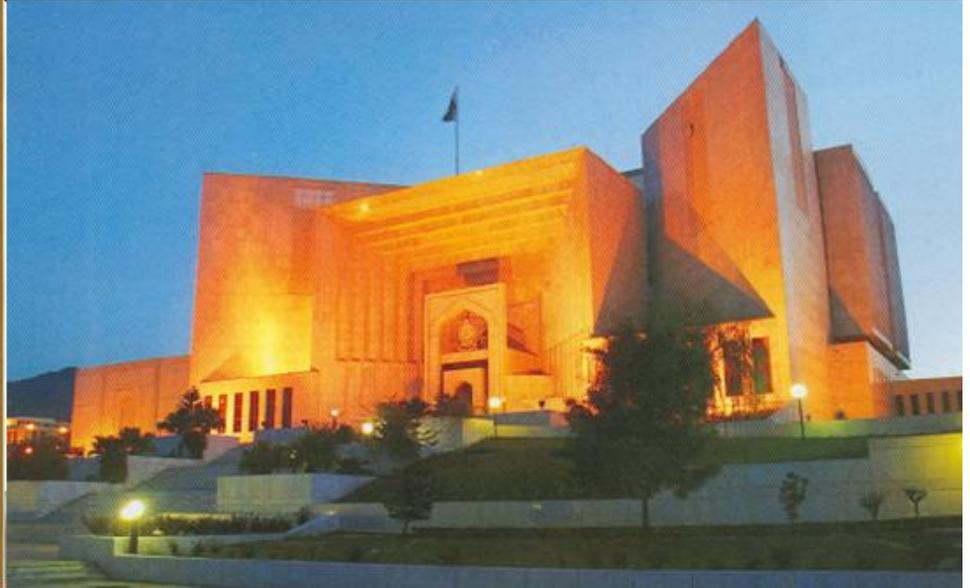


Musharraf and the Supreme Court

By Thomas Houlahan, Center for Security and Science



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Introduction

In listening to a lot of the commentary on the recent showdown between President Pervez Musharraf and the Supreme Court of Pakistan, I've noticed that much of the "analysis" has been pretty hysterical and that many of those offering the opinions on the situation seem grossly ill-informed.

It therefore struck me that it might be a good idea for someone to inquire as to what exactly has transpired between President Musharraf and the Supreme Court. At least it would provide a set of facts for commentators to work off of.

The purpose of this study is not to offer my opinion on whether or not it was right or wrong in moral terms to allow Pervez Musharraf to run for president while still a serving Army general, or whether or not his running for president while in uniform was a good idea. This is simply an examination of President Musharraf's relations with the Supreme Court. The focus is therefore on the legality of Musharraf's actions and those of the Supreme Court. The latter is important as judges are just as capable of doing illegal things as heads of state.

As in the United States, to determine legality of the actions of federal actors in Pakistan, the actions in question are measured against a hierarchy of law. The highest law is the Constitution, as interpreted by the Supreme Court.

Pakistan's Supreme Court takes much more of a strict constructionist approach than their brethren in the United States, for two reasons.

The first reason is that the Constitution of the United States is 220 years old, while the Constitution of Pakistan is 35 years old. As all but nine amendments to the U.S. Constitution were ratified before the oldest Supreme Court justice was born, interpreting the intent behind the amendments can be difficult. In Pakistan, the Constitution and all of its amendments are a matter of fairly recent memory. Therefore, American justices grant themselves more leeway in interpreting the Constitution than their Pakistani counterparts.

The second reason is that the Constitution of the United States is extremely difficult to amend and the Constitution of Pakistan is not. In the United States, two-thirds of each chamber of the Congress must vote to amend it. Then, three-fourths of the states must vote to ratify the amendment. As a result, more than 10,000 attempts have resulted in 17 actual amendments to the Constitution.¹ By contrast, in Pakistan the Constitution can be ratified with a two-thirds vote of the membership of each chamber. Constitutions, like statutes, need to evolve to meet the demands of the times. In the United States, the level of consensus necessary to amend the Constitution makes formal amendment nearly impossible. As a result, Supreme Court decisions have helped it evolve with expansive (and often controversial) interpretations of the Constitution. In Pakistan, amendment of the Constitution is comparatively easy. As a consequence, Pakistan's Supreme Court has not felt an imperative for expansive interpretation. "If you think the

¹The first ten Amendments, the Bill of Rights, were passed with the Constitution in 1787.

Constitution should be changed, take it up with your MNA (Member, National Assembly) or senator,” is the Court’s basic position.

The supreme courts of the United States and Pakistan have one thing in common. Neither has ever invalidated a properly ratified article of the constitution.

The recent problems between President Musharraf and the Supreme Court stemmed from the feeling on the part of some political actors that Musharraf should not be allowed to run for president while a serving general in the armed forces. These actors petitioned the Supreme Court to declare him ineligible. The problem they faced was that just four years earlier, Pakistan’s Constitution had been amended to allow him, personally, to run as a general. There was therefore nothing vague for the justices to interpret. In addition, all of the Court’s case law up to that point had held that the Majlis-e-Shoora (literally, “Council of Advisors,”), Pakistan’s parliament, has the right to pass such amendments. As a result, lawyers for the petitioners were compelled to ask the Supreme Court to overturn its previous decisions and essentially declare the Constitution unconstitutional.

An examination of the historical record shows that the Court has ruled against President Musharraf on some key issues. In 2007, the Court ruled that Nawaz Sharif, who as prime minister nearly killed Musharraf, could not be kept out of Pakistan, even though he had signed an agreement to stay out. The Court has also ruled twice, in 2002 and in 2007, that President Musharraf did not have the power to place the government’s actions beyond the authority of the courts, even in an emergency. In these instances, he accepted and abided by the rulings.

However, when word reached President Musharraf that the Court was about to declare certain articles of the Constitution unconstitutional, he not only didn’t accept it, he didn’t allow it. He declared a State of Emergency on the grounds that one branch of government had created an impasse by violating the “trichotomy of powers,” and dismissed the Court.

An examination of the prevailing Supreme Court case law produced another interesting revelation. The judges who refused to take the new oath as required by President Musharraf and effectively resigned have been widely hailed as heroes. The judges who took the oath and continued to serve have been widely denounced as stooges. In fact, the judges who left the Supreme Court and the High Courts contravened a 2002 Supreme Court ruling regarding the duty of judges during times when the Constitution, or parts thereof, had been suspended. The judges who stayed had behaved in accordance with that ruling.

Another interesting, and related revelation was that the portion of the Judges Oath, which caused so much international consternation because it purported to remove President Musharraf’s acts beyond the review of the courts, was legally unenforceable.

Yet another interesting revelation was that the present Supreme Court, denounced by many as being “packed with Musharraf’s stooges,” has ignored that portion, in accordance with previous Supreme Court rulings, and as noted earlier, ruled that that President Musharraf did not have the power to place the government’s actions beyond the authority of the courts.

What follows is an analysis of the cases that culminated in the dismissal of the Court. It focuses on the Constitution, the rulings and the legal reasoning behind them, not speculation about ulterior motives or conspiracy theories.

Undoubtedly, this study won't end the dispute over what happened, but at least it will provide an accurate survey of the relevant law for people to argue over.

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The Military Takeover

Background

The military takeover of 12 October 1999 was the result of overreaching by Prime Minister Nawaz Sharif, whose party had scored a massive victory in the previous election.

On 5 November 1996, President Farooq Ahmed Khan Leghari dissolved Parliament and dismissed the government of Benazir Bhutto under Article 58(2)(b) of the Constitution. Article 58(2)(b) allows the president to dissolve National Assembly if, in his opinion: “a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.”

The chief factor that Leghari, himself a member of Bhutto’s Pakistan People’s Party, cited for dissolving the government was the prevalence of extra-judicial killings by government security forces. These killings, he maintained, were a violation of the right to life guaranteed by Article 9 of the Constitution.

President Leghari’s dissolution was challenged in the Supreme Court, but the action of the President was upheld as legal and constitutional.¹

In the elections that followed, Bhutto’s PPP suffered a crushing defeat. In 1993, the PPP had won 89 seats in the National Assembly. In the 1996 elections, it won 18.

The chief beneficiary of the PPP’s collapse was Nawaz Sharif’s Pakistan Muslim League, which saw its share of seats in the National Assembly nearly double, from 73 seats to 137. Nawaz was chosen to form a government, which was ratified with 181 votes in a vote of confidence in the National Assembly.

In Pakistan, the Constitution can be amended a vote of two-thirds of the membership of each house of Parliament (not two-thirds of those present and voting), known as the Majlis-e-Shoora. The size of his mandate gave Nawaz Sharif the votes he needed to amend the Constitution. He used this power to introduce constitutional requirements of parliamentary loyalty on the part of legislators and to remove the president’s power to dissolve the National Assembly. In practical terms, this removed any effective constitutional check on the prime minister’s power. It meant that there could be no question of a vote of no confidence in National Assembly against Nawaz Sharif, nor could there be a presidential dismissal for malfeasance or misrule.

Nawaz Sharif also amended the Constitution to remove the president from decisions regarding the appointment of military service chiefs. This meant that it was now possible to appoint service chiefs on the basis of loyalty to Nawaz Sharif personally.

After the resignation of General Jehangir Karamat as chief of Army Staff, Pakistan’s most powerful military office, Nawaz Sharif appointed General Pervez Musharraf to replace him.

After disagreements in the wake of fighting between the Pakistani Army and the Indian Army in the Kargil district of Kashmir, the prime minister announced the replacement of Musharraf with Lt. General Ziauddin Butt, head of Inter-Service Intelligence (ISI) as the Chief of Army Staff. At the time, Musharraf was returning from an official tour of Sri Lanka. When Nawaz Sharif ordered that the plane carrying General Pervez Musharraf not be allowed to land at

¹*Mohtarama Benazir Bhutto v. President of Pakistan* (PLD 1998 SC 388).

Karachi Airport, Pakistani troops took control of the airport. The plane landed with seven minutes of fuel to spare.

Nawaz Sharif was removed by the Pakistani Army and the chief of Army Staff took control of the affairs of the country.

On 14 October, 1999, Musharraf declared a State of Emergency and announced that parts of the Constitution would be held in abeyance during a transition back to political normalcy. He also issued a series of orders which were challenged in the Supreme Court.

After hearing several petitions, the Supreme Court issued its consolidated ruling on 12 May 2000 in Syed Zafar Ali Shah v. General Pervez Musharraf, Chief Executive of Pakistan and Others (PLD 2000 SC 869). The Court validated the takeover and the Provisional Constitutional Order that followed it on the principle of *salus populi suprema lex* (“The welfare of the people shall be the supreme law”), which had been established in an earlier Supreme Court case involving the ouster of Zulfikhar Ail Bhutto by the military.²

The Court held that on 12 October 1999 a situation had arisen in Pakistan for which the Constitution provided no solution, and that intervention by the Armed Forces through an extra-Constitutional measure became necessary. It also held that the 1973 Constitution still remained the supreme law of the land, though certain parts of it had been held in abeyance on account of necessity.

The Court also held that Nawaz Sharif’s attempted removal of Musharraf as chief of Army Staff violated the principle of *audi alteram partem*, a key feature of due process. Meaning, literally, “hear the other side,” the principal refers to the right of the accused to present arguments against his accusers. Because the COAS is a constitutional post, the attempt to remove Musharraf from it without due process was ruled *ab initio* void (literally, “void from the beginning”) and of no legal effect.

In 2002, another series of petitions were filed. As characterized by the Supreme Court, the petitions were:

primarily directed against the Chief Executive’s Order No. 12 of 2002 (hereinafter called the Referendum Order) under which the Chief Executive/President of Pakistan [Musharraf] has decided to hold a referendum seeking people’s democratic mandate to serve the nation as President of Pakistan for a period of five years to enable him, *inter alia*, to consolidate the reforms and the reconstruction of institutions of State for the establishment of genuine and sustainable democracy including the entrenchment of the local government system, to ensure continued good governance for the welfare of the people and to combat extremism and sectarianism for the security of the State and the tranquility of society.

Though primarily directed against the Referendum Order, the petitioners took the opportunity to revisit issues raised in the first series of petitions against Musharraf’s rule. The Court disposed of the petitions *en bloc* in Qazi Hussain Ahmed, Amir Jamat Islami v. Gen. Pervez Musharraf (PLD 2002 SC 853) and took the opportunity to clarify its position in Syed Zafar Ali Shah’s case, especially with regard to the role of the judiciary and the responsibilities of judges.

²Begum Nusrat Bhutto’s v. Chief of Army Staff (PLD 1977 SC 657)

The Court's Power to Review Martial Law Orders

The first question the Court considered was whether or not the petitions to the Court could be maintained with regard to Musharraf's orders. Article 184(3) of the Constitution allows the Supreme Court to hear a case involving "a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II."

