

Rule of Law or Law of the Ruler Black Coats Struggle for an Independent Judiciary

Rubina Saigol

When I was asked to write about the lawyers' struggle in Pakistan, I was hesitant and perplexed. I am not a lawyer and cannot presume to present an academic paper on legal issues that the lawyer community best understands. However, as a sociologist and human rights activist I have been engaged at different levels with the lawyers' movement for rule of law in Pakistan. As such I can only write a narrative account of the movement as I saw it unfold over the last two years. After presenting an account of the events that sparked off the movement, I will try to offer some tentative insights into the dynamics of the struggle in the context of Pakistan's historical political development. These insights are by no means immutable truths; rather they are my perceptions and understandings of the movement and are meant to raise certain issues for debate. This narrative is divided into two parts: the first part is an account of the events from the suspension of the Chief Justice on March 9, 2007 up to the present time (November 2008); the second part tries to explore the issues and offer some insights into why all this happened.

Part I

Let justice be done, though the heaven fall!

William Murray 1st Earl of Mansfield 1705-1793

The man who said "NO"

On a cool March day in 2007, Pakistan's Chief Justice Iftikhar Muhammad Chaudhary was summoned by the military dictator cum president, Pervez Musharraf, to his fortified Army House in Rawalpindi. Encircled by an array of daunting military generals in uniform the diminutive figure of the Chief Justice was seated in one of the ostentatious chairs of the overbearing House. Among the menacing figures towering over the CJ were the chief of the influential Inter-Services Intelligence and some of the most powerful Khakis in the country. In front of the CJ sat the General himself in his army fatigues with his dreaded boots spread forth in potential threat. He demanded of the CJ to resign. The CJ refused to oblige. He was coaxed, cajoled, threatened, intimidated and enticed using warning sticks and colorful carrots. He refused.

Several hours of badgering failed to cow down the little man whose frail appearance did not match the unprecedented courage that brought out the "No" somewhere from deep within his heart and his conscience. Baffled and incredulous that a mere "bloody civilian" had dared to disobey the Khaki overlords, the petulant General tried to show "evidence" of wrongdoing and corruption from little slips of paper handed over officially to him by his equally nonplussed companions. The CJ challenged the high and mighty to prove their accusations. Undaunted by the deathly presence of boots and guns, the CJ stuck to his own guns – his guns of conscience, conviction and courage. Flummoxed and

irate, the arrogant General left the room ordering his minions to convince the judge that his time was up. The judge did not budge.

Enraged that a civilian with a small frame and an unassuming manner could dare to defy his orders and challenge his unlimited power to do as he liked, the egotistical COAS decided to shred the constitution to pieces and suspended the Chief Justice. Later on he sent a reference to the Supreme Judicial Council against his new adversary.

The ensuing images flashed across television screens across the country were just plain incredible – incredible and horrifying. The Chief Justice's cars were fork lifted from his house, his telephone lines were cut and his family was not allowed to see or meet anyone. When the Chief Justice, supported by some members of the legal fraternity tried to walk to the Supreme Court he was pulled by the hair by a policeman and forced into a car. This manhandling of one of the most esteemed offices in the land was unbelievable even in a state that is nothing less than a military garrison.

The lawyers rise up

By late afternoon of March 9, 2007 virtually all television channels in the country began to flash the news that the Chief Justice had been suspended by the President. It was sudden; it was unexpected; it was shocking. Details of what had transpired that fateful day at the Army House poured in slowly, but the news of the suspension spread like wildfire engulfing the entire nation in its enlightening flames. A flurry of SMS and e-mail messages fired up cyberspace and telephone lines became too busy for any other business. In this day of fast information the news was in every household within hours, and the independent media began to hold talk shows and invite expert opinions on what this meant and what would happen now.

The lawyers were almost immediately galvanized, spontaneously as it were. The anger came from a refusal to bow down to a long-hated dictator one more time. It was like the last straw on a very tired camel's very broken back. The legal fraternity refused to accept the arbitrary and illegal suspension. The allegations were so vague, so immaterial and frivolous that even a school boy would not have been convinced of the CJ's guilt. This time the General had gone too far. As though eight years of plundering and looting the country were not sufficient, he wanted more blood, more sacrifice from a depleted and exhausted nation. But this time the nation was not prepared to give anymore – enough is enough!

