

**THE RULE OF LAW AND THE  
SUPREME COURT OF PAKISTAN**

*By*

**MR. JUSTICE TASSADUQ HUSSAIN JILLANI**  
**Judge**  
**Supreme Court of Pakistan.**

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George Bidault, a French intellectual and former Prime Minister once remarked (F.N.1) stated that “*good or bad fortune of a nation depends on three factors; its constitution, the way the constitution is made to work and the respect it inspires*”. The evolution of constitutional rule in Pakistan has passed through difficult phases. There have been periods of constitutional abrogation, of deviation, of holding the constitution in abeyance and in those difficult times, the Supreme Court has been called upon to pronounce on the legality of the action taken and how to ensure restoration of constitutional rule.

As some of you would know, Pakistan like Australia has a legacy of colonial rule. It came into being as an independent State in August, 1947 and continued to be governed under an interim constitutional arrangement (i.e. through the Indian Independence Act, 1947). In March, 1956, the first Constitution of Pakistan was framed but unfortunately on account of variety of factors, the said constitution was abrogated and Martial Law was imposed in October, 1958. This was the first time that the Supreme Court was confronted with an

unprecedented situation. The Court faced a dilemma how to prevent the country to be governed purely by the dictate of an army ruler and ensure that the country was back on the rails of constitutional governance. It (in *State v. Dosso* F.N.2) validated the imposition of martial law by invoking the Kelsenian theory and held that, “*a victorious revolution was itself a law creating fact.*” Although the application of Kelsenian theory in the facts and circumstances of that case has been subject of critical comment but the positive aspect of the judgment was that it unequivocally declared that the country would continue to be governed as nearly as possible under the Constitution which stood abrogated [*Province of East Pakistan v. Muhammad Mehdi Ali Khan Panni* F.N.3].

The Martial Law was however, lifted and a new Constitution was promulgated in 1962. There was constitutional democracy but in March 1969, the country plunged into yet another constitutional and political crisis leading to the imposition of Martial Law and the Constitution was abrogated. The political turbulence and war with India led to separation of East Pakistan which is now Bangladesh. The Chief Martial Law Administrator was forced to hand over power to the political party which commanded majority in the Western wing of the country i.e. the areas which now constitute Pakistan and late Zulfikar Ali Bhutto became President. The issue of

legality of martial law once again came under consideration before the Supreme Court (in the famous ***Asma Jilani's case*** F.N.4). Declaring the martial law to be illegal, the Court dubbed the Chief Martial Law Administrator as a usurper. It revisited the ratio laid down in the earlier judgment by holding that Kelsenian theory had been wrongly applied; that no valid law comes into force from “*the foul breath or smeared pen of a person guilty of treason against the national order.*”

In 1973 the Parliament unanimously passed a new Constitution and it was because of this wide approval and acceptance that it continues to be the Constitution of the country. In 1977, General Elections were held, there were serious allegations of rigging, and there was country wide street agitation which prompted the Army to take over. Assemblies were dissolved and government was dismissed. But this time, the constitution was not abrogated but it was declared to be, “*held in abeyance*”. The Supreme Court of Pakistan validated the action taken (in ***Begum Nusrat Bhutto's case*** F.N.5) on the ground of “*State necessity*” and the principle of *salus populi suprema lex*. The Court found that on account of massive rigging in the 1977 elections, the State machinery had crumbled down and the constitution did not provide remedy. This period of constitutional deviation continued till 1985 when the constitution was revived and with this came the 18<sup>th</sup> amendment in the Constitution which was approved by the Parliament

by 2/3<sup>rd</sup> majority. In October 1999, the then Prime Minister of Pakistan dismissed the Chief of Army Staff but the Chief of Army Staff took over the reins of the government, suspended the Constitution and dismissed the Parliament. The question of the vires of the action taken by the Chief of Army Staff was subjudice before the Supreme Court when a new Provisional Constitutional Order was promulgated by the Army Chief which prescribed a special Oath and those who did not take oath were laid off. In consequence of this, several Judges of the Supreme Court and High Courts ceased to be Judges. The question of constitutionality of the actions taken was adjudicated upon by the Supreme Court (in **Zafar Ali Shah's case** F.N.6), and it validated the same by holding as follows:-

*“After perusing the voluminous record and after considering the submissions made by the parties, we are of the view that the machinery of the Government at the Centre and the Provinces had completely broken down and the Constitution had been rendered unworkable. A situation arose for which the Constitution provided no solution and the Armed Forces had to intervene to save the State from further chaos, for maintenance of peace and order, economic stability, justice and good governance and to safeguard integrity and sovereignty of the country dictated by highest considerations of State necessity and welfare of the people. The impugned action was spontaneously welcomed by all sections of the society.”*

The Court also empowered the President to amend the Constitution for the limited period till the normalcy is restored. This constitutional deviation came to an end in 2002 when fresh elections were held but the amendments made by the Army Chief were validated through the 17<sup>th</sup> Amendment passed by the Parliament in 2003. General Musharraf through a referendum held on 30.4.2002 became President of Pakistan. In October 2007, when his term of office was to expire, he wanted to contest for the second term and his eligibility to do so was challenged by one of the candidates and this matter came up before the Court (an 11 Members Bench ) in *Wajihuddin v. the State*. The issues involved in the said petition were two fold: whether General Pervaiz Musharraf could contest the elections notwithstanding the Constitutional restraint that no holder of public office could contest the elections unless a period of two years has elapsed between his retirement and the elections. General Musharraf was still holding the office of the Chief of Army Staff; (ii) whether the Assemblies whose term was to expire in two months time or the succeeding Assemblies would form the Electoral College in view of Article 43 of the Constitution. The current Assemblies had elected the President for a term of five years which was about to expire. I was member of the 11-Members Bench which was hearing the case. The arguments dragged on and when the polling day approached nearer, on the application of

