

Response of Judiciary to Military Intervention in Pakistan During Pervaiz Musharraf Era



Asim Niaz Khan	PhD Scholar, Department of Political Science, Qurtuba University of Information Technology Dera Ismail Khan Dr.asimniazkhan@gmail.com
Azmat Ali Shah	Assistant Professor, Department of Political Science, Qurtuba University of Information Technology Dera Ismail Khan

Abstract: *In Pakistan, Military has intervened four times directly in politics of nation. However, it is an unfortunate, that in Pakistan, the judiciary, being the custodian of the constitution, has not properly performed its duties and failed in safeguarding the constitution against the aggressive attempts of dictators on constitution. The evil nexus of army and judiciary has halted the way of Pakistan in many respects. This research work is about to explore the dynamics of military interventions in politics under the leadership of Pervaiz Musharraf on Oct 12, 1999 against the elected government of Nawaz Sharif and to highlight the response of judiciary to the actions of Musharraf. The Musharraf Era (1999-2008), Pakistan has witnessed many ups and down that changed the overall outlook of the Pakistan on social, economic and political sides. This research work is qualitative in nature and post-positivist approach has been adopted as philosophical foundation for the research. The researchers have gathered the data from both primary and secondary sources and Thematic Analysis has been carried while analyzing the data for obtaining the results. It is suggested by this study that efficient legal and constitutional measures should be taken in order to refrain the military from interventions in politics and the judiciary should be empowered in such manner that it could resist any attempt on the constitution.*

Keywords: Military Intervention, Politics, Pervaiz Musharraf, Supreme Court, Justice Iftkhar Chaudhary

Background of the study

Democracy is regarded as the best practical form of government so far. But it requires a strong leadership to safeguard the sacredness of the Constitution and all the institutions including judiciary. Democratic system, however, requires a clear-cut understanding before the appreciation of the roles of judiciary in its nourishment. Rule of law is basic for a democratic system along with supremacy of constitution, equality before law and securing civil rights. Superiority of a democratic system is mainly due to systems of checks and balances and separation of powers, which the 3 organs of the government are exercising over one another. (Nordlinger, 1981)

In Pakistan, the democratic set ups have been endangered many times by military for various reasons. In which we can include the feeble intuitions, incapable political leadership, corruption and the geo-political situations. After the death of 1st Governor General and Prime Minister, the rest of political order was substandard. On the contrary, military appeared as one of strongest organization. The executive, however, have the benefit of superiority over judicial and legislative branches. Here military intervened, due to political calamity, in the politics of Pakistan by either way. One can easily realize that Pakistan's political history is full of constitutional fatalities, due to adventurism and extra-legal steps of military. (Sayeed, 1969)

Pakistan, after independence inherited the British civil, military and judicial institutions, which were mainly established for serving their colonial schema. Pakistan carried on the parliamentary traditions of elections and representation. Pakistan needed sincerity and capability in politicians for safe democratic system where the military has nothing to with the politics. MA Jinnah successfully initiated a parliamentary democracy in Pakistan. There was an elected legislature with civilian rule which was supposed to work as both Constituent and legislative Assembly of Pakistan. Unfortunately, institution building process took back seat because of numerous problems, faced by the baby state of Pakistan. Pakistan was stacked between civilian and military regimes since independence. (Ahmad, 1988)

Military in Pakistan did not hesitate to abrogate the constitutions and oust the elected ministries whenever the circumstances favor them. The judiciary was forced to give legitimacy to the unconstitutional moves of the despots. One can easily observe that judiciary has followed power patterns of that time. The judiciary has always legalized the military coups in Pakistan. (Anjum, 2001)

In Pakistan, the higher courts have been considerably pathetic in opposing illegal use of influence by the military in spite of considerable independence and autonomy. Keeping in view the extensive political power of military, one can easily understands the lack of power with judiciary as judicial oversight on armed forces is not surprising. Due to this situation, the courts and army have developed a relation and partnership. The role of judges has been disappointing while delivering justice in important cases which had larger cost for democracy. The major problem with institutions in Pakistan is that the officials have always done for the wellbeing of individuals rather than institutions. There is a connection between the institutions of judiciary, executive, legislatures and the constitution as all these are interconnected with each other. The development of Pakistan rests in rule of law so all the institutions should follow their constitutional patterns and regulations. (Burki,

1999)