However, orders had been issued purporting to restrict the power of the Court from calling into question or permitting petitioners to call into question the validity of any of the provisions of the orders issued by Musharraf.

Provisional Constitution Order No. 1 of 1999 contained the following language:

No Court, tribunal or other authority shall call in question the Proclamation of Emergency of 14th day of October 1999 or any other Order made in pursuance thereof. No judgment, decree, writ, order or process whatsoever shall be made or issued by any court or tribunal against the Chief Executive or any other authority designated by the Chief Executive.

The Oath of Office (Judges) Order No. 1 of 2000 contained the following language:

A person referred to in clause (1) and (2) who has made oath as required by these clauses shall be bound by the provision of this Order, the Proclamation of Emergency of the fourteenth day of October, 1999 and the Provisional Constitution Order No. 1 of 1999 as amended 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.

In late 1999, Musharraf had a nation to run, a lack of legal training and a need to issue orders immediately. He had therefore borrowed liberally from orders issued by General Zia ul-Haq during the previous imposition of martial law. No clause-by-clause analysis of their applicability to the present emergency or their constitutionality had been undertaken.

The Court reminded the government that in *Nusrat Bhutto's case*, General Zia ul-Haq's imposition of Martial Law was declared valid based on the Doctrine of State Necessity, but the Court had held that the power of judicial review remained available to it. It insisted that the Court had the power to examine the legality of the actions of the government and to determine whether the necessity continued to exist or not. Zia ul-Haq had disregarded the ruling, to the extent of issuing Provisional Constitution Order, 1981 which formally declared that the superior courts had no power to judicially review actions of the Martial Law regime. The Court had never held Provisional Constitution Order, 1981 valid, however.

The Court also made it clear that its 2000 validation of military rule during a transitory period in *Syed Zafar Ali Shah's case*, did not imply abdication from judicial review. The Court held that judiciary's involvement was "necessary to steer a middle course so as to ensure that the framework of the pre-existing Order survives." It stressed that the 1973 Constitution still remains the supreme law of the land. The Court pointed out that the Oath required adherence to the

Supreme Judicial Council's Code of Conduct and that the Code compelled judges to submit to the Constitution. As a result, the Court reasoned:

[T]hat the Superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Armed Forces, if challenged, in the light of the principles underlying the law of State necessity as stated above. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any legislative instrument enacted by the Chief Executive and/or any order issued by the Chief Executive or by any person or authority acting on his behalf.

Pointing to its ruling in *Farooq Ahmed Khan Leghari v. Federation of Pakistan* (PLD 1999 SC 57), the Court added that it had jurisdiction to review or re-examine the continuation of the Proclamation of Emergency at any stage if the circumstances so warranted.

The Court also suggested that the submission of the government's response to the Court's notice concerning its own legitimacy (albeit containing a preliminary objection as to the maintainability of the petitions) was a tacit recognition of the Court's inherent authority to hear these petitions.

The Court also pointed to the "well-established principles that the provisions seeking to oust the jurisdiction of the Superior Courts are to be construed strictly with a pronounced leaning against ouster." It found no compelling justification for ouster in this instance.

However, the Court also made it clear that the limits on judicial review which had been in place before the takeover remained in effect:

We may also observe here that the power of judicial review has to remain strictly judicial and cannot be undertaken with a view to encroaching upon the domain of other branches of the government.

The Court also indicated that it was weary of what had become a tradition of referring political matters to the courts:

Unfortunately, ever since the dissolution of the Constituent Assembly by Governor General Ghulam Muhammad in 1954 till the takeover of the government by General Pervez Musharraf in October, 1999, all political questions which should have been dealt with and resolved elsewhere, have been brought to this Court.

The Court nevertheless concluded that in the exercise of its inherent powers of judicial review it had the right to examine the validity of the petitions and that the questions raised in them satisfied the requirements of Article 184(3). The petitions were ruled maintainable.

Judges Taking New Oaths

The Court also addressed the issue of taking oaths to military administrations. It observed that a new oath of office was taken by the judges of the Supreme Court under PCO No. 1 of 1999

and the Oath of Office (Judges) Order No. 1 of 2000. It stressed that this was done “with a view to reiterating the well established principle that the first and the foremost duty of the Judges of the Superior Courts is to save the judicial organ of the State.” The Constitution had not been entirely abrogated, although its observance as a whole has been interrupted for a transitional period.

The Court reasoned that it had three options open to it in relation to the situation arising out of the military takeover of 12 October 1999:

1. It could tender resignation *en bloc*,
2. It could dismiss these petitions for lack of jurisdiction in view of the purported ouster of its jurisdiction under PCO No. 1 of 1999,
3. It could accept the situation as it was, in an attempt to save what institutional values remained to be saved.

The justices felt that the first two options would represent abdications of judicial responsibility.

The first option, according to the Court, “most certainly could be equated with sanctifying (a) chaos/anarchy and (b) denial of access to justice to every citizen of Pakistan wherever he may be.” The Court ruled that:

A duty is cast upon the Superior Judiciary to offer some recompense for those rights which were purportedly violated in view of the promulgation of PCO No. 1 of 1999. This could be achieved only by taking the Oath and not by declining to do so and thereby becoming a party to the closure of the Courts, which would not have solved any problem whatsoever but would have resulted in chaos, anarchy and disruption of peaceful life. Independence of *Judiciary* does not mean that Judges should quit their jobs and become instrumental in the closure of the Courts. Indeed, the latter course would have been the most detestable thing to happen.

As far as the Court was concerned, independence of the judiciary means that “contentious matters, of whatever magnitude they may be, should be decided/resolved by the Judges of the Superior Courts according to their conscience.” That could not happen, in the Court’s view, if judges did not stay at their posts.

The second option, in the Court’s opinion, would have represented a “complete surrender” to the military regime.

The justices therefore took the Oath under PCO No. 1 of 1999 “so as to secure the enforcement of law, extend help to the law enforcing agencies for maintenance of public order and with a view to restoring democratic institutions, achieving their stability and guaranteeing constitutional rights to the people of Pakistan.”

The Court had no sympathy for judges of the Supreme Court or of the provincial high courts who had not been given, or had refused to take, oath under the Oath of Office (Judges)

Order. They were ruled ineligible for reinstatement on the grounds that their cases were covered by the doctrine of past and closed transaction.³

Military Rule for a Transitory Period

In clarifying its position in *Syed Zafar Ali Shah's case*, the Court first outlined the significance of Pakistan's legislative institutions. The National Assembly, as the nation's highest representative body, reflects the will and aspirations of the people of Pakistan. The provincial assemblies reflect the will of the population of their respective provinces. The Senate is a symbol of unity of the federating units of the country as a whole. It therefore followed, in the Court's view, that the recent suspension of these institutions should be examined "with great care and caution, otherwise it would adversely affect the democratic processes in the country, which may cause instability, impair the economic growth and resultantly prove detrimental to the general well-being of the people."

However, the Court also took notice of the following conditions, which had precipitated the crisis that culminated in the Army's assumption of power.

- The representatives of the people, who are responsible for running the affairs of State stood accused of massive corruption and engaging in practices that benefited themselves and worked to the detriment of the public.
- A number of references had been filed against the former prime minister, ministers, parliamentarians and members of the provincial assemblies for their disqualification on grounds of corruption.
- A number of parliamentarians and members of the provincial assemblies had lied about their wealth to the Election Commission and Tax Authorities.
- There was a general perception that corruption pervaded every sector of Pakistani society.
- There was no political and economic stability.
- The economy was in a "state of collapse due to self serving policies of the previous government, which had threatened the existence, security, economic life, financial stability and credit of Pakistan."
- Bank loan defaults were rampant. According to a report of the governor of the State Bank of Pakistan delivered following the coup, defaults totaled 356 billion rupees.
- Pakistan's debt burden was equal to the country's entire national income.

³Justice Iftikhar Muhammad Chaudhry, who as chief justice would be sacked in 2007, justices Abdul Hameed Dogar (now chief justice) and Muhammad Nawaz Abbasi, who took the oath in 2007 and Justice Qazi Muhammad Farooq, who retired and now serves as Pakistan's Chief Election Commissioner all signed on to this opinion.

- The government was “neither accountable nor transparent.”
- All the institutions of the State were being “systematically destroyed.”
- Democratic institutions were not functioning in accordance with the provisions of the Constitution. The Senate and the National and Provincial Assemblies were loyal to the former prime minister rather than the Constitution. As a result, “there was, by and large, one-man rule rather than democracy.”
- The previous government had attempted to “politicize the Army, destabilize it and create dissension within its ranks.”
- The previous government had initiated a campaign of disparagement of the judiciary after it had refused to allow the previous prime minister to try civilian charges in military courts.
- Members of the ruling party had ridiculed, disparaged and maligned the judiciary in Parliament (cause for disqualification under Article 63[1][g]), but had not been referred for disqualification proceedings as provided for under Article 63(2) of the Constitution.
- The Supreme Court had been stormed by supporters of the previous prime minister.
- Telephones of judges of the superior courts and other personalities were tapped despite the fact that tapping of telephones and eavesdropping had been ruled “immoral, illegal and unconstitutional.”
- The previous prime minister’s constitutional and moral authority had “completely eroded.”

As a result, the Court held that:

[T]he extra constitutional step of taking over the affairs of the country by the Armed Forces for a transitional period to prevent any further destabilization, to create corruption free atmosphere at national level through transparent accountability and revive the economy before restoration of democratic institutions under the Constitution, is validated, in that Constitution offered no solution to the present crisis.

In the Court’s view, the takeover probably could have been avoided if Article 58(2)(b) of the Constitution had been in force. That clause had provided a presidential check on the prime minister. Because that clause enabled the president to dismiss the government if necessary, it left no reason for the armed forces to do so. However, Article 58(2)(b) had been repealed by Parliament at the behest of Nawaz Sharif. There was therefore no remedy provided in the Constitution to meet the situation prevailing at the time of the takeover. As a result, the Court validated the takeover on grounds of State necessity and “on the principle that it is in public

interest to accord legal recognition to the present regime with a view to achieving his declared objectives and that it is in the interest of the community that order be preserved.”

The Court took judicial notice of the fact that the people of Pakistan had generally welcomed the army take-over and interpreted it as a form of implied consent.

However, the Court added that “prolonged involvement of the Army in civil affairs runs a grave risk of politicizing it, which would not be in national interest, therefore, civilian rule in the country must be restored within the shortest possible time after achieving the declared objectives.”

The Use of Referendum

The Referendum Order provided for a national referendum on the continuation of Pervez Musharraf’s leadership on 30 April 2002. In that referendum, the electorate was asked to vote “yes” or “no” to the following question:

“Do you want to elect President General Pervez Musharraf as President of Pakistan for next five years for the survival of local government system, restoration of democracy, continuity and stability of reforms, eradication of extremism and sectarianism and for the accomplishment of Quaid-i-Azam’s (Pakistan’s founder, Mohammed Ali Jinnah) concept.”

The main challenge to the Referendum Order, which the Court viewed as a vital step in the restoration of full democracy and the removal of the Army from politics, was that referenda were not specifically provided for in the Constitution.

The Court had little patience with this argument. It pointed out that the rigidity of the Constitution had brought about Army intervention in 1977 and 1999. It held that “the Constitution does not provide solution to all political problems.”

“Referendum,” it noted, “is nothing but an appeal to the people of Pakistan, who are the political sovereign of the country.” The Court extensively examined the use of referenda in other countries as well as in Pakistan and found no inherent evil. In fact, it quoted favorably from a book by Mehmud Ali Qasuri, Chairman of the Committee which prepared the 1973 draft constitution:

A referendum would be useful in circumstances where it becomes necessary, in mid term, to elicit the views of the electorate on matters of major importance. Referendum can in some circumstances be a substitute for dissolution of legislature.

The government’s resort to referendum in order to obtain popular validation of its policies was therefore ruled constitutionally valid and the petitions were dismissed.

President Musharraf Running for President While Chief of Army Staff

Background

In Pakistan, the general rule that government employees should stay out of elective politics predates the republic. It was first formalized in the Government of India Act of 1935. The rule was aimed mostly at civil servants, there being obvious benefit to the maintenance of a non-political class of technocrats to handle the nuts and bolts of governance in India. Article 26(a) of that document held that a person shall be disqualified for being chosen as, and for being, a member of either chamber “if he holds any office of profit under the Crown in India...”

However, the drafters saw a need for flexibility as well, so the rest of 26(a) reads: “...other than an office declared by Act of the Federal Legislature not to disqualify its holder.” Thus, the right of the legislature to make exceptions is as old as, and stands on an equal footing with, the prohibition itself.

Every one of Pakistan’s constitutions has contained this disqualification and has granted the legislature the right to make exceptions. Article 63 of the current (1973) Constitution contains a broadened prohibition. In 1985, General Zia ul-Haq had the Constitution amended to disqualify anyone who had held an office of profit for the previous two years. The right to legislate exceptions remained.

