

Towards a New Consensus in the wake of Judicial Crisis in Pakistan

*Sajjad Naseer,
Lahore School of Economics*

Pakistan's chequered political history took yet another turn, when General Pervaiz Musharraf ordered the removal of Iftikhar Mohammed Chaudhry, the Chief Justice of Pakistan on 9th March 2007 by filing a reference against him.¹ This triggered a legal and political tsunami that swept across the country in varying degrees and intensity. Uncharacteristically, the legal community collectively rose to defend their chief and demonstrated an unprecedented show of strength and unity. While the legal battle was fought in the court, the lawyers added a political dimension to their struggle by resorting to street protests, rallies, demonstrations and by boycotting the court proceedings throughout the country every Thursday of the week. The political void caused by the inaction of political parties was filled by this mobilization process launched by the legal community, and the chief justice emerged as more of a hero and Musharraf started looking like a villain. This mobilization proceeded with speed and the arrival of the chief on 12th May 2007 at Karachi to address the Bar, witnessed a brutal use of violence resulting in forty nine deaths.

While the legal community was in the vanguard of this struggle, the political parties, civil society groups, intelligentsia, print and electronic media dove - tailed to raise the political temperature. Emboldened by the populous sentiment, the Supreme Court Bench threw the reference out under Article 209 of the Constitution and unanimously held to restore the Chief Justice. This happens to be the first fiercely contested clash between the overpowering executive and a subordinate submissive judiciary, resulting in the victory of the latter.

This lustrous victory turned out to be short - lived and Musharraf lost his nerve with the continuing defiant behaviour of the Chief, his colleagues, retired judges and the lawyers community. On November 3rd 2007 President Pervaiz Musharraf, in his capacity as the Army Chief², issued a Proclamation of Emergency (“Proclamation”) under which an Emergency was imposed in the country and the Constitution was suspended. The same day, a Provisional Constitutional Order No 1 of 2007 was issued by the Army Chief under the authority that he derived from the Proclamation, while an Oath of Office (Judge) Order 2007, was issued by the President. It was a unique violation of the constitution, where under Clause 2 (1) of the PCO gave the President the power to amend the Constitution simply through the issuance of an executive order, and clause 4 authorized him to alter, amend or repeal any law of the country.³ Ironically, this power was allowed to him by the then reconstituted Supreme Court (1999) to amend the Constitution (a power that does not exist with the Supreme Court under the 1973 Constitution). Assuming all powers, Musharraf ‘virtually’ sacked 60 judges of the Supreme and High Courts and reconstituted the higher judiciary by hand-picking the judges, reducing the judiciary to its historic subordinate role.⁴

These unusual and dramatic events puzzled political analysts, foreign observers and practitioner of politics alike. This may be seen as fallout of the sustained struggle of the lawyers for over a year. During this period, people at large began to see more clearly the other side of the political spectrum as highlighted by the powerful electronic media. The excesses of the regime were debated and analysed; its policies received critical scrutiny and the opposition’s political leaders and analysts got regular visibility as they articulated their views against the government. The role of print media was no less significant as more and more anti Musharraf articles were published regularly. These activities resulted in a general state of mobilization, reinforcing the anti Musharraf sentiments without translating into a mass movement as there existed structural tensions and the political forces did not coalesce on one point. Even after the February 18th 2008 elections, where people gave their verdict against Musharraf and his Pakistan Muslim League (Q) Party, the continuing crisis has not rested. Even after the formation of Governments at the Federal and Provincial level, there is no movement towards the resolution of two contentious issues viz; the restoration of judges to their position of November 3rd 2007 and the future of Musharraf. Differences have erupted between the major coalition partners, Pakistan People’s Party and the Pakistan

Muslim League (N) over these issues and the latter has withdrawn its ministers from the federal cabinet as the 'Bhurban Declaration' was not implemented.⁵ The lawyers continued to be defiant and organized the 'Long March' from all over Pakistan which took five days to reach Islamabad. It was a mammoth gathering of its own kind for the capital but fell short of its objective as it required besieging the newly elected parliament, which could have serious implications for the future of democracy. Without getting into the conflicting opinions and evaluation of the outcome of the 'Long March'; the 'judges issue' occupies the centre stage of political discourse and activities. As a result, there is a growing perception that the government in Islamabad is not fully functional casting doubts about the viability of the new political setup.