Statement of the Problem

In Pakistan, the Military, due to many reasons, have intervened in politics. Whenever, moreover, there emerged any political problem, everyone was looking for the military reaction. However, in crucial cases, when military thought that the situation couldn't be solved with indirect intervention, the military preferred to intervene directly. So far, 4 times i.e., in 1958, 1969, 1977 and 1999 military intervened directly. Nevertheless, researcher has selected the era of (1999-2008) for this research, because this period is crucial regarding Civil Military Relations and the role played by Higher Judiciary in Pakistan. This study will examine that how the judicial branch has responded to the Military intervention in Pakistan during the said period. The judicial branch has rightly been expected to execute its due role in curtailing the unrest in a proper and constitutional manner. Judicial judgments in this regard have long lasting unconstructive repercussions for political development in society and for its own image in the eyes of public. The judiciary has always looked for men in power instead of constitution and merit. Similarly, civilian authorities have not played its due role in promotion and consolidation of democracy in Pakistan. Civilian authorities, due to its incompetence and incapability, provided the military with chances for their interventions in state business. The aim of this research is to investigate the role of judiciary in maintaining supremacy of the constitution in Pakistan during the selected period. The period, selected for this research is distinctive, in the sense that it started with military coup by Pervez Musharraf who ousted the elected government of Mian Muhammad Nawaz Sharif, followed by long period of military rule and again a constitutional emergency in 2007. The Court judgments, legitimization of military's coup, political crisis, tension within the judiciary and tussle between the government, opposition and military would be the key points of research.

Research Questions

1. What were the root causes of military

interventions in politics of Pakistan; historical perspective and during Musharraf Era?

2. How the judiciary played its role in questioning the military's taking control of power in historical context in general and during 1999-2008 in particular.
3. What are the implications of military interventions in politics in Pakistan?
4. What kind of role the judiciary has played in political development during Musharraf era?

Significance of the Study

Various reading material has been produced by foreign and local experts on the role of judiciary and its role on military interventions in politics in Pakistan, in a scattered form. The literature, available on the issue is in scattered form. Therefore, according to the worth of the topic, it requires detailed research on the selected topic. The subject matter of the study is exceptional and of great significance in consequence to the political development of Pakistan as it encompasses the 2 unconstitutional steps of Pervaiz Musharraf, once in 1999 and another in 2007. The research will work as a guide for the students of political science, history, Pakistan affairs, constitutional law and general readers interested in the topic.

Literature review

Causes of Military Intervention in Politics

The available literature on military's intervention suggests that military does so due to ill and corrupt governments, anarchy, incompetency of civilians to deal with public affairs and invitation by some politicians. The political scientists argue that in developing states, there has always been a vacuum in system which the army fills as a rescuer of the country. Strategic and geographical position of a state too sometimes compels army to intervene in politics. Some states of Asia, Africa and Latin America with less socioeconomic development are either had been ruled or still under military.

Lasswell (1937) was among the first expert on civil-military relations and pronounced the

'Theory of Garrison State.' According to him, concentration of power in the hands of either military or executive results in formation of 'garrison state.' The result would be deterioration of democracy and appearance forms of authoritarian rule. (Lasswell, 1937)

Contrary to theory of Garrison state, Huntington (1991) elucidated that professionalism in military is a core because of its institutional autonomy which helps in maintaining its control over civilian governments. He is of the opinion that professionalism is a vocation, characterized by competency, responsibility and corporatist nature. He contains that military involvement in the politics of under developed democracies is the result of politicization of state institutions. These institutions lack in willingness to face the increasing requirements of public sector which results in chaos and thus military gets liking among the masses especially in the working or middle class. To him, military intervenes in politics of such societies where there is transition along with financial, social, cultural and political underdevelopment. (Huntington, 1991)

Stephen (1973) has explained both of the above-mentioned theories in praetorian nature of military in South America. He declared that security issues in Latin America have been increased during the cold war, resulting in innovative professional role of military. In such situation, the military portrayed itself as a defender and guardian of social order against the communist encroachments. (Stephan, 1973)

Kinds of Military Intervention in Politics

According to Finer (1975), the military coup can be divided into two kinds. First, as a corporate coup and second as factional coup. In the former coup, the military acts as a united and business body, commanded by key generals. In the later coup, however, a faction of few middle ranked armed personals tries against their corporate officers. Sometimes, this coup may be against the civilian authorities. The probability of triumph in the former coup is greater, with certainty of success, because of involvement by senior military officers. While in case of later coup, this chance is very little as its success ratio

is less than 50%. (Finer, 1975)

Judiciary and the Military Regimes

To Tate (1993), when military regimes start to assume power, they modify structurally the judicial branch, contrary to the executive branch, legislatures, mass media and political parties. However, he further states that judges are less in number as of civil bureaucrats. According to the principles, the judges can be removed from service after due process or replaced with their counterparts. As usual, judges are not subordinates to executive so can't be easily used by military. Therefore, the relations military with judiciary are subjected to impending variation as compared to civil and military relations. The question is how military affects the judiciary?

