

Defending the Constitution Under the Rule of Law

HONOURABLE MR. JUSTICE TASSADUQ HUSSAIN JILLANI, JUSTICE OF THE SUPREME COURT OF PAKISTAN*

Editor's Note

Justice Tassaduq Hussain Jillani is a senior Judge of the Supreme Court of Pakistan. In November 2007, he was a member of the nine strong Bench of the Supreme Court of Pakistan, which was hearing the case challenging the validity of the re-election of General Perwaiz Musharraf following controversial elections in October 2007. On November 3, 2007, General Musharraf suspended the Constitution, imposed a state of emergency, and prescribed a fresh oath of loyalty for judges. Those who did not take the oath were deposed. Justice Jillani, along with several other judges of the Supreme Court, refused to take the new oath and consequently was removed from office.

After the general elections in February 2008, the Constitution was restored and an elected Government revived. General Musharraf resigned, and there was a growing demand for restoration of the Judges who had been removed from the Constitutional Courts. In September 2008, Justice Jillani, along with others, rejoined the Court, and finally, on 16 March 2009, the Chief Justice of Pakistan, Mr. Justice Iftikhar Muhammad Chaudhry, was re-instated by an executive order of the Prime Minister of Pakistan.

The American Bar Association awarded the 2008 Rule of Law Award "to those judges in Pakistan who demonstrated courage in upholding the rule of law in their country." On behalf of the Pakistan Judges, Justice Jillani was invited to receive the Award at the annual luncheon of the American Bar Association in July 2008 in New York. Regrettably, Justice Jillani was unable to attend in person, but Judge Clifford Wallace, of the United States Court of Appeals for the Ninth Circuit, read this paper on his behalf.

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We publish, at the request of Justice Jilani, his paper as delivered and as it reflected the exceptional time of constitutional crisis in Pakistan.

Thank you Mr. President and thank you members of the American Bar Association for awarding the 2008 Rule of Law Award to the Judges and lawyers who demonstrated courage in upholding the Rule of Law in Pakistan. And thank you for inviting me to receive this Award on behalf of the Judges. Such gestures and the moral support extended by other institutions of international civil society are reflective of an evolving global community of shared values which augurs well for amity and understanding among nations in this age of globalized interdependence.

Those who did not take oath when the state of emergency was imposed on November 3, 2007, and the Constitution was held in abeyance were motivated by no reason other than defending the Constitution and upholding the Rule of Law. Temerity and lure of prestigious offices were shunned for a higher principle. They believed that the court is the keeper of the conscience. And the conscience is the Constitution.¹

As some of you know, our country, like most of the countries in their formative phases, has had a chequered history of political instability followed by periods of constitutional deviations. Barring one exception,² all these suspensions of the Constitution were condoned by the Supreme Court under the doctrine of necessity.³ But the distinguishing feature this time has been that never before has such a large number of Judges of the superior courts refused to take fresh oaths. It sparked off a movement of lawyers and members of the civil society seeking restoration of Judges. It became a major issue in the February 2008 general elections. Today both the major political parties in the ruling coalition have publicly committed to restore the Judges to their original position. There is, however, divergence of opinion on the modalities.

The manner in which the Judges acted and the way the Bar and the public responded are unprecedented in recent history. Those of you who are not very familiar with our constitutional history may ask what role the constitutional courts play in our country that has made them so credible and why this unprecedented crisis.

The conflict between the judiciary and the executive is as old as the advent of the institution of the state. In a democracy, it is considered a healthy sign. Historically it has promoted democratic values and the Rule of Law. Only those countries where judiciaries acted as watchdogs to ensure that all organs of the state remain within their defined limits have been able to develop stable democratic institutions. In 1608, King James I arrogated to himself the power to transfer a case and decide it himself as according to him the Judges were his delegates. The then Chief Justice of England, Justice Coke, maintained that law was supreme. The King got offended and in sheer anger said, "*This means that I shall be under the law, which it is treason to affirm,*" to which the Justice Coke retorted, "*The King should not be under man, but under God and law.*" This was a defining moment in the development of Rule of Law in England, and it ultimately led to the Glorious Revolution and

1. BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 362-68 (2003).

2. *Asma Jilani v. Federation*, PLD 1972 S.C. 139 (Pak.).