Pakistan’s first (1956) Constitution extended the disqualification to the presidency. The second (1962) Constitution was silent on the presidency, other than to require that in order to run for president, one must meet the qualifications required to run for Parliament. The current Constitution reintroduced the presidential prohibition, in Article 43, which states that: “the president shall not hold any office of profit in the service of Pakistan.”

Unlike the section pertaining to qualification for election to Parliament, there was no constitutional right of Parliament to legislate exceptions for the presidency until recently.

In 2003, as part of the 17th Amendment, the Constitution was amended to extend the right of the legislature to make exceptions to the Office of Profit rule to the office of president.¹

The following year, Parliament passed the President to Hold Another Office Act. This specifically stated that the current holder of the presidency (Pervez Musharraf) was not disqualified from being elected president due to his concurrent service as chief of Army Staff. The exemption is applicable to Pervez Musharraf personally and would not apply to any future office seeker.

The 17th Amendment also contained a *non obstante* clause, which enabled Pervez Musharraf to serve as president, notwithstanding anything anywhere in the Constitution that might otherwise have ruled his presidency invalid. The *non obstante* clause had the effect of overriding any provision of the Constitution that might disqualify him.²

From late 2004 to early 2005, the Supreme Court received several petitions challenging the provisions that had enabled him to run while still a serving Army general (holding an office of profit in the service of Pakistan). On 13 April 2005, these petitions were answered *en bloc* in *Pakistan Lawyers Forum v. Federation of Pakistan & Others* (PLD 2005 SC 719).

¹The 17th Amendment was passed by the National Assembly on 29 December 2003. It was passed by the Senate on 30 December 2003. It was signed by the President on 31 December 2003.

²Constitution of Pakistan, Article 41(7)(b)

The Validity of the 17th Amendment's Enactment

The petitioners in *Pakistan Lawyers Forum* argued that Pervez Musharraf's presidency was illegitimate because he had assumed the presidency and had it validated by a national referendum rather than running in a formal election campaign. Based on this premise they argued that the 17th Amendment should be struck down on the grounds that it was not enacted by a properly constituted Parliament.

According to Article 50 of the Constitution, Parliament is comprised of the National Assembly, the Senate and the president. The petitioners therefore argued that the Parliament that had enacted the Amendment, though elected in the October 2002 general election, was not validly constituted because the president was not elected by the Electoral College. In other words, they contended that since the president, a component of the Parliament, was invalid, the Parliament was likewise invalid.

The Court held that at the time the 17th Amendment was enacted, General Pervez Musharraf was the duly appointed President of Pakistan by virtue of Article 41(7)(b) of the Constitution of Pakistan. This provision, the Court pointed out, contains a *non obstante* clause and is to have effect notwithstanding anything contained in the Constitution.

As noted earlier, Pervez Musharraf came to power in an extra-constitutional act by the Army. His presidency was validated in a national referendum on 30 April 2002. That August, he issued the Legal Framework Order. The LFO was an amendment of the Constitution by executive order rather than the formal amendment process.

The LFO provided for the reestablishment of the Constitution and the holding of parliamentary elections in October of 2002. It also reestablished Article 58(2)(b), which allowed the president to dissolve the National Assembly if "a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary." In addition, it updated the *non obstante* clause (Article 41[7][b]) that General Zia ul-Haq had introduced into the Constitution to clarify his status as president, applying it to Musharraf.

The Court's ruling in *Syed Zafar Ali Shah v. General Pervez Musharraf* (PLD 2000 SC 869) had given Musharraf the power to amend the Constitution. However, the Court had placed restrictions upon that power, ruling that it can be resorted to only if the amendment was required for the orderly running of the state and the Constitution failed to provide a solution for attainment of the declared objectives of the Chief Executive (the reestablishment of democracy).

The Legal Framework Order was challenged by the Watan Party before the October 2002 parliamentary elections.³ In its decision on that case, the Court mentioned that none of the major political parties had challenged the LFO. It also wrote approvingly of the reincorporation of 58(2)(b) into the Constitution and of the solicitation of lengthy debates and the opinion of the public and intellectuals," that preceded its promulgation of the LFO.

The Court declined to examine the Constitutional validity of the LFO or its provisions, however. It held that: "The elected Parliament is in immediate sight and obviously the

³*Watan Party through Punjab President Ladies Wing Tasneem Shaukat Khan v. Chief Executive/President of Pakistan, and Another* (PLD 2003 SC 74)

Parliament and not this Court is the appropriate forum to consider all these amendments.” It also observed that the Watan Party had boycotted the elections called for under the LFO and had no candidates at all at the national or provincial level. The Court ruled that the party had no *locus standi* (standing) to challenge the LFO.

In *Pakistan Lawyers Forum*, the Court pointed out that Musharraf was President “not only by virtue of an earlier referendum but by virtue of a vote of confidence obtained from a freely elected Parliament and all the Provincial Assemblies of the four Provinces.”⁴ That procedure, it noted, was nearly identical to that stated in the Second Schedule to the Constitution. Though he had no opponent in the vote of confidence, as one usually would in a regular election, the Court held that this did not invalidate his presidency:

it can scarcely be argued that the validity of an electoral mandate depends on the presence of competing candidates, after all, a person who runs unopposed for a particular office is still deemed to have been validly elected notwithstanding the absence of opponents.

Since Musharraf’s presidency was valid, the Court ruled that no procedural challenge to the 17th Amendment could be sustained on the grounds that Parliament was not validly constituted at the time the said measure was enacted.

The Court went farther. It pointed out that in 1997 the Supreme Court had ruled that an election could not be ruled invalid even if, at the time those elections took place, the president was indeed a usurper.⁵ That Court had adopted the reasoning of the High Court of Sindh that:

[W]hen a civilian government is deposed or overthrown by a military dictator, the only recognized peaceful means to revert to the civilian rule, is through use of ballot, even though such exercise is to be undertaken under the aegis of the military dictator or usurper.⁶

The Court pointed out that it is settled law that the validity and competence of an elected Parliament cannot be challenged on the basis that the person conducting the election was not somehow qualified or authorized to hold that election.

Parliament’s Right to Make Amendments

The Court also made it clear that it saw Musharraf’s role in the Amendment as largely beside the point. The Court reminded the petitioners that in *Watan Party* it had designated Parliament as the proper forum to challenge the LFO. It then noted that Parliament had not questioned the validity of the LFO, though it had the power to do so. On the contrary, the Court

⁴President Musharraf had also sought and won further validation in a vote of confidence in the Electoral College on 1 January 2004.

⁵*Mahmood Khan Achakzai v. Federation of Pakistan* (PLD 1997 SC 426)

⁶*Abdul Mujeeb Pirzada v. Federation of Islamic Republic of Pakistan* (PLD 1990 Karachi 9)

noted that after careful consideration, Parliament had ratified it with minor amendments as part of the 17th Amendment.

Thus, the *non obstante* clause had been ratified by two-thirds of the elected representatives of Parliament. The issue of whether or not amendments to the Constitution made through the LFO were within the competence of the then Chief Executive was therefore academic as far as the Court was concerned. The Court held that: “The issue before this Court does not relate to the competence of General Pervez Musharraf as the Chief Executive to make constitutional amendments, but to the competence of a duly elected Parliament to make constitutional choices.” “Even to the extent that these are open to examination by this Court, it would be appropriate for this Court to defer to Parliament’s assessment as to their acceptability,” the Court added.

Based upon the Constitution and precedent, the Court was in no doubt that the Parliament was competent to make such choices. Citing a 1983 case and underlining the salient portion of the quote for emphasis, the Court pointed out that its position was that the amending power (Parliament), “unless it is restricted, can amend, vary, modify or repeal any provision of the Constitution.” *Fauji Foundation v. Shamim ur Rehman* (PLD 1983 SC 457). The only constitutional restriction on the power of Parliament to amend the Constitution is that amendments be enacted in the manner stipulated by the Constitution.

To the Court, it was clear, based on the history of the 17th Amendment, that Parliament had independently applied its mind to each provision of it and had then reached an independent conclusion as to whether to validate any particular provision, to amend it or even to repeal it.

Conflicting Articles of the Constitution

The petitioners also contended that clauses 7 (which contained the *non obstante* clause and extended the right of the legislature to make exceptions to the Office of Profit rule to the office of president) and 8 (which provided for a vote of confidence by the Electoral College after the parliamentary elections) of Article 41, which had been added by the 17th Amendment were unconstitutional. The petitioners claimed that these clauses were in irreconcilable conflict with Article 43 (which specifically forbade a president from holding an office of profit). They claimed that Article 43 took precedence and that the clauses must yield to it in accordance with the Doctrine of Harmonious Construction.

The Court found no conflict between the clauses 7 and 8 of Article 41 and Article 43 because Article 41, Clause 7’s *non obstante* clause overrides Article 43. The Court pointed out that Parliament had made it clear in enacting and validating clauses 7 and 8 of Article 41 that those clauses take precedence of the other provisions of the Constitution, including Article 43.

As a result, in the Court’s view, the Doctrine of Harmonious Construction required that “in the instant case, full effect be given to clauses (7) and (8) of Article 41 because that is the clear intent of Parliament and in the event of a conflict between these clauses and any other provision of the Constitution including Article 43 these clauses will prevail.”

The petitioners also maintained that clauses 41 (7) and (8) were in direct conflict with Article 244, which required members of the Armed Forces to swear an oath (set out in the Third Schedule of the Constitution) not to engage in any political activities whatsoever.

The Court likewise held that the *non obstante* clause contained in Article 41, Clause 7 overrode the oath taken by Pervez Musharraf as a soldier in accordance with Article 244. It also held that Clause 8's provision for a post-parliamentary vote of confidence was a clear indicator that Parliament intended for Musharraf to be allowed to hold the office.

The petitioners further argued that the chief of Army Staff cannot be the president of Pakistan because that post is not excluded from the definition of "service of Pakistan" under Article 260 of the Constitution. As such, they reasoned, Musharraf was disqualified from being elected as a member of Parliament (qualification to stand for Parliament is a requirement of anyone running for president) and therefore to be the President of Pakistan.

The Court reminded the petitioners that it is settled law that presidential candidacies are only subject to the parliamentary eligibility requirements contained in Article 62. The parliamentary disqualifications contained in Article 63 do not apply to the presidency, as upheld most recently in *Qazi Hussain Ahmed, Amir Jamat Islami v. Gen. Pervez Musharraf* (PLD 2002 SC 853). As a result, the definition of the term "service of Pakistan" in Article 260, which applies to Article 63 disqualifications, had no effect on President Musharraf.

In any case, the Court held that the *non obstante* clause contained in Article 41, Clause 7 and Clause 8's provision for a post parliamentary election vote of confidence would override any disqualification based on Article 260 definitions.

The President to Hold Another Office Act

The petitioners also argued that the President to Hold Another Office Act should be declared unconstitutional because assent to it was given by an acting president (Muhammadmian Soomro, President of the Senate) who lacked the constitutional authority to do so.

The Court pointed out that the oath as Chairman of the Senate or the Speaker of the National Assembly includes the performance of functions of the President whenever called upon to do so. Therefore, it could see no restriction on the functions to be performed by the acting president.

The Court also noted that Article 260 of the Constitution defines the term "president" to include not only the president of Pakistan but also any "person for the time being acting as, or performing the functions of, the president of Pakistan." Thus, the Court held, no distinction could be drawn from that definition between the president and the person who is either acting as president or performing the functions of the president.

The petitioners also argued that the statute should be struck down because it was not, in the Court's words, a "good thing."

The Court reminded the petitioners that it had consistently held that the wisdom or policy of the legislature is not open to question in the exercise of the power of judicial review. Quoting the holding in *State v. Zia-ur-Rahman* (PLD 1973 SC 49) the Court wrote that: "it is not the function of the judiciary to legislate or to question the wisdom of the Legislature in making a particular law." It added:

This Court must have due regard for the democratic mandate given to Parliament by the people. That requires a degree of restraint when examining the *vires* of or interpreting statutes. It is not for this Court to substitute its views for those expressed by legislators or strike down statutes on considerations of what it deems good for the people. This Court is and always has been the judge of what is constitutional but not of what is wise or good. The latter is the business of Parliament, which is accountable to the people.

The petitioners' final avenue of attack against the President to Hold Another Office Act was that, in the Court's characterization, striking it down: "would be the more appropriate thing to do and would be in consonance with popular demand."

The Court called the petitioners' attention to the fact that it has never struck down a statute on subjective notions of likes and dislikes or what is popular and unpopular. The Court reminded the petitioners that statutes are presumed constitutional and that the Court is required to make every attempt to reconcile the statute to the Constitution. Only when petitioners had met the burden of proving that a statute cannot be reconciled with the Constitution could the Court strike one down. In this case, the Court ruled that they had not met that burden.