Pakistan is home to a variety of crises on a regular basis and its track record of managing these hardly seems encouraging. The multiple crises as witnessed today may be summed up as a manifestation of the clash between the forces of status quo and the popular will asserted through elections. The parliament has been impotent and the judiciary subservient to the will of the Executive. The 'external variable' resulting in Pakistan's alignment with the West, first during Ayub Khan's rule (1960's), then a decade of General Zia (1980's) and now nine years of Musharraf (1999 to date) as an ally in the war against 'terrorism' has serious implications for political management. Pakistan in its political history has moved much beyond the concept of 'Praetorian Society' formulated by Samuel P. Huntington in his book, 'Political Order in Changing Societies' to explain the emerging realities in the developing world.

The institutions of the Parliament and the Judiciary have been exploited, manipulated and broken at regular intervals. The overpowering Executive has been dominant and moved regularly towards monopolizing power. In structural terms, the power is concentrated in the Executive through the 17th Amendment, the establishment of National Security Council as a supra-constitutional body and even the terms and conditions of the February 18th elections were issued and determined.

As multiple crises persist in a stinging manner for over a year, the critical hour has arrived and the different players and stake holders need to reach a new consensus about the institutional functioning of the polity under a constitutional rule.

This paper seeks to explore and examine the various facets of judicial crises' along with other contributing factors. The focus will be to evaluate the place of judiciary in an institutional setting, the current political system and its functioning, the lawyer's movement and mobilization, the breakup of the existing consensus and the prospects of a new one emerging.

Judicial Activism and Institutional Functioning

Though various Constitutional dispensations in Pakistan delineated the role of judiciary as an organ of the government in an institutional setting, its role and performance fell short of its designated position. This was caused by the repeated military interventions⁶ and extended rule by the uniform men for 34 years. This pattern of recurring interventions did not allow the judiciary to evolve as an institution. An institution is characterised by its longevity, traditions, norms and practices it develops over a period of time. As the life of the judiciary was terminated at regular intervals, it failed to develop the features of an institution. Each time, the superior judiciary validated the military rule, took oath under the 'Provisional Constitutional Order' issued by the 'military ruler'. These exercises relegated the higher judiciary to a subordinate position to act and work under the coercive power of the Executive. The 'law of necessity' propounded by Dr Hans Kelsen was interpreted in a manner to give protection and validation to military rule. This promoted a judicial culture of perpetual subordination depriving the judiciary to play its meaningful role within the ambit of the Constitution. Thus the institutional functioning of the superior judiciary is suspect and questionable.

It is, however, pertinent to note that the Supreme Court at two different occasions gave decisions contrary to the ones it habitually pronounced. In the Asma Jilani case, the Supreme Court held that the military rule of General Yahya Khan was entirely illegal in 1972.⁷ Whereas this judgement is instructive for practitioners of law and politics, the fact of the matter is that the regime of Yahya was not in power. This can hardly be a case where Supreme Court demonstrated its independence.

The second case came up before the Supreme Court in 1993 when the Parliament was dissolved and the Prime Minister Nawaz Sharif was dismissed by the President of Pakistan invoking 58(2B), a power that was vested in the President through the 8th Amendment of 1985. The dismissal of the Sharif government came when there was no Martial Law and country had experienced the military rule of Zia for 11 years (1977-88). In this context, the Supreme Court full bench declared the dismissal of Sharif government illegal and directed its restoration. Surely, this was the first decision of its kind exhibiting courage and independence. But the informal dynamics of Pakistani politics prevented Nawaz Sharif to return to government or the political leader lacked courage to honour the decision. So the decision whatever its worth failed to institutionalise the independence of the judiciary.

With this background of judicial functioning, the Supreme Court reconstituted after the October 1999 military takeover and having taken oath under the 'Provisional Constitutional Order' began to shape and behave independently. Intriguingly as it may appear, the superior judiciary activism falls in the category of 'public interest litigation'. The burden of explaining this newly acquired orientations towards independent behaviour, perhaps lie in the prolonged rule of 8 years, its consequences in the context of policies, alienation of groups, drop in the popularity of Musharraf and the excessive and unconstitutional rule by the Executive.

As the cases of 'public interest' came before the Supreme Court particularly during 2007, the Executive began to lose face and in the public perception, such decisions were greeted stimulating the judiciary to move on this track.

