

# Judging the judges

By Anwer Mooraaj

BOOK launches can at times be an awful bore. Especially when some retired functionary who really has nothing to say, suddenly decides to inflict his memoirs on an unsuspecting audience in the mistaken belief that his work has some spurious sociological significance which would help to make the world a better place to live in. And so his moribund fancy must have one more grating fling.

But there are notable exceptions, like the one that took place last Monday when a former chief justice of the country, Justice Ajmal Mian, decided it was time to speak out and to set the record straight on a number of vexing legal issues that the public had heard about, but weren't quite sure how they ended. The hall was packed and studied by luminaries from the world of jurisprudence, and he certainly had a great deal to say on that occasion.

His autobiography is especially useful for the student of law as it contains many landmark judgments, often delivered in an agony of outraged propriety, which have not only affected the ineluctable trend of legal decisions, but also adversely affected the growth of the democratic process and contributed to the destabilization of society. It also contains notes on a string of cases which the student and the practising advocate would find useful.

Though he did his bit in trying to introduce some sort of order into a chaotic world, Justice Ajmal Mian's main contribution to the country and to the legal fraternity is that he was able to rehabilitate the flagging prestige of the supreme court which had suffered considerably at the hands of the military and the civilian executive alike. This he did by rendering successive judgments on 20 contempt of court cases against the sitting prime minister and a former prime minister. He also dealt with the Eighth and the Fourteenth Constitutional Amendment, the freezing of foreign exchange, the imposition of the emergency and the anti-terrorist act.

I first came across Ajmal Mian in 1956 in one of the many rooms of the LSE library frequented by the students of law, when he was probably poring over the

judgments of Lord Birkenhead or studying how Edward Carson put an end to forensic platitudes and irrelevant peroration from the bar. At the time I didn't have the slightest idea that the dapper, quiet, well behaved and dignified student who sat under a lamp by the window and kept largely to himself, would one day be elevated to the position of chief justice of Pakistan.

On the few occasions when we conversed, and that too briefly, I was struck by his grasp of logic, and his gift for reducing a highly complex philosophical problem to its bare essentials. He is one of the most clear-headed people I have ever had the privilege to meet. Regrettably, the LSE isn't mentioned in his autobiography, but the Windmill Theatre with its naughty girlie revue, which he visited along with Nawab Naqshband of Multan has been given a paragraph. In the comprehensive index at the end of the book the reader learns that Justice Sajjad Ali Shah's name appears on 136 pages, which is not surprising, because Justice Shah was embroiled in a bitter conflict with a sitting prime minister which led to the storming of the supreme court.

It would be difficult to speak at any length about the judiciary in this country, without mentioning the two judgments of the Federal Court, the predecessor of the supreme court, which, in a sense, pointed the way for other 'injudicious' legal opinions and judgments which followed. All it really needed was for a precedent to be set. The rest was easy.

The precedent was, of course, the Maulvi Tamizuddin Khan case, which though rarely mentioned these days, is still regarded as the most notorious judgment in the annals of jurisprudence in this country. The case was exhumed and resurrected for the audience by the author to illustrate an interesting point.

Governor-General Ghulam Mohammed dissolved the constituent assembly of Pakistan and dismissed its speaker by his order dated August 5, 1954 on the ground that the assembly had failed to frame a constitution. Maulvi Tamizuddin Khan sprung into action. He filed a petition before the Sindh high court under section 223-A of the Government of India Act of 1935, which was enacted by the constituent assembly of Pakistan conferring writ jurisdiction on the high courts and the chief courts. The Sindh

chief court after allowing the writ petition declared the order of the governor-general illegal and unconstitutional.

Round two belonged to Ghulam Mohammad. He filed an appeal against the judgment of the Sindh chief court before the federal court of Pakistan. Their lordships upheld the appeal, setting aside the judgment of the Sindh chief court on the ground that section 223-A had not been validly enacted, as the governor-general's assent to it was not obtained.

The legal fraternity then held its breath as two great jurists crossed swords, metaphorically speaking. Chief justice Mohammed Munir represented the majority view which eventually prevailed. But there was a dissenting voice, albeit a powerful one. Justice A.R. Cornelius held that an assent of the governor general was not required as the assembly was not only the federal legislative assembly but also a constituent assembly, vested with the power to frame a constitution for the newly created state of Pakistan. In his view, section 223-A was validly enacted and the Sindh high court had jurisdiction to declare the governor-general's order as illegal and unconstitutional.

Justice Ajmal Mian expressed the opinion that if Justice Cornelius' view had been the majority one, the political history of Pakistan would have evolved quite differently. The sort of military adventurism that the nation subsequently witnessed might have been averted, and there might not have been a need to invoke the doctrine of necessity in the military takeovers of Ayub Khan, Zia-ul-Haq and Pervez Musharraf. He added that a contrary view was taken by the Supreme Court in 1972 when Yahya Khan imposed martial law; but the judgment had no impact because it was rendered when Yahya Khan was no longer in power.

The point which he finally managed to drive home was that out of 56 years of independence, Pakistan has been subjected to 18 years of military takeovers, and one of the casualties of this has been the constant insecurity of the tenure of the judges. The treatment of the judiciary by politicians and the executive, has at times also been highly capricious.

Justice Fakhruddin Ibrahim, a great advocate of democracy, who set the desultory tone for the book launch, did throw a spanner in the

works by suggesting that not all members of the superior judiciary are what they seem.

He informed the audience about the time during the reign of General Zia-ul-Haq when the GOC in Sindh wanted to appoint a civilian governor from among the five sitting judges of the high court and expressed doubts whether anyone would agree. Imagine their surprise when all five judges agreed to serve. And imagine their surprise when they found out these were the same judges who in an earlier judgment had observed that military rule was not only anti-Islam but against the genesis of Pakistan.

The evening, however, belonged to Justice Javed Iqbal who delivered the keynote address. Articulate, witty and hard hitting he came across as the last ambassador of a dying breed of after-dinner speakers in the British tradition. The audience was riveted to the stage when he spoke and hung onto his every word.

In between wry comments about Justice Ajmal Mian's sanitary requirements in his lodgings in London, and a reluctance to compare Bill Clinton's life with that of Ajmal Mian, Justice Iqbal made some penchant observations about what needs to be done in the field of jurisprudence.

No government in Pakistan, wants an independent judiciary. Governments attempt to use the law to suppress their opponents. Only opposition politicians want an independent judiciary, but when they come to power they also want a pliable judiciary to settle scores with their opponents.

He felt, however, that the judiciary also needed revamping. Although the Judges Case attempted to eliminate political interference in the appointment of judges in the superior courts, it has accorded primacy to the views of the chief justices. And if a chief justice turns out to be unscrupulous, power can be misused. The establishment of a commission for judicial appointments therefore needs serious consideration.

Justice Iqbal concluded by suggesting that the supreme judicial council should be activated so that a case of misconduct against a superior court judge could be investigated, and judges of the superior courts could be made accountable. This will certainly repair some of the damage done to a great institution whose independence is essential to the functioning of democracy.