Thus began one of the longest movements for the rule of law ever witnessed in the history of the world. There is no precedent. Nations have witnessed movements for labor rights, farmers' rights, women's rights and national rights but no nation had ever seen such a protracted and resolute movement for the rule of law and constitutionalism. The irony is that usually it is governments that invoke the notion of rule of law to suppress dissent and create quiescence, yet here was a government that found itself on the wrong side of the law – and on the wrong side of history. It stood with violation of the

rule of law and constitution while those being baton charged, beaten and tear gassed were demanding that law be restored to the land!

Within days mammoth rallies and processions were held across the length and breadth of Pakistan. Scores of Black Coats were followed by indignant members of civil society, labor and women's rights activists, farmers' groups, media, journalists, teachers, professors, thinkers, writers, poets, academics and rights activists in marching against the travesty of justice by a COAS who seemed out of touch with reality, time, history and events. Eight years of relentless attacks by the COAS on all institutions of democracy and people's power engendered a rage that became difficult to contain, channelize or redirect. It focused squarely on that symbol of Praetorian power – the person of the COAS and the entire country rang with slogans of “Go Musharraf Go” from Khyber to Karachi and beyond. A number of other colorful slogans were spawned by this bold and irrepressible movement. The gist of the slogans is captured in one of the simplest examples: “CJ come back; COAS go home.”

The lawyers decided to boycott the courts and every Thursday they gathered in front of the High Courts and other courts to protest against the unconstitutional one-man rule that had brought the country to the brink of disaster. Lawyers and protesters carrying placards, wearing black arm bands that said “NO” filled the streets of Lahore, Islamabad, Karachi, Multan, Rawalpindi and Peshawar. All kinds of slogans were coined: “We will fight until the judiciary is independent”; “Restore Judiciary now”. These slogans became a hallmark of the movement across the length and breadth of the country.

As the man who had dared to say “No” to those who were used only to “Yes, Sir”, Iftikhar Chaudhary became a symbol of judicial freedom. It was not that he had been a popular public figure. Many of the people had never heard his name before. It was not that he was a charismatic man who enthralled his audiences. Ordinary, unassuming and a little shy in his gait and manner, he became the person around whom people's love and rage of years crystallized. He became the pivot around whom the rage against an unjust regime, and the love for an institution that people came to see as their savior against injustice, revolved.

As the Chief Justice moved from city to city addressing Bar Councils that invited him to speak, the journeys became long – as though the roads had stretched out to welcome the small man who had stood up to overwhelming power. A journey from Islamabad to Lahore, which normally takes between five to six hours or less, became a marathon of over twenty-five hours. As his lawyer, Aitzaz Ahsan, drove the deposed CJ down the memorable highways of struggle, people from all walks of life spontaneously thronged to see and hear a man who represented to them all the things missing in their lives – justice, legality, truth. The outpouring of love for a man hardly known before March 9 was the biggest puzzle to the boots accustomed to mercilessly trampling upon all and sundry in their endless quest for power.

The state reacted predictably. Lathi-charge, beating, brick-batting, tear-gassing and arrests - the usual paraphernalia of repressive states - was brought into full use. None of

this however cowed down or diminished the spirit of the lawyers and those with a conscience who continued their struggle for the independence of an institution that came to represent something deep and valued. The worst demonstration of a bewildered but trigger-happy state was in Karachi where the CJ went on May 12, 2007 to address the High Court Bar Association. The lawyers accompanying him and the CJ were detained at Karachi Airport as the city was placed under siege by gunmen shooting from rooftops and randomly murdering anyone in sight. Karachi became a battlefield with bodies lying on the streets and blood oozing out from every pore of the people and the city. As the massacre was going on in Karachi, the government, ruling party and the COAS celebrated festively in Islamabad in front of a hired crowd of bored captive audiences. The General showed his fist from behind a bullet proof podium designed to keep him safe against people's rage. He had declared that his would be the last punch in what he saw merely as a wrestling match. The rulers rejoiced merrily as Karachi became a cauldron of blood and death.