The Basic Structure Argument

Petitioners also argued that the 17th Amendment violated the "basic structure" of the Constitution, and should therefore be struck down.

The Court began by pointing out that there had never been any dispute regarding its legal competence to interpret provisions of the Constitution or its power to strike down statutes it found to be in violation of the Constitution.

However, the Court held that invalidating properly ratified amendments to the Constitution was another matter. It reminded the petitioners that the consistent view of the Supreme Court was that "an Amendment to the Constitution, unlike any other statute can be challenged only on one ground, *viz.*, it has been enacted in a manner not stipulated by the Constitution itself."

The Court granted that there might well be a basic structure to the Constitution. However, it held that there is a significant difference between the position that Parliament may not amend salient features of the Constitution and the position that if Parliament does amend these salient features, it is the duty of the superior judiciary to strike down such amendments. It made it clear whose duty that was under prevailing Pakistani law:

The superior courts of this country have consistently acknowledged that while there may be a basic structure to the Constitution, and while there may also be limitations on the power of Parliament to make amendments to such basic structure, such limitations are to be exercised and enforced not by the judiciary (as in the case of conflict between a statute and Article 8), but by the body politic, *i.e.*, the people of Pakistan.

The Court added that:

The remedy lay in the political and not the judicial process. The appeal in such cases was to be made to the people not the courts. A constitutional amendment posed a political question, which could be resolved only through the normal mechanisms of parliamentary democracy and free elections.

It then reviewed a number of previous holdings that the Supreme Court does not have the jurisdiction to strike down provisions of the Constitution on substantive grounds.

The Court cited a 1972 Supreme Court ruling as an example of the prevailing, clear-cut position of the Court on the limit of its authority with regard to constitutional provisions.

So far, therefore, as this Court is concerned it has never claimed to be above the Constitution nor to have the right to strike down any provision of the Constitution. It has accepted the position that it is a creature of the Constitution; that it derives its powers and jurisdictions from the Constitution; and that it will confine itself within the limits set by the Constitution . . .

[I]t is now necessary to examine as to whether any document other than the Constitution itself can be given a similar or higher status or whether judiciary can, in the exercise of judicial power, strike down any provision of the Constitution itself either, because, it is in conflict with laws of God or of nature or of morality or some other solemn declaration which the people themselves may have adopted for indicating the form of government they wish to establish. I, for my part, cannot conceive a situation, in which, after a formal written constitution has been lawfully adopted by a competent body and has been generally accepted by the people, including the judiciary, as a Constitution of the country, the judiciary can claim to declare any of its provisions *ultra vires* or void. This will be no part of its function of interpretation.⁷

The Court reiterated that view in 1975: “[T]he Courts cannot strike down a law on any such higher ethical notions nor can Courts act on the basis of philosophical concepts of law.”⁸

And the following year:

[T]his Court is committed to the view that the judiciary cannot declare any provision of the Constitution to be invalid or repugnant to the national aspirations of the people and the validity of a Constitutional amendment can only be challenged if it is adopted in a manner different to that prescribed by the Constitution.⁹

And the year after that:

In Pakistan, this Court in the case of Zia ur Rahman has, however, firmly laid down the principle that a constitutional provision cannot be challenged on the ground of being repugnant to what are sometimes stated as “national inspirations” or an “abstract

⁷*Asma Jilani v. Government of the Punjab* (PLD 1972 SC 139)

⁸*Brig. (Ret'd.) F.B. Ali v. The State* (PLD 1975 SC 506)

⁹*Islamic Republic of Pakistan v. Abdul Wali Khan* (PLD 1976 SC 57)

concept” so long as the provision is passed by the competent Legislature in accordance with the procedure laid down by the Constitution.¹⁰

Even when a constitutional provision removed jurisdiction from the courts on a given issue, the Court’s position had been the same. The Court cited a 1974 case on that point, underlining the relevant portion for emphasis:

In any event, it is not possible for us to declare that a provision of the Constitution is not law because it seeks to oust the jurisdiction of the Courts with regard to certain subjects without affecting the judicial power itself. We cannot strike it down. We can only interpret it, according to the accepted rules of interpretation and define its nature and scope.¹¹

After reviewing the Supreme Court’s consistent position on the question of striking down constitutional articles (as opposed to statutes), the Court examined the practical implications of a ruling in favor of the petitioners with regard to the 17th Amendment. Again, it quoted from the ruling by the High Court of Sind, which was upheld by the Supreme Court.^{12,13} In that case, the 8th Amendment had been called into question:

If I were to declare certain amended provisions of the Constitution as violative of the Objectives Resolution or of the basic structure of the Constitution, it would disturb the basis on which the present structure of the democracy is grounded. It will be difficult to demarcate a line, where to stop. The present legal edifice is based on the amended Constitution. If we take out some amended provisions, the superstructure of democracy built on it may collapse...

A number of other incumbents of other offices and a number of other institutions, who are not before us, will also be affected. This will be an unending process. In my view, there is no manageable standard or the objective standard available with this Court to decide, which of the amendments should be struck down and which of them should be retained.¹⁴

The Court made it clear that in its view the present situation was “almost identical,” and that “the present constitutional structure rests on the foundation of the 17th Amendment, and that without it, the civilian rule may not have been possible.” “By striking down anyone or more of the provisions of the 17th Amendment,” it wrote, “this Court will only destroy the entire system prevailing now.” It added:

If the petition is accepted and the 17th Amendment struck down, this entire constitutional edifice will collapse. The President, the Prime Minister, the Governors, the Chief Ministers, the Parliamentarians, the Members of the Provincial Assemblies, 3 Services

¹⁰Federation of Pakistan v. United Sugar Mills Ltd., (PLD 1977 SC 397)

¹¹*Saeed Ahmed Khan v. Federation of Pakistan* (PLD 1974 SC 151)

¹²*Abdul Mujeeb Pirzada v. Federation of Islamic Republic of Pakistan* (PLD 1990 Karachi 9)

¹³*Mahmood Khan Achakzai v. Federation of Pakistan* (PLD 1997 SC 426)

¹⁴*Abdul Mujeeb Pirzada v. Federation of Islamic Republic of Pakistan* (PLD 1990 Karachi 9)

chiefs and Judges of superior judiciary appointed by the President, all will cease to hold office at once. The government of the country will cease to function and total anarchy will prevail. The government under the Constitution will be undone and a vacuum will be created. This is not the function of the judiciary. In short, accepting the petitions and striking down the 17th Amendment would invite chaos and create a constitutional crisis.

The Parliamentary Form of Government

On a related basic structure issue, the petitioners argued that in a parliamentary form of government, the president is a figurehead. All executive authority vests in the Prime Minister and Cabinet, who are responsible to the Parliament. Article 41(7), they claimed, violated the above norm by allowing a powerful presidency.

The Court held that Pakistan has, over time, developed its own political system and is not bound by the Westminster model of parliamentary democracy. Quoting a 1992 ruling, it pointed out that: “The basic character of the Constitution is now a mix. It is not Presidential; it was never meant to be. It is not totally Parliamentary; as it was intended.”¹⁵ The Court reminded the petitioners that Musharraf had less power as president than General Zia ul-Haq had. It recognized that some presidents have more power than others, but held that that fact did not amount to a violation of the parliamentary form of government.

The petitioners also argued (“strenuously” in the opinion of the Court) that because the prime minister did not have complete and undiluted control over the Armed Forces, Pakistan’s present governmental structure was unconstitutional.

The Court ruled that giving full control over the armed forces to the prime minister could be accomplished only by amending the Constitution. For that, it held, Parliament and not the Supreme Court is the appropriate forum. The Court maintained that it is not the function of the Supreme Court to re-write the Constitution. It concluded that: “the vehement protests of the petitioners that the impugned provisions have destroyed the basic structure of the Constitution appear to be considerably overwrought and no weight can be placed on those arguments.”

High Treason

Finally, the petitioners contended that Musharraf should be charged with High Treason under Article 6 of the Constitution, which states that “any person who abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subvert the Constitution by use of force or show of force or by other unconstitutional means shall be guilty of high treason.”

The Court held that it is for the Federal Government, not the Court, to initiate a prosecution for High Treason. In any case, the Court found that “on facts, which are incontrovertible, there is no basis for initiating such a prosecution.”

¹⁵*Khawaja Ahmad Tariq Rahim v. Federation of Pakistan* (PLD 1992 SC 646)

The Removal of Chief Justice Iftikhar Muhammad Chaudhry

Background

In early 2007, Chief Justice Iftikhar Chaudhry became concerned about media inquiries and reports concerning his conduct. At a meeting with President Musharraf on 13 February 2007, the chief justice asked Musharraf to have intelligence agencies look into the media inquiries, which he felt were tarnishing his image.

Shortly after the meeting, the chief justice also asked senior intelligence officials to look into the inquiries, and, according to Brig. Gen. Ijaz Ahmed Shah, of the Intelligence Bureau, to suppress them.¹

The chief justice seemed particularly perturbed by an open letter issued on 16 February by Naeem Bokhari, a lawyer and television personality. The letter raised the issue of the chief justice's concern with pomp in protocol. He cited guards of honor, the use of government luxury cars, helicopters and airplanes for his travel and what he regarded as undue expense in office and living accommodations. Bokhari also objected to interventions by Chaudhry on behalf of his son, to the extent of arranging for perks at government expense.

The letter also questioned the chief justice's conduct during hearings, hinting at bias. According to Bokhari, Chief Justice Chaudhry was rude and dismissive to some attorneys, demonstrating "arrogance, aggression and belligerence." Bokhari also alleged that the chief justice had a habit of throwing aside files and "contemptuously announcing: 'This is dismissed.'" On the other hand, Bokhari alleged that the chief justice was obsequious to certain attorneys. He also raised the issues of the chief justice occasionally announcing rulings orally that significantly differed from the written rulings that followed and summoning police officers and civil servants to the Supreme Court to be "degraded." Finally, he alleged that the judgment of Chaudhry's brother judges and members of the bar toward him were "adverse in the extreme."²

At the time, officials in the federal government were receiving a number of complaints against the chief justice. Most of the complaints to the government contained allegations of abuse of authority. With allegations of impropriety coming both from and against Chief Justice Chaudhry, the president directed the Intelligence Bureau to look into the matter. Among the findings of the investigation were:³

- The chief justice had attacked the character of a number of judges of the High Courts.
- He wanted to initiate proceedings in the Supreme Judicial Council for misconduct against four justices of the Lahore High Court, five justices of the High Court of Sindh and three justices in the Peshawar High Court, though, according to authorities, there was no evidence of wrongdoing by any of the judges.
- He had ordered two justices of Lahore High Court not to come to court until their retirement, essentially attempting to send them on forced leave.

¹Affidavits of Maj. Gen. Mian Nadeem Ijaz Ahmad (Director General, Military Intelligence) and Brig. Gen. (Ret'd.) Ijaz Ahmed Shah (Director General of the Intelligence Bureau).

²"Naeem Bokhari's Letter to the Chief Justice" *The News International* (Pakistan) March 10, 2007.

³Affidavit of Lt. Gen. (Ret'd.) Hamid Javaid, president's chief of staff.

- He had disregarded the recommendations of other constitutional consultees with regard to judicial appointments. This had created an impasse, as he held out for the appointment of judges of his choice. As a result, there were seventeen vacant posts in the Lahore High Court, seven in Sindh and three in Balochistan. These vacancies had adversely affected the working of these courts.
- He had intimidated civil servants, including pressuring an administrator to upgrade his 1993 Mercedes-Benz to a 2004 model.
- He had used his influence to advance his son's career.
- He had caused two Honda Accord cars to be purchased with government funds for protocol duty for a 2-day conference. Following the conference, the cars were used for purely private and personal use by Chaudhry's family and son in Islamabad and Lahore.
- His son, Dr. Arsalan Iftikhar, used a Supreme Court account to pay for gas for one of the Accords.
- Chaudhry had received hundreds of thousands of rupees for reimbursement of gasoline for his car. The receipts he submitted were for a pump that only sold diesel fuel.
- On a number of occasions, he had claimed reimbursement for airfare for his wife and children when he was not entitled to claim it.
- He had arranged for the allotment of a plot of land in Karachi to which he was not entitled.

As a result of the findings of the investigation, the government decided to recommend that a reference be brought against the chief justice in the Supreme Judicial Council. A draft was prepared, and on 7 March 2007, the prime minister brought the details of the draft reference to the attention of President Musharraf.

The following day, the president's secretariat received a summary containing the recommendation of Prime Minister Shaukat Aziz that the president file a reference against the chief justice to the Supreme Judicial Council under Article 209(5)(b) of the Constitution. Under that article, "If, on information the President is of the opinion that a Judge of the Supreme Court or of a High Court may have been guilty of misconduct, the President shall direct the Council to inquire into the matter."