3. *Dosso v. State*, PLD 1958 S.C. 533 (Pak.); *Nusrat Bhutto v. Fed'n of Pakistan*, PLD 1977 S.C. 657 (Pak.); *Zafar Ali Shah v. Fed'n of Pakistan*, PLD 2000 S.C. 869 (Pak.); *Tika Iqbal Muhammad Khan v Gen. Pervez Musharraf*, PLD 2008 Supreme Court 178 (Pak.).

passage of the Act of Settlement, which made Judges independent of the Crown.⁴ Similarly in *Marbury v. Madison*, Chief Justice Marshall laid the foundations of judicial review by holding that it is the prerogative of the court to declare what the law is.

In Pakistan, the independence of judiciary is enshrined in the Constitution. Like the U.S. we have a written constitution based on the principle of separation of powers. A separate part (part 7) is allocated to the judiciary, and it was made independent of the Executive by a constitutional mandate that was given effect to by a judgment of the Sindh High court and upheld by the Supreme Court.⁵

Besides being the last court of appeal both under the civil and criminal law, the Supreme Court under the Constitution has power to pass an appropriate order "on any question of public importance with reference to the enforcement of Fundamental Rights."⁶ To further buttress the authority and independence of the Supreme Court, the Constitution inter alia provides that the law or a principle of law declared by the Supreme Court shall be binding on all courts and all executive authorities in the country shall act in aid of the Supreme Court. The Judges of the constitutional courts have security of tenure, and they can, as per the Constitution, only be removed on proven charges of misconduct by the Supreme Judicial Council headed by the Chief Justice of Pakistan. It is under this constitutional dispensation that the Supreme Court and other courts function.

The Supreme Court in several judgments has given liberal interpretation to fundamental rights provisions of the Constitution and thereby promoted the Rule of Law and democratic norms. In one case it interpreted the right to freedom of association to include the rights of a political party to keep functioning.⁷ It further expanded this right by holding that a political party, if in power, has the right to complete its term unless its Government is ousted under the Constitution.⁸

In certain cases, the superior courts acted as "social engineers" and catalysts of change. As most of you know, ours has been a male dominated society where instances are not lacking when women were deprived of their right to inherit property, despite the mandate of law, through involuntary surrender. There have been instances when they were denied the right to marry a person of their choice or when they were given in marriage without their consent. The court, when called upon to decide such matters, laid down law, which had the effect of changing the unjust customs and mores. For instance, in cases of denial of right to inherit property, the Supreme Court held that this being a gross violation of fundamental right of a socially disadvantaged gender, claims could be filed even long after expiry of the prescribed period of limitation.⁹

Similarly, there was a socially sanctified tradition under which even a sui-juris woman could not marry without permission of her guardian. In a case where an adult girl married a person of her choice, her father, relying on a document evidencing a fake and illegal marriage with her cousin, launched criminal prosecution for adultery against her, and she was arrested. The matter was brought before the High Court; it not only declared

4. V.A. Bohde, *The Rise of Judicial Power*, in LAW AND JUSTICE (Soli Sorabjee ed., 2004).

5. *Government of Sindh v. Sharf Faridi*, PLD 1994 S.C. 105 (Pak.).

6. *Constitution of Pakistan of 1973* art. 184.

7. *Abul-Alamaudoodi v. the State*, PLD 1964 S.C. 673 (Pak.).

8. *Nawaz Sharif v. President of Pakistan*, PLD 1993 S.C. 473 (Pak.).

9. PLD 1970 S.C. 1 (Pak.).

counter marriage as illegal but quashed the criminal proceedings.¹⁰ The Supreme Court upheld the judgment.

In certain remote areas of our country there is a custom of giving young and even minor girls in marriage as a settlement in blood feuds. The Supreme Court interfered in such cases, the state functionaries were reprimanded for apathy, and a direction was issued to the government to take preventive and punitive action in such cases. Because of the court interventions, the law was amended, and now it is a Penal offence to give a young girl in marriage as a settlement of a blood feud.