One significant outcome of the movement was that political parties, which until then lay in their obscure slumber, suddenly awoke and sensed the moment of change on the horizon. Slowly and cautiously, but definitely, they joined the countrywide movement for change. Off shore political parties, accustomed to carrying out their politics from Dubai, Washington and London, began to flex their weakened muscles.

The CJ fights back

One level of the struggle was street agitation by all and court boycott by lawyers. The legal level of the fight was put up by the CJ through his lawyer, Aitzaz Ahsan. The CJ challenged his suspension as well as the false reference against him in the Supreme Court. The legal battle for his restoration was fought over four months that saw the entire country galvanized around the issue which had fired up the 'national imagination'. The legal fraternity and civil society, with no guns or tanks or bullets at their disposal, were fighting against authoritarian and powerful forces and institutions that possessed a deadly arsenal. The only arms and ammunition that the lawyers and civil society had were the constitution, law, justice and truth.

On July 20, 2007 the full bench of the Supreme Court restored the Chief Justice and threw out the rubbish that does not deserve to be called a 'reference'. It turned out during the course of the high profile case that the (in)security agencies had bugged the houses of judges and had used illegal means of collecting so-called 'evidence'. The court fined the government 100000 rupees for its use of illegal methods and ordered the clean up of judges chambers and offices against the dirt that had been planted there. The reference against the CJ was in fact so shoddy, circumstantial and ill-conceived that the government's own legal team felt compelled to withdraw it. Despite using some of the biggest legal guns in Pakistan the government faced a humiliating defeat in court. The country rejoiced. Spontaneous celebrations broke out across Pakistan and a sense of justice having been done prevailed.

The government subsequently tried to make friendly overtures to the restored CJ but he kept aloof – and with good reason. One of the accusations was that he consorted with members of the government and powerful political figures. Not wanting to be accused of hobnobbing with the powerful, the CJ maintained a discreet distance. In this too the government functionaries faulted him and accused him of being stubborn, obstinate and immutable. Little did they realize that one of the main accusations against him was precisely that he was friendly with those in powerful government positions. His need to maintain a distance therefore was vital.

Political maneuvering

The prolonged and relentless lawyers' movement had politically weakened Musharraf's hitherto almost unquestioned power. Global media reported on events in Pakistan and the CJ was honored by Bar Associations in the USA and by the Harvard Law School. The legal fraternity across continents came to admire the Chief Justice and uphold his stand. Musharraf's defeat in the court case came to be seen by his allies abroad as a potential threat and the mass uprising was perceived as a danger to his iron rule. The lawyers' had so to speak 'softened the target'. To shore up a fading dictator Musharraf's international masters devised what they thought was an ingenious strategy. They figured that since the Pakistan Peoples' Party was Pakistan's largest party (as shown in several previous elections), and Benazir Bhutto was an astute politician with modern and liberal leanings, the PPP was a good bet for bailing Musharraf out and providing him with a legitimate support base. The real purpose was so that the 'war on terror' would not be disturbed or interrupted. Benazir Bhutto was merely an instrument to strengthen their 'indispensable' ally.

Around July of 2007 rumors of a deal between the PPP and Musharraf surfaced. Over time the rumors became stronger and some PPP leaders tacitly or subtly began to accept that there were secret meetings between the two in quiet little corners of the UAE. As an experienced and suave politician Benazir knew that this was her chance to extract her own 'pound of flesh' for her support to the dictator. She bargained for all the cases to be dropped against her and her spouse through a general amnesty for her party. In addition, she insisted that Musharraf remove his uniform as promised in 2004 but not fulfilled, and that he allow the next assembly to elect him rather than forcing his re-election by the same assembly. She also asked for reform of the Election Commission, a fair and free election and assurance of her security upon her return to the country. Musharraf was averse to accepting many of her demands but the guarantors of the deal, foreign masters eager to get on with their ill-conceived 'war on terror' tried to broker a deal which would bring some benefits to each side.