General Musharraf the Court instead of postponing the elections (as that would have changed the complexion of electoral college by efflux of time) allowed him to contest the elections with the rider that the Election Commission of Pakistan shall not notify the result till the final disposal of the pending petition. On the 2<sup>nd</sup> of November, 2007, the counsel for the petitioner who happened to be the President of Supreme Court Bar Association as well filed an application for issuance of a restraint order against respondent General Musharraf, Chief of Army Staff, not to pass any order which had the effect of suspending the constitution or changing the composition of the court. The Court directed the office to put up the petition on the next working day which was 5<sup>th</sup> of November, 2007 as it was a long weekend and the Court was closed. In the afternoon of 3<sup>rd</sup> of November, 2007, the word went around in the Capital that martial law was being imposed. Apprehending this the Chief Justice of Pakistan with the available Judges in the Capital city Islamabad assembled in the afternoon (7-Members) and passed a restraining order which reads as follows:-

- “(i) Government of Pakistan, i.e. President and Prime Minister of Pakistan are restrained from undertaking any such action, which is contrary to Independence of Judiciary;*
- (ii) No judge of the Supreme Court or the High Courts including Chief Justice (s) shall take oath under PCO or any other extra-Constitutional step;*

- (iii) *Chief of Army Staff, Corps Commanders, Staff Officers and all concerned of the Civil and Military Authorities are hereby restrained from acting on PCO which has been issued or from administering fresh oath to Chief Justice of Pakistan or Judges of Supreme Court and Chief Justice or Judges of the Provincial High Courts;*
- (iv) *They are also restrained to undertake any such action, which is contrary to independence of Judiciary. Any further appointment of the Chief Justice of Pakistan and Judges of the Supreme Court and Chief Justices of High Courts or Judges of Provinces under new development shall be unlawful and without jurisdiction.*
- (v) *Put up before full court on 5<sup>th</sup> November 2007.”*

Notwithstanding the order passed General Musharraf, the then Chief of Army Staff imposed the “State of Emergency”, directed the constitution to be held in abeyance, issued a provisional constitutional order prescribing a special oath for judges of the superior courts with the stipulation that those who did not take oath would cease to hold office. Out of the 18 Judges, 13 did not take oath in the Supreme Court and out of 93 Judges from all over the four Provinces of the country, 61 did not take oath.

Those who did not take oath 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. (F.N.7)

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, several of the deposed Judges rejoined the Court, and finally, on 16 March 2009, the Chief Justice of Pakistan, Mr. Justice Iftikhar Muhammad Chaudhry, were reinstated by an executive order of the Prime Minister of Pakistan.

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 passage of the Act of Settlement, which made Judges independent of the Crown. (F.N.8) Similarly in *Marbury v. Madison*, Chief Justice Marshall laid the foundation of judicial review in 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. (F.N.9)

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.*” (F.N.10) 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. (Article 190) 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. (F.N.11) 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. (F.N.12)

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. (F.N.13)

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 counter marriage as illegal but quashed the criminal proceedings. (F.N.14)

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 heinous crimes. (F.N.15) It chided the High Court for being too liberal in cases under the Anti Terrorist Laws. (F.N.16) 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.

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 levelled 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 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'. (F.N.17)

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. (F.N.18) 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. 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." (F.N. 19)

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 Constitutions, 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. 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.

- (1)
- (2) State v. Dosso (PLD 1958 SC (Pak) 533)
- (3) Province of East Pakistan v. Muhammad Mehdi Ali Khan Panni (PLD 1959 SC (Pak.) 387)
- (4) Miss Asma Jillani v. The Government of the Punjab and another (PLD 1972 SC 139)
- (5) Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan (PLD 1977 SC 657)
- (6) Syed Zafar Ali Shah v. General Pervez Musharraf, Chief Executive of Pakistan (PLD 2000 SC 869)
- (7) Bruce Allen Murphy, Wild Bill: The Legend and Life of William O. Douglas 362-68 (2003)
- (8) V.A. Bohde, The Rise of Judicial Power, in Law and Justice (Soli Sorabjee ed., 2004)
- (9) Government of Sindh v. Sharf Faridi, PLD 1994 SC 105 (Pak)
- (10) Constitution of Pakistan of 1973 Article 184.
- (11) Abul Alamaudoodi v. the State, PLD 1964 SC 673 (Pak)
- (12) Nawaz Sharif v. President of Pakistan, PLD 1993 SC 473 (Pak)
- (13) PLD 1970 SC 1 (Pak)
- (14) Humaira v. State, PLD 1999 Lahore 494 (Pak.)
- (15) Mehram Ali v. Federation of Pakistan (PLD 1998 SC 1445 (Pak)
- (16) Mirza Shaukat Baig v. Shahid Jamil (PLD 2005 SC 530 (Pak)f14
- (17) Plyler v. Doe, 457 U.S. 202, 242 (1982) (Burger, W. Dissenting).
- (18) Justice Barak, supra note 13.
- (19) 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](http://www.lexisnexis.com/documents/pdf/20080806034945_large.pdf).