

# Post-restoration: the role of the Bench and the Bar

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**T**HE successful long march of March this year and the unconditional restoration of Chief Justice Iftikhar Muhammad Chaudhry have let loose a wave of expectations that the judiciary post-restoration shall usher in a new society based on the rule of law and that after decades of neglect the people shall have real access to substantive justice for the realisation of their basic rights contained in the constitution. What then is role of the judiciary post restoration and that of the bar?

First and foremost, let it be clear that the lawyers' movement is far from over. It has simply entered a new phase that we foresaw would logically come. In this new phase the bench and the bar are embarked upon a common venture as sailors on a fleet of ships. At the head sails the flagship boarded by the commander of the fleet, the Chief Justice of Pakistan, who has been charged by the emerging national ethos the task of navigating through uncharted waters. The flagship carries, naturally the Chief Justice, the restored judges, the "reappointed" judges and judges appointed this year post 21st of March.

The fleet comprises ships that are of different makes and types. It includes ships headed by PCO judges, by those judges who breached their oaths and also by those who were inducted after the lifting of the Proclamation of Emergency and some by those who were inducted after the elected government took office. We, the members of the bar must board the flagship. Of the three organs of the state, it is the judicial organ that is the custodian of the constitution. It has no coercive power of its own but it exerts its will by the force of its moral authority that it derives from the legitimacy and respect that it commands in the eyes of the people.

It is perhaps in this context that US Supreme Court Justice Sandra Day O'Connor has observed that in the ultimate analysis judges do not protect the constitution; it is the people who do. For the

our progeny, born and yet unborn.

The fundamental rights enshrined in the Constitution include the security of persons in respect of life and liberty, prohibit slavery and forced labor, protect against double jeopardy and self-incrimination, declare that the dignity of man is inviolable, provide for freedom of assembly, association, trade, business and profession, provide freedom of speech, freedom of religion, protection of property and preservation of our language, script and culture.

At the core of these fundamental rights is the notion that all men and women are equal before the law and that without access to justice all rights are illusory and meaningless. The cases of Azizullah Memon and Shehla Zia and the exercise of suo motto jurisdiction blaze the trail to a path beyond the Tamizuddin, Dossa, Nusrat Bhutto and Zafar Ali Shah cases. They illuminated the path to access to justice.

Treading this path is the next challenge for the post-restoration judiciary. But what is justice? It is essentially social justice where individuals are truly equal before the law, free of exploitation and indignity.

To achieve this end it is imperative that judges understand that their judgments must take into account the social background of the vulnerable sections of society. They need to sensitise themselves to understand and comprehend the values, beliefs, perspective of lives, and the daily experiences of others unlike them. Justice Holmes had observed that judges do not only interpret the law but in fact make the law.

Making law involves choosing values. Judicial independence is not to be equated with judicial isolation. We need to change the mindset that pervades our entire judiciary that leads them to ally themselves with the ruling classes rather than with the masses else it will continue

in the times ahead will be for the judiciary to assert its primacy in the matter of judicial appointments at all levels of the institution. The strength of the Supreme Court has been increased to 28 and that of all the High Courts substantially increased. There are proposals to double the numbers of the subordinate judiciary. In its efforts to assert its primacy in the consultative process and to forestall the packing of the courts, the judiciary will need the full and robust support of the bar and to reaffirm its commitment to the decided cases of Al-Jehad Trust and Asad Ali. And how does the bar express its support?

In the first instance the judiciary should support proposals to co-opt the organised bar in the consultative process. The bar on its part must widely disseminate its position on the criteria that must be met by potential appointees to the courts, both superior and subordinate. It must build a consensus, wide in its reach, taking along members of civil society on whom the laurels of the restoration rest no less.

We need to work together with schools and colleges, professors and teachers at institutes of learning; with business forums, workers' unions, professional organisations, women organisations and all those who have a direct stake in ensuring the integrity of the judicial system. While the bench and the bar must continually defend civilian supremacy, they must stay clear of partisan politics lest they endanger their own unity.

They must make common cause with others who suffer from the erosion of the rule of law. When independent television channels are taken off the air or young girls are buried alive or dogs let loose on them we must protest, in our own ways consistent with our positions, with all the force at our command. We must show greater solidarity with the families of missing persons still unaccounted for. In other words the bench and the Bar must be seen as fighting for the fundamental rights of the people at large.

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protect the constitution; it is the people who do. For the larger part of our history, no matter what constitutional system we have lived under, the executive, that controls the coercive apparatus of the state, has dominated the other two institutions of the state. Whenever the military had intervened to take over control to run the affairs of the country, the judiciary had failed the people in discharging its duty to protect the constitution.

When the system of checks and balances between the three organs of the state breaks down, the one that is in control of the coercive apparatus strengthens its grip over our collective affairs.

The rule of law stands eroded and the rule of men prevails. The judiciary's most important task after the restoration, therefore, should be to ensure that the ignominious doctrine of state necessity is consigned to the dustbin of history.

The restoration does not and ought not to be seen as some talismanic wand that has ushered in an era of a fully independent judiciary. The judiciary has to be strengthened so that it can withstand future assaults from the executive. Judicial independence and constitutionalism go hand in hand. Judicial independence cannot co-exist with autocracy that is based on the rule of men as opposed to the rule of law. An independent and vigilant bar enjoying the support of the people is an essential precondition for preserving and enhancing the independence of the judiciary. And will the judiciary and the bar, the two wheels of the chariot of justice, not have squandered the people's trust if they were to shut their eyes and rest on the laurels of the restoration?