Sitting across the Gulf on Arabian sands Nawaz Sharif was watching this whole drama unfold in his longed-for homeland. Seeing the possibility that Benazir might soon land in Pakistan to fight an election, he knew he could not afford to be left behind. In 2006 he had managed to escape from his royal prison in Saudi Arabia to London where he met the Mohtarma and signed the famous 'Charter of Democracy' in May of that year. The two former political rivals, both pained from years in exile and wandering in the sands of

Arabia and the UAE, decided to bury the hatchet and concentrate on the common enemy – the COAS and self-appointed President ruling the roost in the land of the pure. They promised each other a number of coveted items in the CoD including the removal of the 17th amendment and 58 (2)b as well as never knocking on the doors of the Army House to remove each other from power.

The Supreme Court in Pakistan gave a decision in 2007 that no citizen of Pakistan could be kept forcibly away and that the Sharifs had the right to return to their homeland. In 2004 the younger Sharif had been unceremoniously put back on a plane to Saudi Arabia from Lahore where he tried to disembark. On September 10, 2007, the older Sharif, taking some succor from the SC ruling in his favor, decided to land in Islamabad. The entire airport became a garrison. No one could either go in or come out with the Khakis lining the streets ready to prevent PML (N) supporters from reaching the airport to receive their Quaid. Upon landing however, he was persuaded to return and upon his resistance, he was hauled into a plane that changed its destination in midair and left for the holy land. Musharraf's government had violated another Supreme Court order and its war with the court intensified.

On October 5, 2007 Musharraf issued the infamous National Reconciliation Ordinance which wiped the slate clean for Benazir, her spouse and hordes of others accused of various crimes and of plundering the country's wealth. The highly discriminatory law provoked immediate condemnation as it dry cleaned only those politicians who had been accused between January 1986 and October 12, 1999. In other words, it provided total amnesty and freedom from prosecution to those accused of crimes prior to Musharraf's coup, but did not spare the politicians accused after Musharraf took over. It was clear that the Sharifs were not to be spared as most of the cases against them were brought by Musharraf after their removal in October of 1999. Chief Justice Iftikhar Chaudhary immediately placed a stay order on this discriminatory piece of legislation drawing the wrath and ire of the PPP Chairperson, Benazir Bhutto. On October 6, 2007 the PPP legislators sat back and abstained from voting as a uniformed General got himself elected as president by existing assemblies whose term was about to end.

Although the Supreme Court had allowed the election of the COAS to the office of the president to proceed, the challenge by the lawyers' candidate, Justice Wajeehuddin, against Musharraf's candidacy remained. The constitution does not allow any person in the service of the state, military or civilian, to stand for election or take part in politics. The oath of officers also forbids it and those in paid service of the state may enter politics only two years after retiring from active service. In violation of this cardinal principle to separate the state from politics and ensure its neutrality and impartiality, Musharraf had decided to get elected to the august office. Once again all the big guns of Musharraf's legal team – the two Peerzadas (Sharifuddin and Hafeez) as well as the wily and controversial Attorney General, Malik Qayyum, helped by the oily and slippery law minister, Wasi Zafar, went to work to maul and batter the constitution by finding ways to enable a uniformed general to fight for public office.

On October 18, 2007 Benazir Bhutto, having successfully brokered a deal with the dictator, returned home to glory and gore. She was greeted enthusiastically by ecstatic supporters many of whom were blown to smithereens by two bomb blasts the same night. But she was in Pakistan to fight the election and to become the next prime minister after removing the two term bar in good time. Watching from his suffocating gilded prison once again, Nawaz Sharif was perturbed. He could not let the opportunity go. He knocked on the doors of the King to rescue him from his political isolation so that he could lead his party into the expected election. Musharraf's mad dash to the holy land to stop the return of the Sharifs bore no fruit. He returned well before expected, empty-handed and anxious at the possible return of his nemesis. The King of the sacred land believed that if Benazir could be allowed to return why not Nawaz – fairness demanded it. In any case it was thought that the election would be maneuvered to bring in PPP and the PML (N) at best would get about 20 seats in the election. For the powers that be there was nothing to fear. It was generally believed that the elections would be engineered to install pro-Musharraf parties to shore him up. That is why the odd contraption called the APDM (All Parties Democratic Alliance) mid-wifed by Nawaz in London, and consisting of a strange medley including Jamaat-e-Islami, Pakistan Tehreek-e-Insaaf and Pakhtoonkhwa Milli Awami Party, decided to boycott the election.

