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## In the Footsteps of Generals: Musharraf and Martial Law: An Interview with Professor Nadeem Azam of the University of Peshawar

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Photo courtesy of Jessica Anna Cabot



*Nadeem Azam, Professor of Law at the Law College at the University of Peshawar, Pakistan, and Director of Pakistan's only human rights studies center, the Human Rights Studies Center at the University of Peshawar, gave this interview to the Human Rights Brief (HRB). Professor Azam spoke with Jessica Anna Cabot and Zeenat Iqbal of the Human Rights Brief on January 29, 2008. Excerpts from that interview appear below.*

**HRB:** SEEING AS THE RECENT IMPOSITION OF EMERGENCY was not the first even in Musharraf's rule, could you give us a little bit of background?

**NADEEM AZAM:** Sure, it is going to be a long background because we have been most of the time under emergency ever since Pakistan has come into existence. You'll be surprised to know that we have been outside that emergency only for eleven years out of the total of sixty. So for the rest of the time Pakistan has been in one perpetual emergency. And the first emergency emerged in 1951, which was just four years after Pakistan came into existence, where General Akbar Khan, who was then the second in command, tried to bring about a coup [but failed]. We were fortunate to have our first martial law delayed for seven years [until] General Ayub Khan [declared martial law in 1958]. [Martial law is imposed by the Chief of the Army, whereas emergency rule is imposed by the President.]

Basically, when we became independent [in 1947], we adopted the Government of India Act, 1935, as our constitution. The Government of India Act, 1935, [featured] the bureaucracy and the military [as] the two [predominant] organs of the state and gave them tremendous powers. And because it was the same colonial law that continued even after independence, the bureaucracy remained strong, and the military remained the sole organized institution that was claimed to be capable of bringing order to Pakistan.

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*Nadeem Azam is a Professor of Law at the Law College at the University of Peshawar, Pakistan, where he teaches American and British Constitutional Law at the Law College and Public International Law at the undergraduate level. Professor Azam is also Director of the Human Rights Studies Center at the University of Peshawar. He holds an LL.M. in Human Rights Law from the University of Oslo and is currently pursuing his S.J.D. at American University, Washington College of Law.*

[After independence, efforts of the bureaucracy to delay forming a new constitution were successful for nine years so that we only finally got our constitution in 1956. This constitution functioned for two years, until 1958, when Ayub Khan imposed marital law. He lifted martial law when a constitution that he alone created was adopted in 1962.] And needless to say he contested elections under the new constitution and became... President.

The 1962 constitution remained in force until 1969 when, because of widespread protest against Ayub Khan, he relinquished power to another general, [General Yahya Khan]. [In 1971, civil war broke out between East and West Pakistan resulting in their division into modern day Bangladesh and Pakistan.] As a result, because of the embarrassment [of the division, General] Yahya Khan stepped down and handed over power to Zulfikar Ali Bhutto, [a civilian].

The new assembly was renamed... the Constituent Assembly, and [it] started work on a third constitution, which was finally adopted in 1973. Until 1973, and even today, our constitution is still, by and large, based on the same principles that were drawn up by the British Parliament to rule a colony. Because of that we don't have an independent Judiciary, because under the Government of India Act no real power was reserved for the Judiciary. And therefore every time that there has been a military [general] who has come into power, he has never bothered about worrying about the judicial response because he could twist the Judiciary's arm anytime and get away with whatever he wanted. That is what has been happening.

Why is the Judiciary not independent? What is lacking within the Constitution which makes the Judiciary not so independent? One, unlike in the United States... , we retire our judges at the age of 65, over here [in the United States] judges are appointed for life. Now, what do you expect a judge to do? ... I think that a judge is at the peak of his professional career when he reaches [65], because he has years of experience behind him, as a judge and as a lawyer. And just when, as we say in Urdu, when coal turns into diamond because of the years and years of pressure that it is subjected to, when the judge turns into a diamond, we throw him away... .

Secondly, the Constitution gives the power of promotion of judges to the President: there [are] no criteria laid down. Therefore, out of all the judges on the bench of the Supreme Court of Pakistan, every one of them is aspiring to become the Chief Justice. There [are] no criteria for promotion. You can pick up the most junior judge and make him the Chief Justice.

[Third,] there are a number of posts that constitutionally can only be filled by retired members of the higher judiciary; [these] act as bait for these judges. And that is why you would see — whoever is in power — judgments of the Supreme Court bending in their favor, because they want to put themselves in favorable light vis-à-vis whoever is in power so that they could be considered to fill those posts. The Chief Election Commissioner

is supposed to be a retired judge, which again gives more influence to whoever is in power because if you appoint [as] Chief Election Commissioner a person whom you trust, and who has been serving you as a judge of the Supreme Court, you are safer to call for elections and contest them. That is exactly what Musharraf has done under the present circumstances, and that is why political parties are stressing that the Chief Election Commissioner [in the February 18 election] be a neutral person rather than the one appointed by the President. There are [also] seventeen members of the bench of the Federal Shariat Court: all of them are supposed to be retired judges.