The decisions in three outstanding cases helped the judiciary to assert its independence, which eroded the authority of the overpowering executive. The first case pertained to the privatisation of the Pakistan Steel Mills. It was held that the Constitutional requirement and procedures of the 'Privatisation Commission' were ignored and the government went through the process in 'indecent haste'. The second case was 'Lal Masjid', and the Supreme Court entertained petitions of the arrested and released many on bail.⁸ The third case that attracted the attention of the Supreme Court was that of the 'missing persons'. Many people (some put the number over 500) in Pakistan had 'disappeared'

allegedly by the American (FBI, CIA) and Pakistani agencies (ISI,MI,IB) in pursuance of the “War on Terror”. These actions were challenged in the Supreme Court and a bench under the Chief Justice Iftikhar Muhammad Chaudhry had directed Ministry of Interior and the representatives of the military agencies to appear in Court and answer the issues raised. As a result, some people were released but the Supreme Court kept pressing the issue that embarrassed the government. These two cases had serious implications in terms of foreign policy, particularly ‘War on terror’.⁹ This was indeed causing cracks on the consensus around which different policies were pursued.

Apprehending the mood and the newly acquired disposition of the Supreme Court, Musharraf anticipating a decision declaring his election as President illegal, moved to impose an ‘Emergency’ on November 3rd, 2007, sacking 60 judges of the superior Judiciary. Consequently, his position as President is surrounded by controversies,¹⁰ and even Mr Zardari, co-chairperson of the Pakistan People’s Party repeatedly declared that his party did not accept Musharraf as the constitutional President.

‘Judicial activism’ is a functional category in many democratically governed political systems around the world. This tends to work within the democratic framework. Whenever a decision of the court helps the people at large or provides relief even on policy issues, the democratic government takes the decision in good stride as it does not erode the legitimacy of the government. Hence judicial activism is compatible with democratic government. On the contrary, it runs into problems as it is incompatible with authoritarian dispensation. The decisions of the superior Judiciary threatened the legitimacy of Musharraf government and caused fissures in the consensus on foreign policy.

Political System and its Functioning

General Pervez Musharraf, Chief of the Army Staff, seized power in a bloodless coup on October 12, 1999 by deposing Mian Nawaz Shariff the then Prime Minister of Pakistan and his elected government, which commanded a two-third majority in both the houses, proclaiming to be the Chief Executive and not the Chief Martial Law Administrator.¹¹ On October 17, 1999, the General in his address to the nation outlined the aims and objectives

of his regime by pledging to implement the seven-point agenda.¹² The Supreme Court validated his take - over, directing him to hold elections in three years but strangely enough, empowered him to amend the Constitution.

9/11 2001, changed the political fortunes of Musharraf as he decided to be an ally of the U.S in its war on terrorism. This virtually ended the isolation of his regime from the international community. Encouraged by this engagement and supported by the 'allies' economic and military support, he decided to move quickly on the home political turf.

On April 30, 2002, Musharraf ordered a 'referendum' for his election as the President of Pakistan and the Pakistan Election Commission declared him winner, having captured 97% votes. While he ensured his position as President of Pakistan for 5 years, the opposition alleged gross irregularities in polls and according to their count, only 5 to 7% voted in the 'referendum'.¹³

Before venturing for the exercise of the 'referendum', the ISI and MI were shaping the political landscape since 1999, creating a new Muslim League, supervising, and monitoring the outcome of the 2000 local elections, queering the pitch for the 2002 general elections, organising the defection of the Patriots from the PPP, and getting the 17th Amendment, which gives constitutional cover to General Musharraf's actions, passed with the help of the MMA mullahs.¹⁴ The 17th Amendment changed the equation of power in favour of the President empowering him to dismiss the government and also set up the National Security Council as a supra-constitutional body to oversee the working of the civil government. Musharraf also promised to drop his uniform at the end of 2004,¹⁵ which he did not honour.

Having fractured the mainstream political parties and keeping their leadership in exile, the elections of 2002 yielded a political outfit tailored to suit the needs of the Musharraf regime. The decision-making centred around the presidency and the assembled weak political forces played no role on key domestic and foreign policy issues, though it is proudly claimed that this is the first assembly of Pakistan having completed its five year term.

As the war on terrorism intensified and the consequences of Musharraf's policies alienated groups and parties, the need was felt to negotiate realignment of political forces. It was realised that one mainstream political party (PPP) be taken on board along with the Kings Party and MQM to form a coalition to have a replay of 2002 – 2007.

It is interesting to note that the external variables played a key role in bringing about an understanding between Musharraf and Benazir of PPP. Washington initiated the process and was outsourced to London at a later stage. It successfully culminated in the return of Benazir to enter the politics of Pakistan. This activated the third variable (Saudi Arabia) to push for the return of Nawaz Sharif, who had lived in exile in that country before moving on to London. This pressure facilitated the return of Sharif's family back in Pakistan and Nawaz Sharif entered the politics of Pakistan by taking a hard anti-Musharraf line.