In terrorism related cases, the Supreme Court has been particularly strict. It upheld the Anti Terrorism Act by holding that the legislature could pass a special law to cater for such a heinous crime.¹¹ It chided the High Court for being too liberal in cases under the Anti Terrorist laws.¹² The court has always maintained, however, that while investigating such cases, cannons of due process should be duly observed. Because when the law enforcement agencies roughshod the law in the name of terror, it amounts to playing on the wicket of the terrorists who wreak violence in disregard to law. One of the most onerous functions of the Judiciary in a constitutional democracy is to protect the liberty, the due process, and the Rule of Law. As rightly observed by an illustrious member of international judicial fraternity, Justice Aharon Barak, the President of the Supreme Court of Israel:

"Indeed, the struggle against terrorism is not conducted outside law but within the law, using tools that law makes available to a democratic state. Terrorism does not justify the neglect of accepted legal norms. This is how we distinguish ourselves from the terrorists themselves. They act against the law, by violating and trampling it, while in its war against terrorism a democratic State acts within the framework of law and according to the law."¹³

The U.S. Supreme Court, as most of you know, has held in two cases, that the detainees at Guantanamo Bay have full rights under the Constitution to have a fair trial and a right of appeal so as to challenge their detention for an indefinite period without any charge in the U.S. civilian courts.

One of the important and recent cases on the application of the principles of due process is that of Mr. Iftikhar Muhammad Chaudhry, the Chief Justice, against whom a reference [an indictment] was filed. A full court comprising of thirteen Judges quashed the reference and restored the Chief Justice, holding that procedure adopted and the charges leveled were not sustainable in law.

The brief overview of the powers and working of the Supreme Court would indicate that under the Constitution it has wide powers. But the magnitude of injustices it is confronted with is still wider both quantitatively and qualitatively. In absence of responsive and credible institutions of law enforcement, people tend to bring every cause, every grievance, and every lie before the constitutional courts and in particular before the Supreme Court. The Supreme Court by and large has refrained from interfering in matters

10. Humaira v. State, PLD 1999 Lahore 494 (Pak.).

11. Mehran Ali v. Fed'n of Pakistan, PLD 1998 S.C. 1445 (Pak.).

12. Mirza Shaukat Baig v. Shahid Jamil, PLD 2005 S.C. 530 (Pak.).

13. Justice Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002).

of public policy. We believe that it is not the function of the court to get embroiled in politics and passions of the day. Our perception on such matters has been, “*the constitution does not constitute us as ‘Platonic Guardians’, nor does it vest in this court the authority to strike down laws because they do not meet our standards of, ‘desirable social policy’, ‘wisdom’, or ‘commonsense’.*”¹⁴

While dispensing justice, the Supreme Court has broadly kept three considerations in view. First, that Judiciary is one of the three organs of the state, and good governance is possible only if the three remain within their defined limits. Second, the law may not keep pace with the changing times and may not respond to every situation. The court has a role to bridge the gap between the law and the society.¹⁵ This consideration is particularly relevant to the powers of the Supreme Court under Article 184 of the Constitution. Third, the Court has been conscious that as a member of the United Nations and being part of a global community, Pakistan has certain obligations under the international law. We live in an interdependent world. Any activity within the country that has or has a potential to have nexus with a crime committed outside the country, be it a financial crime or an act of terror, has to be brought to justice under the law. If laws are flouted, it breeds contempt. The society becomes prey to stagnation, resentment, and violence, which is then exported. Perhaps one of your illustrious sons Dr. Martin Luther King was alluding to this chain reaction of injustice when he said, and I quote, “*Injustice anywhere is a threat to justice everywhere.*”¹⁶

If one delves deeper, most of the perpetrators of violence the world over have roots in cultures that are deficient in the Rule of Law. Unfortunately the Rule of Law is not evenly enforced, and bitter lessons are not heeded to in the third world countries, leading to arbitrariness, loss of liberty, and injustice. It weakens the state institutions, be it judiciary, legislature or vital departments of the Executive. It is not appreciated that the Executive can gain strength within and without only if it respects the Constitution, the law, and the rules.