So when you are nearing that magical age of 65, you start worrying about what you are going to do after retirement. And, thereby, you would bend your judgments to whoever is in power [in hopes of getting one of these appointments].

So the present emergency arose again because Musharraf, like his predecessor General Zia, chose the appropriate supporter, in the form of a super power, in order for him to serve their purposes. I understand that there is fundamentalism in Pakistan; there is no doubt about it. People like me are the ... targets of that fundamentalism. I was shot two years back by fundamentalists because I spoke openly against fundamentalism, in class, in public meetings. I was shot in broad daylight. My wife was with me, we were driving in a car. My wife also got hit, and thank God we both survived.

Musharraf, in order to stay in favorable light vis-à-vis the Americans — and probably he didn't even have an option — declared war on terrorism, became a partner with the United States in that war. In order to perform his role as a junior partner, he had to show some results. Now, he's also used fundamentalism as a justification to stay in power, like Zia, but he's done it in a slightly different way. He's fighting fundamentalism, but at the same time, if he actually fights fundamentalism and controls it within Pakistan, then there would be no justification for him to stay in power. So ... he's trying to control [fundamentalism], and this is the impression that he is trying to give, whereas in reality, I have my conviction that he is not controlling it in a way that would eradicate fundamentalism because then there would be no more justification for him to stay in power.

There is a provision for emergency under the 1973 Constitution, Article 233, which speaks about the imposition of emergency and gives that power to the President. But then if you look at the Provisional Constitution Order [PCO], which was promulgated by Musharraf when he announced emergency, he did not issue that order in the capacity of the President. It says: 'I, General Pervez Musharraf, Chief of the Army Staff, hereby impose emergency.' So this wasn't an emergency — it was a martial law. This was an action not covered by Article 233. On November third, immediately following Musharraf's PCO, the Supreme Court went into deliberations on the constitutionality of the emergency rule. They held that it was unconstitutional coming from the Chief of the Army Staff, and, in response, the Chief Justice was removed and arrested by Musharraf — and [so were] all other judges who would [have challenged Musharraf].

**HRB:** This was not the first time, even within the year, that the Chief Justice had been suspended. What led up to this?

**N. A.:** The Chief Justice, who was appointed by Musharraf himself and is now 59, started showing his teeth back in March.

And that is something that Musharraf could not take. He initially removed [the Chief Justice] on charges of corruption, which were concocted.

[The Chief Justice] was reinstated because of the upheaval in public sectors and among lawyers. This was pressure that Musharraf could not... take. And then the remaining judges of the Supreme Court also, for the first time in history, encouraged by the popular movement and by the movement that was being run by lawyers, felt encouraged to have [the Chief Justice] reinstated. For the first time in the history of Pakistan, the Judiciary [ruled against the] Executive ... . But then the Chief Justice picked up... human disappearance cases. Musharraf, in order to put himself in favorable light vis-à-vis the Americans, started — or the intelligence agency started — detaining people like me, you, ordinary people [as terrorists]. It is not difficult for an intelligence agency as good as the ISI [Inter-Services Intelligence], because, due to the Afghan war it is the CIA [U.S. Central Intelligence Agency], which... equipped and trained [the ISI] and now today it is even better than the CIA [at] catch[ing] who they are really after.

Right, so, they've been catching people, concocting files, making fake files on them, trying to prove a connection with Al

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Qaeda. And for every individual handed over to the Americans that is brought to Guantánamo, the Pakistanis were paid money. This was even discussed in Congress. And after bringing those people to Guantánamo Bay, the Americans discovered that most of those people had nothing to do with terrorism or with Al Qaeda, so they had to set them free. Ten billion dollars were paid in this way to Pakistan. And, therefore, the Chief Justice, because of the provision in the Constitution [that] authorizes the Supreme Court to take *suo motu* notice for human rights violations, [the Supreme Court] took *suo motu* notice of those ... disappearances and asked the government to furnish information as to why those people had been arrested, where they were being kept, and what were the specific cases under which they were being detained.

**HRB:** When was this?

**N. A.:** This was what started this fiasco, after the Chief Justice was reinstated in late summer 2007.

Another issue that came up [is that] lawyers like me who have big mouths challenged Musharraf[']s re-election in court. [In order to gain standing in the case, fifteen of us, working

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in government service, filed our own papers [to run] for the Presidency and were rejected. [We did this because no one] who is in government service can ... contest elections to any public office unless that person has resigned his public office and has stayed outside government service for a period of two years. Some of those people [whose papers were rejected then] went to court and challenged Musharraf's nomination because he [also] was still in public office. [Military personnel such as the Chief of the Army Staff are considered as working in government service in Pakistan.]

Fearing that the Chief Justice, now that he was restored with all of his teeth, was going to disqualify him from elections, before the judgment came out [Musharraf] imposed martial law. He got the Chief Justice removed and [placed] other judges [on] the Supreme Court that took oaths [of allegiance] under the Provisional Constitutional Order. And once the emergency was lifted, they were confirmed as judges of the Supreme Court under the Constitution. Seventy percent of the higher judiciary in Pakistan was replaced during the martial law.

