

**THE JUDICIARY AND MILITARY PARADOX:
CONTINUING COLLUSION/COOPERATION AND INCREASING CONFLICT**

Faisal Siddiqi
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“Men make their own history, but not of their own freewill; not under the circumstances they themselves have chosen” – Karl Marx

“The essential precondition for the effectiveness of law, in its function as an ideology, is that it shall display an independence from gross manipulation.” – E.P. Thomson

“No Judiciary elsewhere in the world had to pass through what might be described as judicial torture...[W]ho could say that the coercive power of the State was with the court and not with the Governor-General? At moments like these public law is not found in books; it lies elsewhere, viz.: in the events which have happened.” – Justice (Retd) Munir

“A page from our own recent history reminds us that the Chief Justice of Pakistan did not possess or control any division when he refused to obey the unconstitutional dictates of General Pervez Musharaff, who commanded quite a few divisions, and still emerged victorious with the help of the people. The lesson to be learnt is that if the cause is constitutional and just then the strength and support for the same is received from the people at large who are the ultimate custodians of the Constitution. I am not too sure as to how many divisions would a population of over 180 million make.” – Justice Asif Saeed Khosa

Question:

- Is there a pattern of both collusion/ cooperation as well as conflict between the judiciary and military in Pakistan’s judicial history? If so, how do we explain this contradictory pattern of both collusion/cooperation and conflict?

Methodology:

- There are many examples of the judicial-military paradox but I address the above question by examining only two such categories of judicial events, as macro examples of such phenomenon. That is, judgements regarding military take overs, and removal of judges through the administration of fresh judicial oath. The above two categories of judicial events have a long term causal effect on the power relationship between the judiciary and military in contrast to other examples of judicial- military paradox of collusion/cooperation and conflict.
- In terms of evidence, the above question is addressed by principally relying on judgements, judicial events/facts, biographies, interviews. I do not place primary reliance on speeches or articles by judges.

Two dominant theoretical narratives explaining the Judiciary and Military Paradox:

- First narrative:- there has been consistent collusion between the judiciary and the military since the Maulvi Tamizuddin Case (1954). Conflict between the judiciary and the military is explained by a theory of *great judges*, emphasizing the superlative judicial ability, integrity and courage of individuals, or on the other hand, the lawyers/judicial movement of 2007-2009 is explained through the General Kiyani conspiracy theory.
- Second Narrative:- “Some of our greatest national problems will be relieved if only we realize the momentousness of what transpired in this country since 2007, through blood, sweat, tears, and toil of our people.” (Justice (Retd) Jawwad S. Khawaja) This narrative emphasizes the radical rupture between the pre-2007 and post 2007 judiciary and locates judicial conflict with the military as arising out of the collective struggle of judges, lawyers, and people.

Alternative Theoretical Narrative:

- Reliance is placed on five explanatory tools to explain the judiciary and military paradox.
- Explanatory tool No. 1:- structural/institutional dependence and contradiction between the judiciary and the military
- Explanatory Tool No. 2:- historical context
- Explanatory Tool No. 3:- judges as reflective strategic actors engaging in strategic cooperation, silence, defiance or defection
- Explanatory Tool No. 4:- international/global context
- Explanatory Tool No. 5:- intellectual/jurisprudential context

Military Takeovers: Legal Instruments and Judicial Responses

- 1958: Proclamation by the President. Proclamation of Martial Law by the Chief Martial Law Administrator. Laws (Continuation in Force), Order, 1958. No removal of judges through fresh oath.
- 1969: Two Proclamations of Martial Law by Chief Martial Law Administrator. Provisional Constitutional Order, 1969. No removal of judges through fresh oath.
- 1977, 1981: Proclamation of Martial Law by Chief of Army Staff. Proclamation of Emergency by President. Laws (Continuation in Force), Order, 1977. Removal of Chief Justice of Pakistan through constitutional amendment as well as removal of judges through fresh oath.
- 1999: Proclamation of emergency by Chief of Army Staff. Provisional Constitutional Order, 1999. Removal of judges through fresh oath.
- 2007: Proclamation of emergency. Provisional Constitutional Order, 2007. Removal of judges through fresh oath.
- Analysis of the above legal instruments shows that the military was creatively constructing these legal instruments, as both carrot and stick for the judiciary.
- Analysis of the judicial phenomenon of refusing to take oath from a military dictator shows that after 1981, this phenomenon increased in each military takeover and it finds no parallel before 1981.

Judgements regarding military takeover:

- Dosso Case [PLD 1958 SC 533], Asma Jilani Case [PLD 1972 SC 139], Begum Nusrat Bhutto Case [PLD 1977 SC 657], Zafar Ali Shah and Waseem Sajjad Cases [PLD 2000 SC 869, PLD 2001 SC 233], Sindh High Court Bar Association Case [PLD 2009 SC 879]
- Analysis of the above judgement shows that judicial legitimization of military takeovers show both, jurisprudential changes as well as increasing limitations on military rule.