

The Preservation of the Rule of Law in Times of Strife[†]

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Editor's Note

Since Mr. Aitzaz Ahsan prepared this paper, the Chief Justice of Pakistan, Mr. Justice Iftikhar Muhammad Chaudry, has been restored to office. On March 12, 2009, the Lawyers' Movement, as led by Mr. Ahsan, commenced another Long March from Lahore to the capital of Islamabad—a journey of 170 miles. Arrangements were made to block the roads and prevent the lawyers reaching Islamabad. A number of arrests were made, but on the night of the fourth day of the March (night of March 15/16, 2009), the lawyers were able to break through the blockade on the route from Lahore to Islamabad, and at 5am on March 16, 2009 the Prime Minister, Mr. Yousaf Raza Gillani, issued an Executive Order for the reinstatement to office of the Chief Justice.

It is of enormous credit to the courage and persistence of Mr. Ahsan, the lawyers of the Lawyers' Movement, and all who supported them, that the Government of Pakistan has responded to this democratic demand—a testimony to peaceful demonstration and a victory for the Rule of Law.

For the last two years the brave, fearless, and dedicated lawyers of Pakistan have been marching on the streets in their black suits and ties for the reinstatement of those judges who stood up to the whims of a military dictator.

As has been extensively reported, the Pakistani dictator, General Musharraf, dismissed the Chief Justice in March 2007. He was reinstated in July of that year by an order of the Supreme Court of Pakistan. But in the 'election' crisis of later that year, in November 2007, the General declared a State of Emergency and sought to suspend the Constitution, and when the Supreme Court, as presided over by the Chief Justice, ruled against this action, General Musharraf arrested the Chief Justice with as many as sixty other judges, detaining them with their entire families under house arrest. The lawyers took to the

[†] This paper is based on the address which Mr. Aitzaz Ahsan, as President of the Pakistan Supreme Court Bar Association, gave in New York on August 9, 2008 at the American Bar Association Rule of Law Initiative Luncheon and Award Ceremony.

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streets and spearheaded a hugely popular movement, the Lawyers' Movement, as it became known, for the reinstatement of the Chief Justice and his colleagues, impelling general elections and forcing Musharraf to resign. The Chief Justice and some of the other judges who took this independent position have not, however, been reinstated by the successor Government, and it is the intention of the lawyers of Pakistan to continue our peaceful, non-violent protests until the Chief Justice is reinstated and the rule of law restored. It is therefore necessary to place before the international community of lawyers the paradox inherent in the actions of a democratic Government that refuses to reinstate independent judges until more vigorous, though non-violent, protests force it to do so.

Pakistan is, no doubt, in the eye of many a storm. It is an embattled state. On its western border there is an armed insurgency. This insurgency affects the entire world and thus the world is deeply interested in resolving it. But the world's leaders do not necessarily have the right solutions.

On Pakistan's eastern border there is indeed a great and vibrant democracy. The people of Pakistan wish it well. The people of Pakistan want to see it and its people prosper and live in peace. But that democracy continues to spend enormous sums upon its defense quite disproportionate to the needs of its people. This maintains, perhaps by design, a fear psychosis in the Pakistani mind. After all, the fear or mistrust of which other state or power impels both of us, India and Pakistan, to spend such vast sums on our defense when we have some of the poorest people, and some of the worst slums, in the world? The history of at least four wars during the last sixty years does not help cure people of this paranoia. India took the lead in crossing the nuclear threshold. It was natural for Pakistan to follow.

Domestically, too, Pakistan is beset with enormous challenges and problems. The economic front has become the most engaging at present. With oil and food prices spiraling unpredictably world-wide, the conditions in the developing states have become precarious. Pakistan is one of these developing states. But Pakistan, at the same time, is engaged in a war on its own territory and, in some respects and some measures, against its own people. This is quite a predicament.

And in this context the cause that the lawyers of Pakistan have been fighting for becomes more and more relevant.

The importance is that this is a terrorist war zone. Therefore, the existence of an independent and functioning judiciary is quite crucial to the prosecution of this form of war, which President Bush dubbed as a 'War on Terror'. The implication is evident. Without an independent judiciary, a contestant cannot win this form of war.

I praise the judicial system in the USA. It is fiercely independent, and its Judiciary has challenged its Executive over Guantanamo Bay and over detention without trial. It is simple. An independent judicial system has to be provided in this theater of war. It is the people in that area that matter.

As Chief Justice of Pakistan Mr. Justice Iftikhar Muhammad Chaudhry has recently stated: "*In any war the most effective weapon is a population with enforceable rights.*"¹ The population he was referring to is the population in a terrorist war-zone.

1. Iftikhar Muhammad Chaudhry, *Chief Justice of the Pakistan Supreme Court, Address to the New York City Bar Association: Pakistan: Independent Judiciary Vital for Democracy* (Nov. 17, 2008), available at <http://www.hrsolidarity.net/mainfile.php/2008vol18no04/2664/>.