In Pakistan, if one were to distinguish a headline from a trend line in assessing change, the recent events are a pointer to a moral renaissance and augur well for the spiritual health of the nation. Never before has so much been sacrificed by so many for the supremacy of law and justice. That makes the future of the Rule of Law in our country far better than anywhere in the developing world. The assertion of the judicial conscience, the rise of a vibrant Bar, a vigilant civil society, and the emergence of an independent media would ultimately lead to the establishment of a constitutional democracy, stable political institutions, and an expanded enforcement of the Rule of Law. These to me are the trend lines that I would like to pin my hopes on.

Mr. President, I have been deeply moved by the vision reflected in the Rule of Law Initiative of the American Bar Association. It is indeed in accord with the best elements of your nation’s moral ethos. Countries around the world would immensely benefit from this Initiative. Honorable members of the Bar, you are leaders of public opinion of a country that today is at the pinnacle of its soft and hard power. By its thought and actions

14. *Plyler v. Doe*, 457 U.S. 202, 242 (1982) (Burger, W. dissenting).

15. Justice Barak, *supra* note 13.

16. Amartya Sen, (July 25, 2008) (unpublished research paper, on file with ABA’s World Justice Project), available at http://www.lexisnexis.com/documents/pdf/20080806034945_large.pdf.

it can influence the course of events both in the developed and the developing world. It is an awesome power, an awesome challenge, and an awesome opportunity. That being so, it should espouse and promote only those causes and values which it has lived and stood by. This would inspire greater credibility and would strengthen your claim of moral leadership.

You have a proud legacy of wresting independence through blood and sweat and by holding certain “*truths to be self evident*,” (Declaration of Independence), of going to civil war to secure human rights, of judicial independence in laying down *Marbury v. Madison*, of authoring the Universal Declaration of Human Rights, of leading the free world in the reconstruction of Europe, and then of self-accountability demonstrated in the rise and fall of McCarthyism. You have Dr. Martin Luther King and his inspirational “*dream*,” and you have John F. Kennedy and his “*vision of the world*.” And finally you can rightly take pride in having produced the two greatest philanthropists known in human history—Bill Gates and Warren Buffet. For centuries the Statue of Liberty perched on the New York harbor has been a symbol of welcome, of hope of openness, and of freedom and liberty for people around the world. Why with this glorious track record, does “*The Economist*” draw the picture of a tired and worried “*lady liberty*” sitting on a broken podium with the torch of liberty lying on its feet? Why does it talk of an “*unhappy America*”?¹⁷ Why does Fareed Zakria speak of “*The Post American world*”? Why is America facing a crisis having moral overtones on some of the issues in the realm of international politics? These are some of the questions; I would leave it to you to think and respond.

But you have a role to play because in the past some of the illustrious members of your profession have provided an inspiring and transformative leadership to the American people. Destiny beckons you to re-live those moments and follow the shining stars of honor, dignity, and idealism that adorn your heritage. And maybe in moments of moral ecstasy you may like to remind yourself of your founding father’s advice to the nation carried in his farewell address as President. It has a strong message and has relevance even in this age of globalized interdependence. It is inspirational; it is prophetic. Washington said:

*“Observe good faith and justice towards all nations; cultivate peace and harmony with all; religion and morality enjoin this conduct; and can it be, that good policy does not equally enjoin it? It will be worthy of a free, enlightened, and at no distant period, a great nation, to give to mankind the magnanimous and too novel example of a people always guided by exalted justice and benevolence.”*¹⁸

17. THE ECONOMIST, July 26-Aug. 1 2008.

18. George Washington, President of the United States, Farewell Address to the People of the United States (Sept. 19, 1776), in S. Doc. 106-21, 22 (2d Sess. 2000), available at <http://www.access.gpo.gov/congress/senate/farewell/sd106-21.pdf>.