To Tate, judiciary may be compared with the following points:

- **Independence:** To what extent courts can freely interpret the laws, contrary to the will of military, having or intended to have power?
- **Impartiality:** To what extent the courts are neutral while deciding the cases against the wishes of military?
- **Scope of decision making:** To what extent judiciary can deliver judgments purely on legal basis?
- **Depth of decision making:** To what extent judges would dare to question the military's legitimacy in special cases.

Tate holds that role of judicial branch as the guardian of constitution can be particularly important in the military – judiciary relations. This is because as usually, military become worried with the perceptible unconstitutionality of their coups. Judiciary can't play its due role unless it has the structural independence from other institutions. Similarly, its role in resolving disagreements is possible through its impartiality. Additionally, administrative scope and deepness of the judiciary evidently influence the administrative functions of any state. However, the power of granting legitimacy to unlawful and unconstitutional action by judiciary is the main concern of

military. (Tate, 1993)

Tate argues that military portray their coups as necessity and a temporary action in initial stages. They declare that this action was to protect the state from a devastating situation which may result in complete failure of the state. The military shares some power with politicians; however, they retain the final authority with themselves. The military do not visibly abolish or alter judicial order, in first stage, as they deal with other institutions. By doing so, military tries to show their respect to constitution. However, the military never dare to set free the judicial branch to confront their political power and seek indirect ways to influence the judiciary.

To Tate, if the judiciary posts challenges on merit to military, then they have the following options; that are Use of force, ignoring the orders and brining of constitutional changes to curb their power.

Containment of Judiciary by military

A core challenge for military rulers is to avail the cooperative role of judiciary. The military regimes don't dare to directly confront the judges because military leaders, usually, can control the core powers of judiciary i.e., judicial review and judicial activism without disturbing the independence and liberty of judiciary.

a) Judicial Self-Restraint

The judges of higher rank know better about their vulnerable position during military rule. Judges are familiar to the consequences of such judgments, which can hit military interest, for his person and institution. According to Helmke (2009), judges can challenge the dictators when their power is about the cease and they set themselves to be in good terms with the upcoming ones. Independence of judiciary, no doubt, may be there in military regimes; but is for just for image building. (Helmke, 2009)

b) Parallel versus Unified Judicial Systems

Another technique to curtail the powers of judiciary is to make a parallel judicial system. By creating military courts and hiring of non-tenured judges who don't care for due process. By doing so, the military regimes try to side line

the politicians, opponent to military intervention. According to Toharia (1975), establishment of parallel judicial system facilitates the military regimes to curtail the higher courts and counter the judicial activism. (Toharia, 1975)

c) Limitation on Access to Justice

The army regimes have usually deployed different tactics to restrict judicial activism which limits the working pace of judges of higher courts. Shapiro states that military regimes create limitations over the power of judicial review, the courts enjoy as an institution and its legal foundations, which is the necessarily required. Obviously, the military rulers can easily manage highly centralized judicial review structure rather than decentralized one. The centralized system compels a small number of judges who might be having mind set of bargaining and cooperation.

The weak position of courts as compared to the military is not determined by only the direct limitations imposed by military but the pathetic civil society and ignorant common masses too adds to the weak position of judiciary. There is lack of will among the political parties and advocates for collective and comprehensive plan for strong and impartial judiciary.

Research Gap

After extensive study, the researcher found the research gap. Judiciary plays a pivotal role in any civilized state by doing their due job. Similarly, military interventions in political affairs too have far reaching effects over the society. A lot of research work has been done on military interventions in politics of Pakistan and the role of judiciary in these circumstances but that work are in scattered form. The learned researchers have either investigated the role of military or judiciary. Though one has investigated the both phenomena but that is not revolving the critical period i.e. selected by the researcher. So, to fill the research gap, the researcher will try to investigate the causes, nature, determinants and implications of military interventions in political matters and the role, played by the higher judiciary of Pakistan, during the given time period i.e. 1999-2008.

Research Methodology

Research has been defined, simply, as a systematic way of solving problems and addressing the issues. While doing so, we collect data of various types in order to answer the questions. This process needs accurate and pre-defined methods to achieve the required goals. In Political Science, usually, we use two types of philosophical approaches. The first one is Positivism which focus on scientific knowledge which means that the data is being collected through the five senses. The researcher tests theories before finalizing the research questions and research objectives. While the post-positivist traditions represent an old-fashioned kind of research, and this idea proves true for quantitative research rather than qualitative one. The research work is post-positivist in nature. The data has been collected from both primary and secondary sources. The researcher has conducted open ended interviews of lawyers, Ex-Servicemen, Journalists and experts of social sciences for primary data while secondary data has been collected from the research papers, research articles, researcher thesis, research journals, research reports, newspapers, achieves, books etc. The researcher has analyzed the primary data through thematic analysis and applied content analysis on secondary sources.