Pakistan is in the war zone. And America's most "indispensable ally", General Pervez Musharraf, hacked the justice system to the ground and pulled it out of its foundations. This hacking had the effect, not merely of depriving the honorable judges of their exalted offices, but in fact of depriving the very people of their rights.

The Constitution of Pakistan, which the General purported to suspend, amend, and restore, does, no doubt, provide for an entire set of fundamental rights. And it provides, on paper now, the means of their enforcement through what, in effect, are the writs of habeas corpus, certiorari, mandamus, and prohibition. But where is the machinery for the enforcement of the rights? That has been trampled under the military commander's jackboots.

When sixty out of a total of a hundred judges of the superior courts were purportedly dismissed and actually, and physically, arrested and detained with their family members, including their children, on November 3 last year, General Musharraf delivered a fatal blow to an independent and functioning judiciary in the war zone. Condone that action, and you wipe out the chance of any judge in Pakistan ever becoming independent for all times to come. And independence of the judiciary does not derive merely from constitutional provisions purporting to guarantee it. A judiciary is independent when its judges are fearless and independent. This is an on-the-ground situation. It is not merely, and esoterically, conceptual.

Which judge will dare be independent if he has before him the example that the General made of the Chief Justice and other judges? Each would fear not only for himself but for his wife and children, too. And as Bacon said, in times when one was not accused of male chauvinism: "*He that hath wife and children, hath given hostages to fortune.*"

Without an independent justice system, the people are deprived of the enforcement of their rights. That, in effect, is a negation of all rights. And a people deprived of rights are a people that become alienated from he who deprives them of the rights and those who support him.

As the Chief Justice of Pakistan, Mr. Justice Iftikhar Muhammad Chaudhry has also recently observed:

"without an independent judiciary, therefore, people gradually lose their commitment to the Constitutional system provided by the state. More gradually they become indifferent to its survival. In the course of time they become apathetic, cynical and resigned. A system that will not enforce their rights alienates the people. They then choose to follow those who challenge it, even those who oppose it by military force. Thus are crucial battles lost. Thus are crucial battles being lost."

The US administration takes pride in advancing the cause of democracy in Pakistan. We do not accept this claim. It is well known that before the lawyers began to march, there was no challenge to General Musharraf. Before the Chief Justice refused to resign on demand, no one had said no to the General. A dictator, weakened by the Denial and the Lawyers' Movement, turned to Washington. That is when the U.S. did some stitchwork and pitched in with the demand for elections. But in the process its ally had destroyed the judicial edifice.

Elections were, no doubt, held on February 18 last year. But the dismissed and detained judges, who were independent minded and fearless, were not reinstated. That remains the position to date. Neither a most vigorous movement nor a massive Long

March to Islamabad has been able to persuade the leadership in the new Parliament to restore these independent judges.

It is necessary to mention two salient facts. First, the lawyers' movement in Pakistan is entirely non-violent and peaceful. The lawyers carry with them no weapon except the precepts of our Constitution. Their weapons are none more lethal than habeas corpus, certiorari, mandamus, and prohibition. All the Bar Associations in Pakistan are structured on the principles of democracy, tolerance of diversity, peaceful means, and pluralism. They are neither militants nor fanatics. They are supported by a vigorous and vibrant civil society.

Second, no democracy can survive without an independent judiciary. No strong and stable Parliament can be constructed on the debris or ruins of an independent judicial edifice. The south Asian experience, in fact, is that an independent judiciary is the most significant protection available to Parliament. It covers the flanks of electoral institutions by resisting assaults from all adventurers waiting in the wings.

The entire argument that Parliament must prevail over justice and law is thus flawed. The advice that we should let Parliament settle matters, even when Parliament refuses to undo the outrageously illegal actions of November 3, is misconceived. No democracy will survive without law. Without an independent justice system, even the best democratic system remains in jeopardy and eventually degrades into lawlessness and anarchy. We want to see a truly sovereign, decisive, and stable Parliament.

Thus our movement continues despite the constitution of a new Parliament. Thus we continue to bear pressure upon those who govern, this time those who inhabit Parliament. Our pressure is entirely non-violent as was established by the Long March last year. Millions welcomed the marchers as they drove through villages, towns, and cities. They showered flower petals and provided them with water and food items. Hundreds of thousands came along in the last lap to the capital and assembled outside Parliament. That was on the seventh day of travel through the length and breadth of the country. The sun was rising over the Margalla hills as I began the speech that would conclude the peaceful non-violent protest march. It had risen by the time I concluded.

But the Government did not seem to have leant an ear to the protest. An International Republican Institute poll, held towards the end of last year, asserted that 83 percent of the people of Pakistan want the independent Chief Justice and judges back. So we will march on.

We seek no outside intervention on our behalf by any Government. Equally, we do not appreciate such interference on behalf of the one who is perceived, by that 83 percent, as the adversary.

A non-violent struggle is being waged on the streets of Pakistan for the supremacy of the Constitution and the law. It is a war in which at least one side is empty handed and without any kind of weapon or projectile. It is in the interest of the world that that side prevails.