On 9 March, President Musharraf met with Chief Justice Chaudhry, as requested by the latter. The chief justice opened a file and shared with the president the contents of the complaint filed against him by Justice Jehanzeb Rahim of the Peshawar High Court. He discussed the details of the case and offered his point of view for about twenty minutes.⁴

⁴Affidavit of Lt. Gen. (Ret'd.) Hamid Javaid, the president's chief of staff.

Justice Rahim had lost a civil court case to his stepmother on the issue of the disposition of his deceased father's (and her husband's) assets. A Peshawar High Court division bench then reversed the civil court's decision, whereupon the stepmother appealed the case to the Supreme Court.

A three-justice panel, which included Chief Justice Chaudhry, passed a verdict in favor of Justice Rahim's stepmother. Justice Rahim then filed a complaint against Chief Justice Chaudhry, alleging bias.⁵

After Chief Justice Chaudhry concluded the discussion of the Rahim complaint, President Musharraf reminded him of their 13 February 2007 meeting, during which, he had requested an investigation by intelligence agencies regarding the media inquiries. The president told him that a discreet fact-finding probe had ensued and that he was pained to learn of the findings. He then discussed the findings with Chaudhry, and told him that he was bound by the advice of the prime minister and had no discretion over whether or not to file the reference with the Supreme Judicial Council. Later that day, the reference was filed.⁶

On the same day, the Chief Justice was rendered "non-functional" by a presidential decree which declared that the Chief Justice could not carry out the functions of his office while the reference was pending against him.⁷ The decree cited no specific law authorizing it.

The Supreme Judicial Council

The composition of the Supreme Judicial Council is set out in Article 209(2) of the Constitution. It is made up of the chief justice of the Supreme Court, the two most senior justices of the Supreme Court and the two most senior chief justices of the provincial High Courts. In the event that one of the Supreme Court justices cannot serve, the next most senior takes his place.⁸ In the event that one of the chief justices of the provincial High Courts cannot serve, the most senior of the two remaining provincial chief justices takes his place.⁹

Thus, on 13 March 2007, when the Supreme Judicial Council met, it was headed by Acting Chief Justice Javed Iqbal. He was joined by Supreme Court justices Abdul Hameed Dogar and Sardar Mohammed Raza Khan and provincial High Court chief justices Iftikhar Hussain Chaudhry (Lahore) and Sabhiuddin Ahmed (Sindh). Chaudhry opened by challenging the fitness of three of his judges to participate.

According to Chaudhry, there was no need to immediately appoint an acting chief justice and a special plane could have been sent to retrieve Justice Rana Bhagwandas, who was senior to Justice Iqbal but was out of the country. Therefore, Chaudhry claimed, Justice Iqbal had:

been appointed as acting Chief Justice contrary to article 180 of the Constitution of Islamic Republic of Pakistan which provides that acting Chief Justice can be appointed when the office of the Chief Justice of Pakistan is vacant or the Chief Justice of Pakistan is absent or is unable to perform the functions of his office due to any other cause.

⁵"Letter to President Against CJP: Lawyer's Plea Against PHC Judge Dismissed." *Daily Times* (Pakistan), April 17, 2007.

⁶Affidavit of Lt. Gen. (Ret'd.) Hamid Javaid, president's chief of staff.

⁷Notification. F(2)/2005 AII. Gazette of Pakistan, Islamabad, Part III, pg. 675, March 9, 2007

⁸Article 209(3)(a)

⁹Article 209(3)(b)

Next, Chaudhry claimed that because Justice Dogar had wrongly sworn in Justice Iqbal as acting chief justice, he had disqualified himself as a justice of the Supreme Court. He then pointed out that there was a reference pending against Justice Dogar in the Supreme Judicial Council.

He also claimed that Justice Iftikhar Hussain Chaudhry (no relation) of the Lahore High Court harbored hostility toward him. Chaudhry reminded the Council that he had opposed Justice Chaudhry's elevation to the Lahore High Court. He also claimed that "More than one reference of misconduct are pending against him before SJC."¹⁰

On 15 March 2007 President Musharraf issued another decree sending Chaudhry on forced leave. This time, he cited the authority he was claiming:

No. F.1(2)2005-A.II.- Consequent upon initiation of proceedings of the Supreme Judicial Council against Mr. Justice Iftikhar Muhammad Chaudry, the President in terms of Article 2(l) of the Judges (Compulsory Leave) Order, 1970 (P.O. No. 27 of 1970), is pleased to order that Mr. Justice Iftikhar Muhammad Chaudry, Chief Justice and Judge of the Supreme Court of Pakistan, shall be on compulsory leave with effect from the 9th March, 2007, till submission of the report by the Supreme Judicial Council and the President's order thereon, in terms of Article 209 of the Constitution of the Islamic Republic of Pakistan.¹¹

On March 24, 2007, Justice Rana Bhagwandas, having returned from leave, took the oath as Acting Chief Justice.

Chaudhry Petitions the Supreme Court

On 18 April, Chaudhry filed a petition with the Supreme Court challenging the constitutionality of the President's reference to the Supreme Judicial Council, his suspension order and the composition of the Supreme Judicial Council and its competence to try him.¹²

In the petition, he claimed that both the prime minister and the president had been motivated by malice in filing the reference. According to Chaudhry, the prime minister was hostile toward him because, as chief justice, he had been critical of him in the *Pakistan Steel Mills* case. President Musharraf, Chaudhry alleged, made the reference because he had refused to resign as chief justice. The suspension order was challenged on the grounds that PO 27 of 1970 was unconstitutional.

As to the Supreme Judicial Council's composition, the petition repeated the allegations that Chaudhry had made before the Council and added a few. In addition to the previous allegations against Justice Iqbal, Chaudhry claimed that he could not be fair because he conceivably stood to gain the office of chief justice if Chaudhry was permanently removed. Similarly, the fact that the Chief Justice of the Lahore High Court stood to gain a seat on the

¹⁰*Daily Times* (Pakistan), March 14, 2007

¹¹Notification. F1(2)/2005 AII. Gaz. of Pakistan, Islamabad, Part III, p711, March 15, 2007

¹²Constitution Petition No.21 of 2007

Supreme Court with Chaudhry's permanent removal (and the resulting vacancy), so the possibility of a decision in his self-interest could not be discounted, according to the petition.

With regard to the Council's competence to try him, Chaudhry argued that only a permanent chief justice, not an acting chief justice, could preside over the Supreme Judicial Council. The petition went on to claim that since the chief justice had to preside over the Supreme Judicial Council, it followed that he must be immune from its rulings. Indeed, Chaudhry asserted that he could not even be tried by the Council. In addition, the petition alleged that because the Supreme Court was now being presided over by an illegitimate chief justice, its orders would be illegal.

The government responded by pointing out that Article 211 of the Constitution clearly stated that proceedings before the Council cannot be called in question in any court. The government therefore asserted that the Supreme Court was barred from interfering in this Council proceeding. The government also asserted that the Constitution made no distinction between an "acting," or a "permanent" chief justice on the issue of service on the Supreme Judicial Council. It also argued that there was no distinction between "judge of the Supreme Court," and the "Chief Justice of the Supreme Court" for purposes of accountability before the Supreme Judicial Council. The government contended that if the creators of the Constitution or those who had had the power to amend it over the years had wished for the Chief Justice to be immune from Supreme Judicial Council Proceedings, they would have granted it explicitly.

In addition, the government pointed out that to grant this immunity would put accountability with regard to the chief justice in the hands of colleagues over whom he had a certain amount of authority. Ahmed Raza Qasuri, arguing for the government, asserted that allegations of wrongdoing against the chief justice would no longer be inquired into by a constitutional process, but handled as a "household affair," with a price to be paid in terms of public confidence.

On 28 April, Acting Chief Justice Rana Bhagwandas appointed a five-member panel to hear Chaudhry's petition.¹³ On 7 May, that bench stayed the proceedings of the Supreme Judicial Council, and requested that, in view of the important constitutional and legal issues involved, "the matter be placed before the Full Court." By that time, both Chaudhry and the government had requested a hearing by the full court. The panel also barred Justice Bhagwandas (the acting chief justice), justices Iqbal and Dogar (who sat on the Supreme Judicial Council) and Justice Sardar Mohammad Raza Khan (who had a conflict of interest) from sitting on a full court panel.

The panel declined to render any decisions with regard to Chaudhry's contentions about the Supreme Judicial Council. It simply stated that: "Further proceedings before the Supreme Judicial Council will, however, remain stayed till the hearing of the cases by the Full Court."

On 20 July, a 13-member bench disposed of 25 petitions that had been filed on the suspension of Chief Justice Chaudhry *en bloc*. In a Short Order, the Court set aside the reference against Chief Justice Chaudhry by a 10-3 majority. It unanimously ruled President's Order No.27

¹³Pakistani Supreme Court cases are not heard by the entire Court as in the United States. As a general rule, Supreme Court cases must be heard by "not less than three judges" appointed by the chief justice. However, the chief justice has the right to appoint a larger bench, and generally does, when matters of great importance are being decided. (The Pakistan Supreme Court Rules, 1980, Order XI)

of 1970 unconstitutional and therefore unanimously ruled that President Musharraf's order based on it to have been passed without lawful authority.

The appointment of an acting chief justice was unanimously declared to have been made without lawful authority. However, the decisions of the Supreme Court during that period were not disturbed by virtue of the application of the *de facto* doctrine.

On 3 November 2007, Pervez Musharraf declared a State of Emergency, during which he removed the chief justice and required that new oaths be taken by judges of the superior courts. The most dissident justices, Chief Justice Chaudhry among them, were not offered the opportunity to take the oath and were therefore essentially dismissed. Some other justices refused to take the oath, effectively resigning.

A seven-justice panel of a reconstituted Supreme Court heard various arguments with regard to the treatment of judges during the Emergency. The dismissals/resignations were upheld.

Nawaz Sharif's Return

Background

In 1997, Nawaz Sharif's Pakistan Muslim League came to power following the fall of Benazir Bhutto's last government. His government was ratified by 181 votes in a vote of confidence in the National Assembly.¹ He took advantage of this unprecedented mandate to amend the Constitution. Among the changes was the removal of the president from decisions regarding the appointment of military service chiefs. This meant that it was now possible to appoint service chiefs on the basis of loyalty to Nawaz Sharif personally.

After disagreements in the wake of fighting between the Pakistani Army and the Indian Army in the Kargil district of Kashmir, Nawaz Sharif attempted to fire Chief of Army Staff Pervez Musharraf while the latter was in Sri Lanka on an official visit.

When Musharraf attempted to return to Pakistan, Nawaz Sharif ordered that the plane carrying Musharraf not be allowed to land at Karachi Airport. Pakistani troops took control of the airport, however, and the plane landed with seven minutes of fuel to spare. Nawaz Sharif was removed and Pervez Musharraf took control of the affairs of the country.

Nawaz Sharif's removal was validated by the Supreme Court under the Doctrine of Necessity. In addition, he was convicted on charges of hijacking stemming from the incident at Karachi Airport. In April 2000, he was sentenced to two concurrent terms of life imprisonment and forfeiture of all of his assets. He was also tried on charges of corruption. That trial resulted in another conviction with a 14-year sentence, a fine of 20 million rupees (about \$335,000 at the time) and a 21-year ban on participation in politics.

A plea bargain and intervention of the Saudi royal family resulted in a commutation of Sharif's sentence by Musharraf in return for his agreement to leave Pakistan for Saudi Arabia. In December of 2000, Nawaz Sharif left for Saudi Arabia.

In late 2003, Nawaz Sharif's brother, Shahbaz Sharif, petitioned the Supreme Court to compel the government to allow him to return. Shahbaz Sharif had agreed to go to Saudi Arabia with his brother. While Nawaz Sharif had left Pakistan following a conviction, Shahbaz Sharif had been facing criminal charges, not a conviction. It had been alleged, but not proven, that while chief minister of Punjab province, he had been complicit in the shooting deaths of five people.

Shahbaz Sharif attempted to avail himself of an article in the Pakistani Constitution (Article 184[3]) that allows the Supreme Court to hear cases involving matters of public importance in which fundamental rights were being infringed. He alleged that his right to return to his country was being denied him.

In March of 2004, the petition was dismissed. The Court had found no grounds for the assertion that the government was blocking his return:

[N]either in the comments nor during the course of arguments the federal government/government of Punjab has disputed the right of the petitioner being a citizen of Pakistan to come back to the country nor referred nor brought on record any agreement/document permitting the government to force the petitioner to live in exile. It appears that he left the country on his own and nothing material has been brought on

¹At that time, there were 217 seats in the National Assembly.

record to substantiate the assertion that he was forced to live in exile. The petitioner has prayed for a relief, which, in fact, always remained available to him and he himself was solely responsible for not availing it earlier. Const. Petition No. 55 of 2003 is not maintainable.

The Court also held that the case was filed by the petitioner in his individual capacity and for the redress of an individual grievance. Thus, he had not raised a matter of public importance as required by Article 184(3).