The challenge of the times ahead is to integrate this fleet, incorporating some ships and discarding some. To do this the judiciary has to tackle the bull by its horns and declare Tikka Iqbal's case non est. The fact the judges were restored by an executive order fortifies the view that the judgment of Tikka Iqbal's case is indeed non est. It must seize this opportunity before Tikka Iqbal's case seizes it; this is the hour, as it enjoys the support of the people, as never before.

If the principal objective of the lawyers' movement was and is to establish the supremacy of the rule of law in Pakistan and not simply to provide employment to judges who had been unceremoniously sent packing and made non-functional on November 3, 2007 then the judiciary must transform itself in to a vibrant institution that stands guard over the constitution and the basic rights of the people, particularly of those groups or individuals who are the most vulnerable.

We chose this constitution on the assumption that it would, if followed, help usher a society in which every citizen would have the opportunity to realise and attain his/her fullest potential. In this scheme of constitutional governance we had hoped that, we the people, would enjoy certain basic fundamental rights, the existence of which was a pre-condition to a change in the quality of our lives and that of

supremacy, they must stay clear of partisan politics lest they endanger their own unity. They must make common cause with others who suffer from the erosion of the rule of law. When the TV channels are taken off the air or young girls are buried alive, we must protest with all the force at our command. The bench and the Bar must be seen as fighting for the fundamental rights of the people at large.

to be seen as another problem faced by the people in accessing justice. At a recent public reference for the late Justice Sabihuddin Ahmed, one of the speakers, his childhood friend, had this way to tell;

"Justice Sabihuddin Ahmed was fond of eating nehari at Sabri on M.A. Jinnah Road on Sunday mornings with some of his childhood friends. One day, he, then a sitting judge of the Sindh High Court, related to Justice Dorab Patel some incident that he observed while having nehari at Sabri. Justice (retired) Dorab Patel, a man of impeccable rectitude, was aghast and turned to Justice Sabih and said, "But Sabih do you think it is appropriate for a judge of the High Court to be eating nihari with the public at Sabri?" Justice Sabihuddin replied: "But, Sir, Judges, including you when you were a sitting judge of the Supreme Court frequently lunched at the Sindh Club." After giving it some thought, Justice Dorab Patel replied "You know Sabih, you are right. I never thought about it this way."

Does this not distort their perception about the needs and aspirations of the people of Pakistan? The judiciary post restoration must change such beliefs. It must be seen by the masses as the protector of their interests. It is heartening that the New Judicial Policy that took effect from June 1, 2009 addresses some of these issues.

We have seen for ourselves how the defiant "No" of Chief Justice Iftikhar Muhammad Chaudhry energised the lawyers and civil society to defend constitutionalism. Together with the media they were able to raise the consciousness of the people, making them aware that dispensation of substantive justice and the realisation of their fundamental rights was possible only if the judicial organ of the state was truly independent and the judiciary comprised of men and women who had the courage to dispense justice without fear or favour.

It was this raised consciousness amongst the people that emboldened the judiciary to strike down the infamous Presidential Reference on July 20, 2007. People's message to the judiciary was loud and clear and the message was: Do not be afraid of doing the right thing because we shall back you. We will need judges of rectitude who will stand up for the rule of law when it is time to take a stand and be counted.

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people at large.

It is no secret that the backlog of cases is acutely straining the justice system which may well burst at the seams. According to a report published by the Secretariat, Law & Justice Commission of Pakistan on National Judicial Policy 2009 — A year for focus on Justice at the Grassroots Level, the current pendency in the superior and subordinate judiciary is 138,945 and 1,565,926 cases respectively. These figures do not include the pendency before special courts and administrative tribunals. Not even one per cent of the federal and provincial budgets are allocated to the third pillar of the state. A judicial officer in Punjab has to deal with 1668 cases per day on the average.

It is for us in the bar to lobby for the allocation of increased funding for the judicial system and to energise civil society to press the legislature and the executive to redefine national spending priorities. Access to justice is both quantitative and about results. The challenge for the judiciary post restoration is to reform the entire judicial system to realise the principle of public policy laid down in Article 37(d) of the constitution. It is not simply about what happens inside the courtrooms but also about what happens beyond. The justice system means the police, the prisons, prosecution and defence, legal aid, adjudication and enforcement. For instance the vulnerable sections of society see the police as part of the problem, either corrupt or furthering the interests of the powerful.

The courts must and in fact have started to take the police to task and make it more efficient, professional and service-oriented but it will be a long journey. The judiciary will need to manage its case load by encouraging transparent and fair plea bargaining and pre-trial settlements being ever mindful that speedy disposal of a list ought not to be at the cost of miscarriage of justice. Towards achieving this end it will be for the courts to nurture the independence of the public prosecutor and the creation of a credible public defender's office the time for which has surely come. The task at hand is difficult but not impossible. The catch words ought to be vigilance, integrity, activism and innovation. The National Judicial Policy 2009 is a welcome step in that direction.

It would do the judiciary well to ponder the words of Lord Chancellor Henry Brougham:

"It was the boast of Augustus that he found Rome of brick and left it of marble. But how much nobler will be the sovereign's boast when he shall have it to say that he found law... a sealed book and left it a living letter; found it the patrimony of the rich and left it the inheritance of the poor; found it the two-edged sword of craft and oppression and left it the staff of honesty and the shield of innocence."

Let's pray that the post-restoration judiciary is some day capable of making this boast. ■

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