**HRB:** Do you feel that Musharraf stepping down as chief of the army has changed anything?

**N. A.:** Well, he has become a little weak: it's like he has broken his pinky. He remains in control of the army, which is the most important thing. He has appointed the most trusted of his generals in his place as the chief of the army staff.

**HRB:** [We] wanted to ask you about the detentions that went on during the emergency rule itself. I have heard that thousands of people were detained. Are ... people still in detention?

**N. A.:** Absolutely, the President of the Bar Council of Pakistan is still in detention. The person who was leading all of those protests is in detention, and that is what matters.

*[Editors' note: It is almost impossible to get a good sense of how many people were detained during the emergency. When recently testifying before the U.S. Congressional Human Rights Caucus, Hina Jilani,*

*co-founder of the Pakistan Human Rights Commission and Special Representative to the Secretary-General of the United Nations on the Situation of Human Rights Defenders, said that at least 6,000 lawyers and hundreds of opposition figures were detained.]*

**HRB:** Is there a concept like *habeus corpus* in Pakistan, [whereby] someone can challenge [his or her] detention?

**N. A.:** Yes there is, but not in the emergency because under Article 233, when an emergency is imposed, the jurisdiction of the Supreme Court and the high courts is suspended. Now that emergency has been lifted, [but] there is no point going to the courts because of the people in the Judiciary. I have explained to you how independent our Judiciary is.

**HRB:** So how does this affect your role as a human rights activist and human rights lawyer, and the rest of the human rights community in Pakistan?

**N. A.:** We can only protest, but unless there are many more of us, it is not going to yield any result, like it hasn't yielded any result in the past. My father was a human rights activist. He's dead now, I have taken over. Probably my son is going to take over from me. But unless super powers who consider themselves the champions of democracy, who give sermons on democracy, come out [and] play a much more selfless role, nothing's going to change.

**HRB:** [We] wanted to ask you also about the restrictions of freedom of speech and freedom of assembly that were imposed during martial law.

**N. A.:** That is the only positive about Musharraf. We have never had the freedom of speech the way we have had it during his rule. Then I think this was, rather than his quality, this was his compulsion because the world is shrinking. People have access to the internet and satellite television. [During the martial law, however,] the media was basically shut down. Those who signed the new media ordinance have been allowed to open, but then

they are not as free as they were before. But the real credible channels, because they would not come to a compromise with the President, are still off air.

**HRB:** What is your opinion about the outlook of the February 18 elections?

**N. A.:** They are definitely going to be rigged, and I don't think that this is going to be a huge success for holding elections under the present circumstances. You see, if you are having a September 11 every weekend, how can you expect people to come out and vote? ... [S]itting in America, I am worried about my wife going to the market to buy groceries, and I have to call her every day to ask her please don't go to the market, send someone else, send a servant, please don't go yourself. How do you expect anyone to come out and vote in a situation like that?

**HRB:** In the U.S. media, we saw that Musharraf had two reasons for imposing martial law. One was to quell an 'unruly judiciary,' which we have talked about. And the other was to fight militants. Even from this distance, that seemed like a patently false claim because whatever is done in the Northwest Frontier Province (NWFP) is done without reference to the Constitution.

**N. A.:** I am from NWFP, I live just twenty kilometers from the border of Afghanistan, and I'll tell you why this is [ridiculous].

use those precision [tools to] pick out the Taliban leaders? If you can monitor their satellite phone conversation when they talk about Benazir Bhutto's assassination, why can't you use a HAM missile? Why indulge in indiscriminate shelling of villages where you suspect two or three Taliban elements to be heading? Where you are killing children, women, older people, civilians who have nothing to do with the Taliban? So rather than the Taliban becoming unpopular because of what they are doing — beheadings and things — they are gaining sympathy because now people in those villages whose children, whose wives are being bombed, they are looking at the Pakistan Army as enemies rather than saviors. So why are you using your military forces? You can never win a war against the general population. You defeat armies, you cannot defeat the population. All of [the suicide bombers] are youngsters, people whose loved ones have died as a result of military action. Because they have nothing left and are so dejected, they don't mind blowing themselves up, as long as they feel they are hurting the military.

Just before I came [to the United States], I witnessed one [suicide bomber]. I passed through ... seconds after the ... bombing had occurred, so much so that there were blood droplets on my windscreen. Now, my son was with me, and we saw body parts scattered around when we passed through that place. He asked me, he said, 'What is this? What are these things lying around?' Because he saw a leg and a part of somebody's face. Now if young children are witnessing so much of violence on the streets, what are they going to grow up into? The first time

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The reason why I say that is because when this war on terror started, there was this one guy from Waziristan, a local Taliban leader, involved in beheading people. That person, while he was on a satellite phone, was hit by a high-velocity, anti-radiation missile (HAM) missile, right in the head. So if you are using a satellite phone which emits very high frequency radiation it will home in on that. Now, when you have that technology, why not

I saw a dead body was when I went to the Afghan war and fought against the Soviets inside Afghanistan. That was when I saw a dead body: I was 17 years old. But my son is only nine, and these are gruesome scenes. What affect is it going to have on my son and all the other children who are exposed to such violence?

**HRB**