However, with the dismissal came the following observation, which would be quoted in the case that followed:

[I]t is not denied by learned Attorney General for Pakistan and Advocate General Punjab nor so could be denied that Article 15 of the Constitution bestows a right on every citizen of Pakistan to enter or move freely throughout the country and to reside and settle in any part thereof. It is a settled proposition of law that the right to enter in the country cannot be denied but a citizen can be restrained from going out of the country. The petitioner is a citizen of Pakistan and has a constitutional right to enter and remain in the country.

In 2007, each brother filed a petition in the Supreme Court. The petitions were filed seeking a Supreme Court ruling under 184(3). Their political party, the Pakistan Muslim League (Nawaz) joined on each petition. The petitions asked the Court to declare that the Sharifs and their entire family “have the inalienable, unqualified fundamental right to remain in Pakistan and participate in and contest the forthcoming general elections.” It also asked the Court to order the government not to obstruct, hamper or resist the return of the Sharif family or to force them to live in continued exile.

The government argued that a hearing under Article 184(3) of the Constitution was inappropriate because this was an individual grievance and no point of public importance was involved in the matter. The government also contended that the Sharifs left the country on their own as a result of legal problems, not because the government forced them to. It reminded the Court that no prohibitory order had been passed imposing any restriction on the movement of the Sharif family. It therefore argued that their concerns were based upon speculation about what might happen to them if they returned. The government pointed out that relief cannot be granted on speculation or conjecture.

The government also called the Court’s attention to the fact that there was an agreement in place, and that the Sharif brothers had proceeded to Saudi Arabia in accordance with that undertaking.

Finally, the government claimed that the petitioners’ claim was barred by laches. Laches is a defense. The party invoking it is essentially asserting that an opposing party has “slept on its rights,” and that as a result of this delay, that party is no longer entitled to its claim.

The Supreme Court decided the two petitions *en bloc*, and delivered its decision on 23 August 2007.

Question of Public Importance

The Court began by distinguishing these petitions from the one filed by Shahbaz Sharif in 2003. It conceded that the earlier petition by Shahbaz Sharif was ruled non-maintainable as an Article 184(3) case:

It is well established by now that the issues arising in a case cannot be considered as a question of public importance, if the decision of the issues affects only the rights of an individual or a group of individuals. The issue in order to assume the character of public importance must be such that its decision affects the rights and liberties of people at large.

The Court attached some significance to the fact that general elections for the provincial and national assemblies were imminent and that the Sharifs were leaders of a national political party elected twice by the people of Pakistan. The Court also seemed to attach significance to the fact that the Sharifs were seeking to return to organize their party and to participate in the General Elections.

The Court also found that the participation of the Pakistan Muslim League (Nawaz) in the petitions was a significant development:

Now the position has been changed altogether and the above captioned petitions have been preferred by the Central Working Committee on behalf of Pakistan Muslim League (N) which has got its own import, significance and it has assumed a character of public importance which also involves the question of enforcement of Fundamental Rights.

Generally, in order to press a claim in a court, a claimant must have “standing.” That is to say the claimant is required to have suffered some injury. However, the Court declined to dismiss the claims asserted by the PML(N) on the grounds that it lacked the standing to assert them. The Court held that “under Article 184(3) there is no requirement that only an aggrieved party can press into service this provision. Supreme Court can entertain a petition under Article 184(3) at the behest of any person.” Therefore, wrote the Court, the “traditional rule of *locus standi* can be dispensed with,” so long as the claim is being asserted “by a person acting *bona fide*.”

The Court therefore ruled that the claims met the “question of public importance” requirement.

Fundamental Rights

Article 15 of Pakistan’s Constitution covers freedom of movement to, from and within Pakistan. Article 15 is part of a package of rights (Articles 8–28) specifically designated “Fundamental Rights” in the Constitution. As this case involved the interpretation of rights granted under Article 15, and that article was a designated Fundamental Right, the Court held that the second prong of the requirements of Article 184(3) had been met. The case was therefore ruled maintainable under that article.

Fundamental Rights and Reasonable Restrictions

The Court examined the nature and importance of fundamental rights. As far as the Court was concerned, the salient characteristic of a fundamental right is its paramountcy to ordinary State-made laws. Such rights were protected by “express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation.” According to the Court:

[T]he aim of having a declaration of Fundamental Rights is that certain elementary rights of the individual such as his right to life, liberty, freedom of speech, freedom of faith and so on, should be regarded as inviolable under all conditions and that the shifting majorities in the Legislatures of the country should not be able to temper with them.

However, the Court recognized that fundamental rights have no real meaning if the state itself is in danger. If the state is in danger, the Court reasoned, the liberties of the subjects, including their fundamental rights, are themselves in danger. As a result:

[A]n equilibrium has to be maintained between the two contending interest at stake; one, the individual liberties and the positive rights of the citizen which are declared by the Constitution to be Fundamental, and the other, the need to impose social control and reasonable limitations on the enjoyment of those rights in the interest of the collective good of the society.

Thus, according to the Court, it is a cardinal principle that guarantees to individuals are subject to the overriding necessity or interest of community. A balance therefore must be struck between rights of individuals and the interests of the community. On this point, the Court referred approvingly to the holding in an Indian case:

If in serving the interests of the community, an individual or number of individuals have to be put to some inconvenience and loss by placing restrictions on some of their rights guaranteed by the Constitution, the restrictions can never be considered to be unreasonable.²

That the government was allowed to place certain restrictions on individual rights, even fundamental ones, was therefore beyond question as far as the Court was concerned. However, such restrictions had to be reasonable.

On the issue of what restrictions were “reasonable,” the Court found that the Supreme Court had long since ruled on the issue:

“A reasonable restriction” in the sense of Article 11 is one which is imposed with due regard to the public requirement which it is designed to meet. Anything which is arbitrary or excessive will of course be outside the bounds of reasons in the relevant regard, but in considering the disadvantage imposed upon the subject in relation to the advantage which the public derives, it is necessary that the Court should have a clear appreciation of the public need which is to be met and where the statute prescribes a restraint upon the

²*Nasirabad Properties Ltd. v. Chittagong Development Authority* (PLD 1966 Dacca 472)

individual, the Court should consider whether it is a reasonable restraint, in the sense of not bearing excessively on the subject and at the same time being the minimum that is required to preserve the public interest.³

The Court concluded that any invasion upon the rights of citizens, whether by a private individual, a public official or public body, must be justified with reference to some law of the country. It therefore followed that “no member of the executive can interfere with the liberty or a property of a subject except on the condition that he can support the legality of his action before a Court of Justice.”

Reasonable Restrictions on Movement

The Court held that every citizen has an undeniable right conferred under Article 15 of the Constitution to go abroad and return back to Pakistan without any hindrance and restraint, but that this right “is neither absolute nor unqualified.” It pointed out that the article itself contains the following language: “subject to any reasonable restriction imposed by law in the public interest.”

The Court held that the state has power to impose reasonable restrictions on the right of freedom of movement of a free citizen where such restriction is necessary in the interests of the general public. It cited, as an example, a law restricting the movement of prostitutes in a part of town.

On the other hand, as examples of unreasonable restrictions, it cited a restriction for an indefinite or an unlimited period, one that is disproportionate to the mischief it seeks to prevent, or a law which imposes restrictions but does not provide any safeguard against arbitrary exercise of power.

On the issue of reasonable restraints, the Court adopted the reasoning of a ruling in an earlier Lahore High Court case:

The imposition of restrictions by requirement of permits, etc., is justified as a reasonable restriction in the public interest. But a law which subjects a citizen to the extreme penalty of a virtual forfeiture of a citizenship upon conviction for a mere breach of the permit regulations or upon a reasonable suspicion of having committed such a breach can hardly be justified upon the ground that it imposes a reasonable restriction upon the fundamental right to reside and settle in the country, in the interests of the public.⁴

The Law as Applied to the Sharifs

The Court found no law that justified keeping the Sharifs out of Pakistan. They had left Pakistan pursuant to an undertaking. The two brothers had each agreed to stay out of Pakistan for 10 years and not to engage in any business, political or other activities of any nature against the

³*East and West Steamship Co. v. Pakistan* (PLD 1958 SC 41)

⁴*The State Bank of Pakistan and the Central Government of Pakistan* (PLD 1969 Lahore 908)

interests of Pakistan during that period. The Court held that an undertaking was insufficient to justify the restriction of a fundamental right.

In addition, the Court held that fundamental rights cannot be waived. “No right which is based on public policy can be waived,” wrote the Court. “Citizens of Pakistan cannot [opt] themselves out of the various fundamental rights which the Constitution grants them. The fundamental rights are not to be read as if they included the words ‘subject to a contract to the contrary’.”

Finally, the Court held that a fundamental right could not be barred by laches. Such rights can be asserted at any time by their holders.

The Court therefore declared that the Sharifs “have the inalienable, unqualified fundamental right to enter and remain in Pakistan.” It also ordered the federal and provincial governments not to obstruct, hamper or resist their return in any fashion.

The Pre-Election Dismissals

Background

On 28 September, 2007, just before the presidential election of 6 October, the Supreme Court disposed of six petitions (constitution petitions, numbers, 58, 59, 61, 62, 63 and 67 of 2007) filed to contest the eligibility of Pervez Musharraf to run for President. The challenges were filed under Article 184(3) of the Constitution. The petitioners claimed that to allow Musharraf to run would be an infringement of fundamental rights.

For a claim to be maintainable under Article 184(3) the complaint must involve a matter of public importance and the infringement of a fundamental right (one of the rights enumerated in articles 8–28 of Pakistan’s Constitution).

The government raised no objection to the notion that the election of the president is a matter of public importance. However, it asserted that the claims raised in the petitions had no nexus with any of the fundamental rights guaranteed in Part II Chapter 1 of the Constitution (articles 8–28). The government therefore insisted that the petitions were not maintainable.

The attorney general asserted that the right to contest election for a public office is different from the right to challenge the candidature of a person to restrain him from participating in the election. He conceded that a person has a right to raise objections, but pointed out that there is an appropriate forum for raising those objections. That forum was not, he argued, the original jurisdiction of the Supreme Court under 184(3), a forum designated to protect enumerated fundamental rights.

The government also argued that the petitions should be rejected on laches. The petitioners were filing their petitions just before the election, though the amendment (17th) they were challenging had been ratified four years earlier, the statute they were challenging (the President to Hold Another Office Act) had been passed three years earlier and a Supreme Court case on these issues had been decided two years earlier. The government insisted that the petitioners had waited too long to press their claims. The petitioners responded that the Court had held that laches cannot be applied to the assertion of fundamental rights.¹

The Claims

The petitioners essentially argued that the issue of whether or not Pervez Musharraf was allowed to run for president while chief of Army Staff relates to the fundamental rights of the people of Pakistan, enshrined in the Constitution, which were “being denied on account of and for the sake of one person.” Toward that end, they raised the following major claims:

- The holding in *Pakistan Lawyers Forum v. Federation of Pakistan* (PLD 2005 SC 719) which held that Article 62 qualifications apply to presidential candidates but Article 63 disqualifications do not was erroneous.²

¹*Muhammad Nawaz Sharif v. President of Pakistan* (PLD 1993 SC 473). The Court had reiterated its position in the case of the Sharif brothers decided a month earlier.

²In order to run for president of Pakistan, one must meet the qualifications required of a National Assembly candidate.

- The 17th Amendment to the Constitution, which, among other things, allowed Pervez Musharraf to run for and serve as president while in uniform was a complete departure from the concept of democracy and the parliamentary system of government, and was therefore unconstitutional.³
- The amendment of Article 41 by the 17th Amendment that made it possible for Pervez Musharraf to serve as president while in uniform were “one time specific” and were based on a covenant between the political parties. But for this consensus and covenant, there would have been no 17th Amendment.⁴
- Article 244 of the Constitution is applicable with full force on the forthcoming election of the President. General Pervez Musharraf violated his oath as a member of Armed Forces by engaging in political activities and had therefore incurred a disqualification under Article 63(1) to hold the office of President.⁵
- Act VII of 2004 (the President to Hold Another Office Act) violates articles 2A (the Objectives Resolution), 8 (Laws inconsistent with or in derogation of Fundamental Rights to be void), and 25 (Equality of citizens) of the Constitution.⁶
- The President to Hold Another Office Act is discriminatory because it only bestows the right to hold another office on Pervez Musharraf. Future presidents and future chiefs of Army Staff will not enjoy the same privilege.
- The present national and provincial assemblies do not constitute a valid electoral college for the election of President under Article 41(3) of the Constitution as the terms of the national and provincial assemblies under Article 52 and 107 of the Constitution respectively, are also expiring with the term of President in office.
- By remaining chief of Army Staff beyond the retirement age of 60, Pervez Musharraf was occupying that office illegally and unconstitutionally. He had thereby incurred a disqualification under Article 63.