The entry of these mainstream political leaders along with others was made possible through a 'National Reconciliation Ordinance' enabling the disabled politicians to enter politics. The assassination of Benazir postponed elections for six weeks to be held on February 18, 2008. These elections took place on Musharraf's terms and conditions. The election process was manipulated but the outcome of elections changed the political landscape of Pakistan. Musharraf's Pakistan Muslim League (Q) lost as people of Pakistan generally cast an anti – Musharraf vote. Political situation further changed as mainstream political parties formed a coalition government at the centre. Nawaz Sharif persisted with his strident anti – Musharraf rhetoric and Zardari limping under the 'Reconciliation Ordinance'.

For three months, the coalition partners failed to resolve the judges issue nor moved to impeach the President. The structural constraints inherent in the rules of politics issued by Musharraf inhibit any movement forward. Additionally, Washington continued its support of Musharraf and seeking to win over Zardari to possibly re-arrange the governmental setup according to the original plan.¹⁷ The federal government seems paralysed and many hiccups in the provincial setups. The democratic forces haltingly struggling to regain the political space but the status-quo forces are resisting. The opposition forces (APDM) to Musharraf keep their pressure and luring Nawaz Sharif to join them. As the political forces are pulling and pushing within and outside the system, there is

a stalemate which cannot stay like this for long. There is an urgency to negotiate another contract or political dispensation enabling the political system to function.

Lawyers Movement and Mobilisation:

The removal of Chief Justice Iftikhar Chaudhry on March 9, 2007 will stand out as an extraordinary event which played a pivotal role in trying to change the legal and political landscape of Pakistan. Initially, the legal community rose in protest against the unconstitutional decision but soon they moved to the streets to demonstrate peacefully. The Bars of the Superior Judiciary, District and even Tehsil level legal forums joined in to display a remarkable show of strength and unity. The lawyers rallied around the objective of restoring the Chief Justice and demanded an independent Judiciary.

These protests and rallies turned political, as workers of almost all political parties including the PPP and the ML(N), civil society groups, intelligentsia, print and electronic media supported the cause of the lawyers. Political forces which had remained dormant all these years got an opening to flex their muscles. This mobilisation of public opinion by the lawyers made the judiciary feel powerful and on July 20, 2007, a 13 – member bench of the Supreme Court reinstated the Chief Justice unanimously and unequivocally.

This decision was a serious set-back to Musharraf regime, which had made preparations for getting him elected for another five year term with President in uniform and without Benazir and Nawaz Sharif returning home. Musharraf also sought this election from his tailor – made Parliament, whose term was to expire soon thereafter.

The revived Supreme Court supported by public opinion was a serious challenge to Musharraf's authority and perceiving it as a threat to the continuation of his rule, he decided to disband it by imposing 'Emergency Rule' in the country. He recreated the judiciary in his own image by re-writing the constitution with an executive order.

The lawyers continued their struggle which culminated into a six-day 'long march' ending before dawn in Islamabad on June 14, 2008. Nawaz Shariff along with other opposition parties fully participated. Paradoxically, Nawaz as a coalition partner took part

but the other partner, the PPP, stood out seeking resolution of the problem through a constitutional package in the Parliament. The lawyers faced the dilemma of confronting a newly born parliament and prudently decided not to besiege the representatives of the people. This dashed the hopes of thousands who were hoping for the decision through pressure tactics. This abrupt termination of the long march without reaping the dividends caused cracks within the legal community and its leadership. It also disappointed the public at large and resolution of the problem appears to be problematic.

In the comparative politics literature, there is discussion to explain the activities that were launched by the lawyers. In developing countries, where the political system is not functional to respond to the needs and demands of groups, there erupts 'anomic interest group' activity. As more and more groups begin to join, the protests expand and grow in size and momentum. Students, trade unions and political parties enter the process and begin to shape as a mass movement. This activity becomes threatening and has the potential to overthrow the government. Mobilisation of groups is the key to success yet it fails to capture power after the government is removed.

This formulation holds validity in the case of Pakistan twice in its history. The mass movement against Ayub Khan (1968 - 1969) and Bhutto (1977) toppled their respective governments but resulted in the military take-over in each case. The dynamics of the ongoing crises are different.

The mobilisation generated by the lawyer's movement failed to attract several important elements like the trade unions, student bodies of public sector universities professional groups, big businesses and the Muslim League (Q) and MQM. Additionally, the support of the west stayed with Musharraf and the army of Pakistan held back its support to the mobilisation process. Without the participation of these vital elements, the movement of the lawyers failed to grow and shape into a mass movement.