Military Take Over of 1999

Pervaiz Musharraf was due to be held responsible for the failed adventure but Nawaz Sharif avoided his instant removal on the plea that it will further down grade the morale of the soldiers. However, on Oct 12, 1999 when army chief was in air, Prime Minister Nawaz Sharif sacked Musharraf as army chief and was replaced by the then DG ISI General Ziauddin Khwaja. General Khwaja was elevated as Four Star General and was designated as the new COAS on the same day. (Nawaz, 2008)

But as per given prior instructions, the closed allies of Pervaiz Musharraf move against the civilian government and took control of all the important building. Musharraf appeared shortly on TV and announced that Nawaz Sharif attempted to his life while he was on plan and he (Nawaz) hijacked the plan and not allowed the

plane to land in Pakistan despite shortage of fuel. In last of his address, Musharraf announced that military has been moved in to avoid further destabilization in Pakistan and appealed the nation to remain calm and assist the armed forces in the hour of need. (Haqqani, 2005). Pervaiz Musharraf, instead of imposing martial law, proclaimed emergency and held the constitution in abeyance. The 4 provincial assemblies, both houses of parliament along with respective presiding officers and all the provincial and federal governments were dismissed. Musharraf labeled himself as the Chief Executive and allowed the President of republic to continue in office. (Rizvi, 2009). On Oct 14, 1999, Pervaiz Musharraf issued Provisional Constitutional Order of 1999 to fill the constitutional and legal vacuum. In the PCO, Pervaiz Musharraf proclaimed that the constitution has been held in abeyance and the state shall be run on the basis of this PCO. Moreover, courts were allowed to enjoy its powers and jurisdiction as per the constitution except to make order against the Chief Executive. (Shahid & Shahid, 2005)

The judiciary was asked to take new oaths under PCO but the then Chief Justice of Pakistan Justice Saeed Uz Zaman Siddiqi refused to take oath under this humiliating order. Justice Siddiqi was put under house arrest on Jan 26, 2000, so he could not influence other fellow judges. Seven out of thirteen Judges of Supreme Court, however, took their fresh allegiance to PCO and Justice Irshad Hassan Khan, who was senior among them, was appointed as the Chief Justice of Pakistan. Moreover, a number of judges from different High Courts were not given fresh oath and as a result they ceased to hold their offices. It is surprising that none of the high court judges refused to take fresh oath and all were willing to adhere to the PCO of Musharraf. (Ahmad, 2010)

Supreme Court Verdict on Musharraf Coup

Leaders of Pakistan Muslim League Nawaz (PMLN) filed a constitutional petition in the Supreme Court and prayed inter alia that the military take-over of Oct 12, 1999, the promulgated PCO of 14 Oct 1999, the promulgated emergency and all the orders, enactments and instruments be declared as ultra-

virus, illegal and extra-constitutional by the Supreme Court of Pakistan. (Aziz, 2008)

On May 12, 2000, a short order was issued and the court rejected all the pleas, made by the petitioners and held the following observations.

- 1) That Musharraf's take over was justified on the basis of State Necessity.
- 2) That constitution is held in abeyance and not abrogated hence it is still the supreme Law.
- 3) That the apex courts are functioning and disposing their duties under the constitution and the fresh oath under PCO doesn't degrade the position of judges.
- 4) That Musharraf, the Chief Executive is empowered with powers to amend the constitution with some limitations and to take necessary actions in legislative and executive spheres.
- 5) That the apex courts still have the powers of judicial review in light of principles of doctrine of state necessity. And
- 6) That the Chief Executive is given with three years period to achieve his declared seven-point agenda. Moreover, the court bounded the Chief Executive to fix a date for fresh elections for the National and provincial assemblies along with Senate before the expiry of the given three years period. (Jaffrelot, 2015)