Maintainability

The Court pointed out that the scope of judicial review of the Supreme Court of Pakistan is perhaps the most extensive in the legal world as the Supreme Court in exercise of this power,

³In the *Pakistan Lawyers Forum* case, the Supreme Court had held that the 17th Amendment did not violate the concepts of democracy or the parliamentary system of government and was constitutional.

⁴In *Pakistan Lawyers Forum*, the Supreme Court held that arrangements between legislators are extraneous to the validity of an impugned Act. The Court is bound to interpret laws or amendments as written, by their plain meaning.

⁵Article 244 requires members of the Armed Forces to take an oath in the 3rd Schedule of the Constitution, in which they agree not to engage in politics. In *Pakistan Lawyers Forum*, the Supreme Court had held that the *non obstante* clause in Article 41(7)(b) made the oath issue irrelevant.

⁶In the *Pakistan Lawyers Forum* case, the Supreme Court had held that the President to Hold Another Office Act was constitutional, though it did not speak specifically to Article 8 or Article 25.

can examine the validity even of an amendment in the Constitution which is violative of the basic structure of the Constitution. However, it went on to say that:

There is no cavil to the principle that original jurisdiction of this Court under Article 184(3) of the Constitution cannot be exercised in a matter brought before it unless it is of *public importance* involving the enforcement of *fundamental rights* conferred by Part-II Chapter 1 of the Constitution (Articles 8 to 28) and in absence of any of the above conditions, this Court is not supposed to entertain a petition under Article 184 (3) of the Constitution.

“The mere importance of a matter, without enforcement of any fundamental right,” it held, “will not attract the jurisdiction of this Court under Article 184 (3) of the Constitution.”

Since the petitioners raised several claims that had already been decided by the Court with the intention of persuading the Court to overrule those decisions, the Court added the following:

The constitutional jurisdiction of the Supreme Court under Article 184(3) of the Constitution also cannot be invoked for the correctness of a judgment of the Court in which a question of law was decided unless it is established that in consequence to the judgment of this Court, a fundamental right falling in Part II Chapter I of the Constitution has been violated. The Supreme Court indeed has power to rectify its own mistake but the provision of Article 184(3) of the Constitution is invokeable only in the matter of public importance relating to the enforcement of fundamental rights.

In the interests of clarity, the Court listed the fundamental rights recognized by the Constitution in articles 8 through 28:

- (8) Laws inconsistent with or in derogation of Fundamental Rights to be void,
- (9) Security of person,
- (10) Safeguards as to arrest and detention,
- (11) Slavery, forced labor, etc., prohibited,
- (12) Protection against retrospective punishment,
- (13) Protection against double punishment and self-incrimination,
- (14) Inviolability of dignity of man, etc,
- (15) Freedom of movement, etc,
- (16) Freedom of assembly,
- (17) Freedom of association,
- (18) Freedom of speech, etc,
- (19) Freedom to profess religion and to manage religious institutions,
- (20) Safeguard against taxation for purpose of any particular religion,
- (21) Safeguard as to educational institutions in respect of religion, etc,
- (22) Safeguards as to educational institutions in respect of religion, etc,
- (23) Provision as to property,
- (24) Protection of property rights,
- (25) Equality of citizens,

- (26) Non-discrimination in respect of access to public places,
- (27) Safeguard against discrimination in services and
- (28) Preservation of language, script and culture.

Of the fundamental rights listed, the Court could only find reference to two in the petitions. The Court wrote that the “learned counsel for the petitioners in the present petitions half-heartedly argued that subject matter of these petitions may fall within the purview of Articles 17 and 25 of the Constitution.” It then reproduced articles 17 (Freedom of Association) and 25 (Equality of Citizens) in their entirety and concluded that:

In the light of nature of rights guaranteed under Article 17 and 25 of the Constitution, the learned counsel for the petitioners have not been able to point out which particular right under these articles required enforcement and in what manner these rights of the petitioners or any other person, were infringed to bring the matter within the ambit of Article 184(3) of the Constitution.

“In the present case,” the Court continued, “petitioners have questioned the eligibility of the respondent to contest the election for the office of President which has no nexus with the rights guaranteed under Articles 17 and 25 of the Constitution.

The Court held that the right to vote or to contest the election is a statutory right and is subject to the limitation imposed by the statutes. Therefore, “the provision of law relating to such rights may not be challengeable with reference to the fundamental rights as the right to file a petition under Article 184(3) of the Constitution arises only in a case of infringement of the fundamental right or a serious threat to infringe such a right,” the Court wrote.

It added that “mere apprehension of breach of fundamental right is not enough to invoke these extra-ordinary provisions.” The Court reminded the petitioners that it is a settled principle of law that under Article 184(3), the Court will not answer a hypothetical question even if such a question in its substantial context may be of public importance relating to the fundamental rights.

The Court also held that in the case of claims that did not refer to fundamental rights, it may refuse to exercise its original jurisdiction if a case was filed with delay (laches could be raised).

By a 6-3 majority, (justices Rana Bhagwandas, Sardar Muhammad Raza Khan and Mian Shakirullah Jan dissenting) the Court held that:

[N]otwithstanding the public importance of the matter, the questions raised in these petitions do not as such relate to the enforcement of any of the fundamental rights guaranteed in Part II Chapter-1 of the Constitution (*Articles 8 to 28*) therefore, these petitions under Article 184 (3) of the Constitution are not maintainable.

The question as to whether a person is not qualified to contest the election for the office of President in terms of Article 41(2) read with other provisions of the Constitution, does not relate to the enforcement of any of the fundamental rights of the petitioners or any other person, to maintain these petitions before this Court in its original jurisdiction under Article 184(3) of the Constitution.

The Parliament, pursuant to its legislative competence under the Constitution, has enacted Act VII of 2004 and this Court having found the said Act not in conflict to any provision of the Constitution, validated the same in Pakistan Lawyers Forum vs. Federation of Pakistan (PLD 2005 SC 719) and pending a review petition against this judgment a fresh petition after lapse of a period more than two years on the same subject, may not be entertainable.

The question relating to the application of Article 63 read with Article 62 of the Constitution to determine the eligibility of a person to contest the election for President cannot be raised before this Court at this stage as the matter squarely falls within the jurisdiction and domain of Election Commissioner of Pakistan, a constitutional forum of exclusive jurisdiction.

The Petition that Triggered the State of Emergency

Background

On 28 September 2007, the Supreme Court had dismissed six petitions challenging Pervez Musharraf's right to run for president while concurrently serving as chief of Army Staff. However, a few petitions were not dismissed, because arguments could not be finished before the election. One of these petitions would ultimately trigger the State of Emergency.

Wajihuddin Ahmed, a former justice of the Supreme Court who was running against Musharraf for the presidency, filed objections in writing to the candidature of President Musharraf by raising a number of constitutional and legal objections. On 29 September, Justice (Ret'd.) Qazi Muhammad Farooq, the chief election commissioner, himself a former justice of the Supreme Court, rejected the objections and approved the candidacy of President Musharraf.

Ahmed's main objection was that the current Electoral College was not competent to re-elect the president for another term of five years as they had already endorsed his present term of five years and their own term was on the verge of expiration.¹

Commissioner Farooq rejected this objection. He pointed out that there is no explicit or implicit prohibition in the Constitution against an electoral college electing the same person as President twice during its term. There was, however, a requirement that presidential elections be held not earlier than sixty days and not later than thirty days before the expiration of the term of President in office. "The term of the President in office shall expire on 15th November, 2007," he wrote. "Therefore, there can be no cavil with the proposition that election to the office of the President must be held between 15th September to 15th October, 2007."

Another objection was that, if elected, this would be Musharraf's third consecutive term, something prohibited by Article 44(2) of the Constitution, because he had served as president from 20 June 2001 to 15 November 2002 before his first elective term began on 16 November 2002.

Commissioner Farooq ruled that the first term is excluded from the tally, having not been enjoyed as a result of election, but as a result of the Proclamation of Emergency (Amendment) Order, 2001 and President's Succession Order, 2001.² Indeed, in the Constitution, Musharraf's position before his election was referred to as the "Chief Executive," not the "President."

Three of the objections were rejected because they made assertions that had already been rejected by the Supreme Court in *Qazi Hussain Ahmed v. General Pervaiz Musharraf* (PLD 2002 SC 853) and *Pakistan Lawyers Forum v. Federation of Pakistan* (PLD 2005 SC 719).

Another objection alleged that President Musharraf was not qualified to contest the election because "he was not sagacious, righteous and non-profligate and honest" within the contemplation of Article 62(f) of the Constitution as he "had not fulfilled the commitment made on the electronic media on 24th December, 2003, to give up the office of the Chief of Army Staff by 31st December, 2004."

Commissioner Farooq rejected this objection, terming it "remarkable in weakness only." He ruled that the matter is debatable and "there is nothing on the record from which the terms and conditions of the commitment or the circumstances under which it was made or not fulfilled could be gathered." In any case, he reasoned, any mark on Musharraf's qualification would have been offset by his promise that, if elected, he would doff his uniform before taking oath of office.

One objection was rejected because it was demonstrated to be false. Ahmed alleged that Pervez Musharraf was not a university graduate within the meanings of Article 8A of the Conduct of General Elections Order, 2002. Two original degrees were produced and attested copies placed in the file of his nomination papers. Thus, it was demonstrated that President Musharraf had obtained a Bachelor of Science degree (with Honors) in War Studies from the University of Balochistan, Quetta (1980), and a Master of Science degree in War Studies from Quaid-e-Azam University, Islamabad (1983).

The Supreme Court Petition (Pre-Emergency Declaration)

On receiving Commissioner Farooq's decision, Justice (Ret'd.) Ahmed petitioned the Supreme Court for relief. The petition, Constitutional Petition 27 of 2007, was filed against Commissioner Farooq. The petition raised the same objections.

¹Musharraf was elected to his first term by national referendum. The Electoral College later endorsed his election.

²Chief Executive's Order Numbers 2 and 3 of 2001

Like the six that had been dismissed, this petition was a challenge to President Musharraf's electoral eligibility filed under Article 184(3), so it was expected to ultimately meet the same fate for the same reason. However, while the case was heard for several days, closing arguments could not be concluded before Election Day.

No matter how slim the petition's chances of success were, the justices were bound to hear the case to its conclusion. The Court therefore issued a stay on final (official) notification of the election results until after the case was concluded.

On 6 October 2007, Pervez Musharraf was elected president by the Electoral College with 57% of total number of votes and 99% of the votes cast in election.³ With the election over, the case resumed.

On 2 November, Justice (Ret'd.) Ahmed, under Order XXXIII (Inherent Powers), Rule 6 of the Rules of the Supreme Court and Article 187 of the Constitution, filed an application with the Court.^{4,5} The application asked the Court to restrain President Musharraf and the Federation from taking any steps, including the imposition of martial law "or some other unconstitutional steps" which might "have the effect of prejudicing the court and the bench, hearing the identical petitions challenging the candidacy of General Musharraf for the presidential election."

That evening, President Musharraf, based upon information he was receiving through various sources, had concluded that the panel hearing the Wajihuddin Ahmed case was preparing to rule Musharraf's election invalid. Such a ruling would have flown in the face of the pre-election Supreme Court ruling regarding granting of relief under Article 184(3). Moreover, the justices were expected to do so by invalidating properly ratified Constitutional Amendments.

Musharraf saw this as a direct challenge to the authority of Parliament. He therefore declared a State of Emergency and required that new oaths be taken by judges of the superior courts. The most dissident justices were not offered the opportunity to take the oath and were therefore essentially dismissed. Some other justices refused to take the oath, effectively resigning.

The Supreme Court Petition (Post-Emergency Declaration)

Before taking up Constitution Petition No.73 of 2007 again, a matter arising out of Justice (Ret'd.) Ahmed's 2 November application had to be disposed of. After the State of Emergency was declared, seven justices of the Supreme Court, including Chief Justice Chaudhry, met to issue a restraining order against the government, dated 5 November 2007, based upon that application. The government moved, by filing CMA (Civil Miscellaneous Application) No. 2874, to get a clarification of the status of the alleged order.

On 6 November, An eight-justice panel from the reconstituted Supreme Court held that at the time of the alleged order, the justices who issued it had ceased to be justices and had not taken the required oath. They therefore could not have legally issued such an order. In addition, the Court ruled the order invalid on the grounds that no notice had been given parties or the attorney general, as required by Supreme Court Rules.

On 19 November, a ten-justice panel held a hearing on the Wajihuddin Ahmed case and four other Article 184(3) petitions that had been filed before the election and had likewise been stayed because arguments could not be completed.

Dr. Anwar ul-Haq, a civil servant (pathologist) who had sought the right to run for president that had been granted President Musharraf, Liaqat Balouch, the vice president of the Jamaat-e-Islami Party, The Pakistan Lawyers' Forum and Makhdoom Amin Fahim of the Pakistan People's Party had also sought the disqualification of President Musharraf.