The elections of February 18, 2008, though upset the political calculations of the regime, the mainstream coalition partners articulated divergent strategies on the restoration of the judges. This inevitably helped Musharraf to stay on despite his unpopularity. Despite the widespread demand for the restoration of judges, the divided groups and forces have resulted in a stalemate awaiting resolution.

Towards a New Consensus:

Any political system to be stable and sustainable needs to be based on consensus. The pre-condition for an efficient political system is the widespread acceptance of decision-making process which is called consensus. When consensus exists, the state is legitimized. Consensus and legitimacy are the key indicators of a political system; its absence translates into instabilities and uncertainties. Legitimacy also means observing constitutional rules and regulation and political legitimacy implies overwhelming support for the political system.

Pakistani consensus building was the consequence of 9/11 and Musharraf regime was accommodated and accepted by the international community. This enabled Musharraf to manufacture and engineer a 'political arrangement' domestically through various motions of electoral politics. The consensus with west was dominant and overlapped into the domestic politics. This consensus was shaken by the decisions of the Supreme Court particularly on the missing persons and the lawyer's movement further threatened it. The elections of February 18, was seen and interpreted as an anti-Musharraf vote, which changed the domestic political setup. The present federal government is not the one that Musharraf had in mind.

The democratic forces have been unleashed but the status-quo forces are doing their best to prevent the change. There are divisions regarding the support for the political system; in fact the demand for changing the system is growing signalling a crisis of political legitimacy. The democratic forces are also vociferous about the restoration of the consensus constitution of 1973. Both on consensus and legitimacy issues there are serious problems translating into instability and uncertainty. The external variable is doing its best to win over the PPP to cement the cracks that have emerged in the consensus operating since 9/11. This contest between opposing forces is taking a heavy toll and it is to be seen which combination of political forces prevails. The time, however, has come to negotiate a new consensus to ensure the continuity of the state.

End Notes

1. The reference included charges of misconduct and corruption.
2. Pervez Musharraf relinquished the office of Army Chief later that month on November 28, 2007.
3. The Gazette of Pakistan Extraordinary, Islamabad, Saturday, November 3, 2007, Part 1, P. 1459.
4. The sacked judges, particularly those of the Supreme Court were put under house arrest along with their family members. They were set free through a 'verbal order' of the Prime Minister, Mr Yousuf Reza Gillani during his first speech on the floor of the National Assembly.
5. The Bhurban Declaration signed by Mr Zardari and Nawaz Shariff pledged to restore the deposed the deposed judges to their November 2, 2007 position within 30 days, a commitment that still awaits implementation.
6. Pakistan was subjected to 5 Martial laws; the two by Musharraf escaped the term Martial Law due to global climate and its compulsions; the last one was declared an 'emergency' though he exercised power as Army Chief, deposing judges and amending the constitution.
7. For detailed discussion of the case, see PLD 1972 SC49.
8. The Lal Masjid (Mosque) in Islamabad housed supposedly militants fully armed and Musharraf government ordered military operation against them that lasted for nine days resulting in dozens killed.
9. That is why the US did not object to the 'emergency' declared by Musharraf on 3rd November 2007 and issued no statement regarding the restoration of judges.
10. Some commentators view the ongoing term of President Pervez Musharraf as his third term in office. Under Article 44(2) of the constitution the Presidential terms are limited to two consecutive terms.

11. In the obtaining climate of globalising world, martial laws were not welcomed. Despite, Musharraf's packaging of his take-over that may not look as martial law, the western world reacted negatively; Pakistan was suspended from the Commonwealth and for three years Pakistan faced the worst kind of acute isolationism.
12. See article by Ardeshir Cowasjee in the daily Dawn of June 4, 2006, where the evaluates the performance of Musharraf regime in the light of his famous Seven-Point agenda.
13. <http://news.bbc.co.uk> retrieved June 28, 2008.
14. See Ayaz Amir's article, 'The meaning of enlightened moderation' in the daily Dawn of March 4, 2005.
15. Musharraf did not honour his word and continued to wear uniform till the end of 2007.
16. See the Daily Times, Lahore, October 6, 2007. The Ordinance enabled the corrupt elements to be eligible to take part in politics. This was a violation of the UN Convention against corruption.
17. The original plan envisaged a PPP led government with Pakistan Muslim League (Q) and MQM as coalition partners.

Annexure-1

Name of Court	Total number of judges before the Proclamation	Number of judges who refused to take oath
Supreme Court of Pakistan	18	13
Lahore High Court	31	11
Sindh High Court	28	14
Peshawar High court	13	4
Balochistan High Court	5	0