Musharraf's Reference against Justice Iftekhhar

Pervaiz Musharraf, being the President, filed a reference in Supreme Judicial Council against the CJP Justice Iftekhhar Muhammad Chaudhary on Mar 09, 2007. A meeting of the council was held just after oath taking ceremony of Acting CJP in the Supreme Court. After examining the matter, the Council held to invite the alleged CJP and bared him to function as judge until the matter is decided by the Council. The charges, leveled against the CJP was that he illegally promoted his son's career, initially in medical line and then in police service. Moreover, CJP was blamed as he has more cars than he was entitled for and having extra protocol, used helicopters and aircrafts for his travel. Some of

the charges were leveled against him in a letter, written by Advocate Naeem Bukhari to him some weeks ago of the Presidential reference. The letter was circulated at large scale by the government to defame Justice Iftekhar. (Khan, 2009)

Justice Iftekhar was served with notice of filing reference against him in the Council without any supporting documents. On March 13, the date for hearing of reference was fixed in the Supreme Judicial Council. On his appearance before the Council, Justice Iftekhar was treated badly by the security personal. When Justice Iftekhar complained about it, the Acting CJP initiated the Contempt of Court against the 7 police officers. On March 15th 2007, under the Presidential Order, the disposed CJP was sent on compulsory leave from 9 March 2007 until the Council submit its report and subsequent order of the President. (Nizami, 2009)

Restoration of Justice Chaudhary

It was on 20 July 2007, when the Full Court of Supreme Court threw away the malicious reference against the then CJP Justice Iftekhar and accepted the petitions of disposed CJP Justice Iftekhar. The short order was issued at the time and the following points were concluded.

1. The petition, filed by the disposed judge is maintainable.
2. By 10:3, the court held that Presidential reference is set aside.
3. The order regarding compulsory leave is ultra-virus and the order was passed without lawful authority by the President.
4. Both the orders of Supreme Judicial Council and of President to restrain the disposed judge from functioning, are set aside as illegal.
5. The invalidity of the above said two orders of restraining the CJP, the appointment of Acting Chief is valid, by applying de-facto doctrine, to the Supreme Court.
6. The full court is of the view that every judge including CJP are not above the law and hence all they are liable to due course of law

and accountability.

Accordingly, Mr. Iftekhar Chaudhary resumed his office on 21st July 2007. (Sehri, 2012)

Emergency Rule in Pakistan

With proclamation of PCO, Musharraf lost even his little popularity and became one of the most hated people at time. To consolidate his power, he, on November 10, 2007 amended the Army Act of 1952 and vast powers were conferred upon the miliary to have the powers of trying the civilian for sedation, treason and other such crimes. Next day, Musharraf announced that the National Assembly will be dissolved on Nov 15, 2007 and general elections to be held in January next year. On Nov 15, COAS Pervaiz Musharraf, through an amendment, transferred the powers of lifting emergency and amending the PCO to President Pervaiz Musharraf. On Nov 21, he amended the constitution and inserted the Article 270 AAA where all the wrongdoings of Musharraf were given immunity and legal protection from Nov 03, 2007 up to the date when emergency is lifted by Musharraf. He also barred any person, authority to challenge and declare the orders as void and illegal. Furthermore, the said actions of COAS and President which are inserted in the constitution even if emergency is lifted unless altered by the "Competent Authority". (Khan, 2009)

Conclusion

General Pervaiz Musharraf took over the reins of government on October 12, 1999 while overthrowing the government of Nawaz Sharif. Musharraf was frightened of possible action against him on initiating misadventure of Kargil without the prior permission of the Prime Minister. His attempt was challenged in Supreme Court of Pakistan but Justice Irshad Hassan Khan validated the coup of Musharraf under the notorious Doctrine of State Necessity despite the fact that there was no such situation on Oct 12, 1999 that couldn't be dealt with the routine legal framework. The powers and prestige of courts has been curtailed through legislation, executive assaults etc. the judges were pressurized and were even expelled from the services. In case of complement with the regime, the judges were given plots, incentives

and out of turn promotions and profitable positions after retirement. For their personal interests and to serve the regimes, the judges even went to the extent that they took action against their colleagues and dismissed their services as they refused to comply with PCO and upheld the supremacy of constitution. With the appointment of Justice Iftkhar Chaudhary as CJP, the Supreme Court of Pakistan started to challenge the Musharraf regime. The court started to take suo motto notice of such matters that were in direct contrast with the interests of the regime. For example, the matter of Privatization of Pakistan Steel Mills and the forceful abduction and disappearance cases were taken by the court. The cases of disappeared persons erupted the tension between the judiciary and the executive. Taking the suo motto cases drawn unhealable cracks in the mutual relations of the two. The supreme of Pakistan gathered more support on the judicial activism from almost all segments of the society whether it was political parties, civil society, press or common masses. This support was, probably, the core reason of the justice Iftkhar stance against the dictatorial regime in which the judiciary succeeded and the dictator lost at the end.

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