The petitioners were uniform in their disdain for the reconstituted Supreme Court and the panel hearing the case as it was now constituted. The original panel had included justices Abdul Hameed Dogar, Muhammad Nawaz Abbasi, Faqir Muhammad Khokhar, M Javed Buttar, Javed Iqbal, Khalilur Rehman Ramday, Tassaduq Hussain Jilani, Raja Fayyaz Ahmed, Ijaz Ahmed,

³Pakistan's Electoral College is made up of the national legislature and the four provincial legislatures.

⁴Rule 6 reads: "Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

⁵Article 187(1) reads: "The Supreme Court shall have power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it, including an order for the purpose of securing the attendance of any person or the discovery or production of any document."

Syed Jamshed Ali and Ghulam Rabbani. All but the first four either were not offered oath or had refused to take it, and were therefore no longer on the Court.

The Court made it clear that because there was a new bench, the cases would have to be reargued.

The Court dismissed the petitions of Dr. Anwar ul-Haq and Liaqat Baloch when their advocate (who was representing both petitioners) said that he had been instructed by both his clients to withdraw their petitions. The Court therefore dismissed them.

Shafqat Abbasi (no relation to Justice Abbasi), counsel for PPP leader Makhdoom Amin Fahim, moved an application requesting the court to take up his petition after restoration of the Constitution and restoration of the justices who had been removed from the Court. The Court asked him either to argue the case or withdraw the petition. The attorney asked for leave to withdraw his petition conditionally. Justice Buttar reminded him that petitions cannot be withdrawn conditionally. Shafqat Abbasi then withdrew the petition.

The Court also dismissed the petition of the Pakistan Lawyers Forum due to non-prosecution. The lawyers, protesting against the State of Emergency and for the restoration of deposed judges, refused to appear before justices who had taken oath under the Provisional Constitutional Order, issued by President Musharraf.

After reading an application for hearing on the Wajihuddin Ahmed petition, the Court chided his attorney for the contemptuous tone of the application. Like the PPP application, it requested the court to take up his petition only after full restoration of the Constitution and restoration of the justices who had been removed from the Court. "The so-called PCO judges are in illegal and unconstitutional occupation of the building of the Supreme Court from where they are constitutionally required to be eased out," read the application. It added:

[T]he PCO judges in occupation of the Supreme Court building cannot be constitutionally accepted or recognized as judges of the Supreme Court. They cannot therefore fix for hearing or try to hear this Constitution Petition. The Petitioner or his Counsel shall not appear before PCO judges, as they do not recognize them as judges.

Ahmed's advocate, M. S. Khattak, apologized and told the court that the application had been drafted by his client and that he had nothing to do with its contents. The Court then asked him to argue his case. Khattak replied that he could not, because he had no instructions from his client to do so. With that, the court dismissed the Ahmed's petition for want of instructions, stating that it would be considered dismissed as withdrawn.

Notwithstanding the withdrawal, the Supreme Court issued a decision in the matter of Constitutional Petition No. 73. It found that the order of the chief election commissioner of Pakistan comported with previous judgments of the Supreme Court and was otherwise unexceptional.

On the question of maintainability, it held, in accordance with the Court's pre-election rulings, that:

the questions involved in the matter of election of the President did not relate to any of the fundamental rights guaranteed in Part II, Chapter I of the Constitution (Articles 8 to 28). Therefore, the petitions under Article 184 (3) of the Constitution were not maintainable."

It added that: "Even otherwise, in view of clause (6) of Article 41 of the Constitution, the validity of the election of the President cannot be called in question by or before any Court."

Constitution Petition No.73 of 2007 was thus dismissed and the interim stay order previously issued by the Court was vacated. The Court directed the chief election commissioner and the federal government to take all the necessary steps to issue a final announcement of the result of the presidential election by 1 December, 2007. The Court also ordered President Muhsarraf to relinquish the office of the Chief of Army Staff before taking oath of office for his second term.

The State of Emergency

Background

On 2 November 2007, Justice (Ret'd.) Wajihuddin Ahmed, whose petition against President Musharraf's candidacy had been stayed before the election and had been picked up after it, had filed an application with the Supreme Court. In it, he asked asking the Court to restrain President Musharraf and the Federation from taking any steps, including the imposition of martial law "or some other unconstitutional steps" which might "have the effect of prejudicing the court and the bench, hearing the identical petitions challenging the candidacy of General Musharraf for the presidential election."

That evening, President Musharraf concluded, based upon information he was receiving from various sources, that the panel hearing the Wajihuddin Ahmed case was preparing to rule in Ahmed's favor, contravening the pre-election Supreme Court ruling regarding granting of relief under Article 184(3). In addition, the justices were expected to do so by invalidating properly ratified Constitutional Amendments.

There was already tension with the judiciary over what the government felt was excessive use of its right to take up issues on its own initiative, known as *suo-motu* jurisdiction under Article 184(3). According to Attorney General Malik Muhammad Qayyum, between 1958 and mid-2005, when Iftikhar Muhammad Chaudhry had become chief justice, the Supreme Court had granted 46 such hearings, slightly less than one per year. Since then, it had granted more than two hundred a year, a more than 20,000 percent increase. Everyday issues were increasingly becoming matters for the Supreme Court.¹ In addition, government and civil service officials were being called to the Supreme Court with increasing regularity and dressed down by justices. President Musharraf was becoming increasingly concerned that the judiciary's activity had risen to the level of interference with the conduct of government.

Now, Musharraf was faced with what he saw as a direct challenge to the authority of Parliament. He therefore declared a State of Emergency, issued a provisional constitutional order that made amendments to the Constitution and required that new oaths be taken by judges of the superior courts. The oath order, in addition to requiring judges to take the oath stated that the oath takers:

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.

The most dissident justices were not offered the opportunity to take the oath and were therefore essentially dismissed. Some other justices refused to take the oath, effectively resigning.

The issue of a judge's duty under such circumstances had already been ruled on by the Supreme Court *Qazi Hussain Ahmed v. General Perwaiz Musharraf* (PLD 2002 SC 853).

¹The Supreme Court had taken a case under 184(3) on the dangers of kite flying. The panel, chaired by Chief Justice Chaudhry, issued a ban on the activity.

The Court held that the tendering of resignation *en bloc* in protest was “detestable” as it would sanctify chaos or anarchy and deny justice to the citizens of Pakistan. Accepting the purported ouster of the Court’s jurisdiction under a provisional constitutional order would represent a “complete surrender,” in the Court’s opinion.

The Court had therefore held that judges should stay at their posts. They should take the oath “so as to secure the enforcement of law, extend help to the law enforcing agencies for maintenance of public order and with a view to restoring democratic institutions, achieving their stability and guaranteeing constitutional rights to the people of Pakistan.”

The Oath itself required adherence to the Supreme Judicial Council’s Code of Conduct and that the Code compelled judges to submit to the Constitution.

The judges who took the oath were therefore not bound by provisions of the Order or the Oath that put the government’s actions beyond legal challenge. In fact, they were required by Supreme Court precedent to ignore it. This explains why, less than two weeks after the justices had taken an oath not to allow provisions of the Provisional Constitutional Order not to be called into question, they were hearing challenges to the State of Emergency itself.

Challenge to the State of Emergency

Hearings on constitution petitions numbers 87 and 88 of 2007, which challenged the imposition of the State of Emergency, were held from 19–23 November 2007. A seven-justice panel comprised of justices who had taken the oath and others promoted to fill vacancies heard the challenge.

The Court held that “sufficient corroborative material has been produced by the respondents, which justifies the taking of the extra-constitutional measures by the Chief of Army Staff and the President.” It validated the Proclamation of Emergency under the Doctrine of Necessity in response to a crisis caused by the previous Supreme Court.

(B)oth the learned counsel for the petitioners repeatedly submitted that the Government ought to have adopted constitutional means to meet the situation that prevailed in the country on or before 3rd November 2007. However, they failed to point out any particular course that had been provided under the Constitution to meet a situation where any organ of the State, particularly when some former Judges of the superior Courts transgressed their constitutional limits and took upon themselves the execution of the functions of the executive or legislative branches of the government, thereby bringing the functioning of the Government to a standstill.

The Court held that the Proclamation of Emergency and the orders that accompanied it, though extra-Constitutional, had been validly issued, but it was subject to the requirement that the country be governed as nearly as possible in accordance with the Constitution. Specifically, the superior courts would continue to have the power of judicial review of any act or action of the Chief of Army Staff, or the President notwithstanding the purported ouster of their jurisdiction by the Oaths Order. That power of review included the right of the Court, at any stage, to re-examine the continuation of the Proclamation of Emergency if the circumstances so warrant. The State of Emergency had to be revoked as soon as possible and free, fair and transparent elections had to be organized.

The chief transgression of the previous Court, in the eyes of the Court, was abuse of its power to entertain claims under Article 184(3) of the Constitution. As a result of what the Court referred to as “judicial activism,” the Supreme Court had involved itself in such issues as the price of fruit, the transfer or suspension of government officials and the stopping of construction projects. The Court characterized the situation as follows:

A survey of case law makes it abundantly clear that the power and jurisdiction under Article 184(3) of the Constitution cannot be invoked for redress of individual grievances. Unfortunately, the former Chief Justice of Pakistan paid no heed to the judicial precepts. He spared no department, whether judicial, executive or legislative.

The Court held that the previous Court’s liberal granting of *suo motu* hearing had “opened a floodgate of applications leading, on the one hand, to an arbitrary pick and choose of the cases, and on the other, to a naked interference in the other branches of the government in the name of judicial activism conveniently ignoring and defying the principle of judicial restraint.”

On the subject of judicial activism, the Court approvingly quoted M.N. Rao, former chief justice of India’s Himachal Pradesh High Court. In his article “Public Interest Litigation and Judicial Activism,” Justice Rao wrote that:

A common criticism we hear about judicial activism is that in the name of interpreting the provisions of the Constitution and legislative enactments, the judiciary often rewrites them without explicitly stating so and in this process, some of the personal opinions of the judges metamorphose into legal principles and constitutional values.

Rao found that in substituting its vision for that of political institutions, an activist judiciary “is undermining the authority of the legislature and the executive by encroaching upon the spheres reserved for them.”

The attorney general had submitted that former Chief Justice Chaudhry and the former Judges of the Supreme Court had also created an atmosphere of extreme uncertainty with regard to cases relating to the election of the President. He had pointed out that one series of cases had been dismissed as non-maintainable under Article 184(3) by a 6-3 majority, while another panel of judges was ruling that another case making virtually the same claims was maintainable. He was troubled by the fact that former Chief Justice Chaudhry had added two new members to that nine-member bench. The attorney general had made it clear, without saying so, that he feared that the former Chief Justice was trying to affect the outcome of that case by adding anti-Musharraf votes to the panel. The Court pointed out that the petitioners had failed to rebut these submissions.

The Court held that the previous Supreme Court, by transgressing its constitutional limits, had threatened to paralyze the machinery of government at a time when it was attempting to deal with terrorism. The Court concluded that:

The sum total of the circumstances led to a situation where the running of the government in accordance with the provisions of the Constitution became impossible for which the

Constitution provided no remedy or satisfactory solution. There was a strong apprehension of disastrous consequences that would have followed in case the action of the 3rd day of November 2007 was not taken by the Chief of Army Staff/President.

The Court also took issue with the previous Court's interference with the proceedings of the Supreme Judicial Council in the case of former Chief Justice Chaudhry. It pointed out that "Judicial accountability is a cardinal principle of the system of administration of justice and is essential to its successful working." It ruled that the previous Court had "made ineffective the institution of the Supreme Judicial Council set up under the Constitution for the accountability of the members of the superior judiciary." The Court was referring to what it saw as the usurpation of the Supreme Judicial Council's jurisdiction by the Supreme Court in the case of Chief Justice Chaudhry. The Court found that Article 211 of the Constitution clearly barred any court from involving itself in the proceedings of the Supreme Judicial Council.

The Court reversed the holding by the previous Court, ruling that:

The Chief Justices and Judges of the superior courts (Supreme Court of Pakistan, Federal Shariat Court and the High Courts) are subject to accountability only before the Supreme Judicial Council in accordance with the procedure laid down in Article 209 of the Constitution.

The Court also ruled, as the Court had in *Qazi Hussain Ahmed v. General Pervaiz Musharraf* (PLD 2002 SC 853), that judges who had not been given, and who had not made, oath under the Oath of Office (Judges) Order had ceased to hold their offices. Under the Doctrine of Past and Closed Transaction their cases could not be re-opened.

Because the Court validated the Provisional Constitutional Amendment, the amendments in the PCO are no longer part of a PCO. They are now part of the Constitution. One of the articles (270 [C]) provided for the dismissal of judges who did not take the oath. Therefore, the judges weren't dismissed by executive order. They were dismissed by an article of the Constitution. As a result, the dismissals can only be undone by repealing the article.

About the Author

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