On November 3, 2007 fearing that he would lose the case for his candidacy in the Supreme Court, Musharraf marshaled his autocratic forces and imposed an emergency which in reality was martial law as it was promulgated by him in his capacity as COAS. This time he dismissed the entire Supreme Court and detained the judges in their houses for five months. Before being deposed seven judges of the Supreme Court declared the emergency to be illegal as the COAS had no authority to proclaim an emergency. Musharraf then proceeded to single-handedly amend the constitution and also invented a new oath for judges. Around 60 judges refused to take oath to him and he declared them removed from office. Never before in the history of Pakistan had so many judges of superior courts defied a military dictator knowing they would lose their jobs.

The SC judges appointed by him justified the emergency and upheld his amendments even though the SC cannot transfer a power that it does not itself possess to anyone else. As the SC does not have the power to make constitutional amendments it cannot confer this power on anyone. Nonetheless, the hand picked SC declared Musharraf's amendments legal and these amendments in turn legalized the newly constructed Supreme Court. So they became judges in their own cause.

Musharraf added Article 270AAA into the constitution to indemnify all acts taken during the emergency and placed them beyond legal challenge. Additionally, on November 10, 2007 he brought about changes in the Army Act of 1952 so that civilians could also be subjected to a court martial.¹ This, in effect, meant the permanent establishment of

¹ On November 10th, 2007 General Musharraf amended the Army Act of 1952 'to allow the military to try civilians for a wide range of offenses previously under the purview of the country's civilian judiciary.....Under the amended Army Act civilians can now be tried in military courts for acts of treason, sedition and less specific offenses such as "giving statements conducive to public mischief.....Shockinglly, trials of civilians conducted by special military courts under the amended law will not be public,

military courts in the country. Furthermore, on November 24, 2007 he made amendments to the Bar Councils Act of 1973 according to which lawyers could be disbarred from practice by the government.² Previously, the power to disbar lawyers for misconduct lay with the Bar Associations themselves and specific procedures were outlined for disbaring a member. However, now the government could disbar lawyers which in effect meant that citizens had no legal recourse to address their grievances against the government. Lawyers would be afraid to represent citizens in cases against the government for fear of being disbarred. These two changes curtailed the basic rights of citizens namely, the right to be tried by a competent legal authority in a duly constituted law court, and the right to have legal defence in a case involving government excesses. The emergency cum martial law was a direct attack on the judiciary and on human rights as well as on legality.

With the promulgation of emergency and the detention of the judges, widespread protests across the country broke out. Once again the legal fraternity was joined by members of civil society, academics, poets, intellectuals, teachers, students and ‘housewives’ in protesting against the draconian measures. The chant of “Go Musharraf Go” became urgent and intensified. Several major independent media channels were taken off the air so that there was a news blackout. But in the day and age of the internet and cell phones messages and news spread like wildfire. The praetorian state again reacted predictably. Large numbers of Black Coats were arrested, detained and beaten. Along with them members of human rights and women’s rights groups were arrested and put into jails.

investigations will be conducted by military officers, and rules of evidence and procedures prescribed by law and the constitution for civilian trials will not apply...While the Pakistan security forces have long enjoyed impunity for serious abuses, the amendments to the Army Act will exacerbate the problem.’¹ This is a clear violation of the basic human right of citizens to be tried under the regular civil and criminal laws of the country. General Musharraf used the emergency to arbitrarily change laws and amend the constitution single-handedly. With the change in the Army Act of 1952 permanent military courts appear to have been established. All such black laws need to be repealed as they criminalize large numbers of citizens for merely expressing dissent. *Destroying Legality: Pakistan’s Crackdown on Lawyers and Judges*. December 2007. Volume 19, Number 19C. Section V. Human Rights Watch.

² This Ordinance to amend the Bar Councils’ Act was ‘announced by Musharraf on November 24 {and} is intended to end the independence of the Bar Association and to give the government powers to disbar lawyers involved in anti-government activities. It provides the government appointed attorney-general, in his capacity as the chairman of the Bar Association, wide powers over the Bar Association. In an attempt to muzzle the lawyers’ movement, the chairman is authorized to expel from or cancel the membership of any member of a bar association, who is not given adequate opportunity to defend him or her self.....Effectively, this amendment allows the government, at its discretion, to revoke any lawyer’s professional license to practice.’ This change would in effect make it impossible for any citizen to go to court against government excesses for no lawyer would be willing to fight a case against an authority that could potentially revoke his license! Pakistani citizens would thus be deprived of the right to a fair trial for they would find no legal assistance. See *Destroying Legality: Pakistan’s Crackdown on Lawyers and Judges*. December 2007. Volume 19, Number 19C. Section V. Human Rights Watch.

Night after night the defiant activists in Lahore, Islamabad, Karachi and other cities held candle light vigils for the detained judges outside their houses barricaded by barbed wire and ringed by police in riot gear. Virtually every day the protesters found the air permeated with foul tear gas. Beating protesters with batons became a daily occurrence as those with a conscience went to the Judges Colony regularly to express their solidarity with the esteemed jurists fighting for rule of law and justice. All the time the government continued to deny that the judges were under detention as the orders were verbal. There was no written evidence. But no one was allowed to see or meet the judges whose phone lines were cut and cell phones jammed.

Once in Pakistan Benazir Bhutto had realized the public mood and openly expressed her support for CJ Iftikhar Chaudhary and vowed to raise the Pakistani flag on his house again. On November 26, 2007 the Sharif brothers arrived in Lahore adding to the anxiety of the COAS and his establishment. They were received by the sound of the *dhol* and delirious Lahorites who had set eyes on their favorite leaders after a gap of many years. On November 28, 2007 Musharraf finally removed his uniform and became a civilian president. General Ashfaq Pervez Kiyani became the new Chief of Army Staff. One of the most important sources of Musharraf's unlimited power came to an end.

At first the Sharif brothers decided to boycott the election in line with the APDM decision. But the shrewd Mohtarma of the PPP persuaded them to step into the fray to defeat the dictator. The Election Commission rejected the candidacy of the Sharif brothers (excluded from the notorious amnesty called 'national reconciliation') for the polls scheduled for January 8, 2008. Nevertheless, they campaigned for their party candidates especially in the Punjab. The restoration of the deposed judiciary, implementation of the CoD, especially the removal of the 17th amendment, which had indemnified Musharraf's first martial law, were major issues on which the PML (N) of Nawaz Sharif fought the election.

On December 27, 2007 Pakistan lost one of its most popular, charismatic and loved leaders. Benazir Bhutto was shot, bombed and killed after a rousing speech in the same Liaquat Bagh where, many years earlier, another Prime Minister Liaquat Ali Khan had been assassinated. This was the same Bagh where the most popular leader of Pakistan, and father of Benazir, had been hanged after a trial that was globally condemned for violating all the norms and requirements of judicial procedure and precedent. The entire country went into a shock and Sindh, from where Benazir hailed, became an ocean of mourning, rage, helplessness, fear and deep inconsolable sorrow.

On account of the riots and unrest in Sindh due to the assassination of their beloved leader, the elections were postponed to February 18, 2008. At first Nawaz's PML (N) decided to boycott in protest against the heinous murder of Benazir. However, the PPP convinced him to fight the election as "democracy is the best revenge". The PPP had now been 'inherited' by Benazir's son and husband with the former becoming Chairman and the latter Co-Chairman of the party in the style of dynastic politics so often witnessed in South Asia.

On February 18, 2008 the national elections yielded an ethnically-split vote. The PPP came out the largest single party but did not get a simple majority. The PML (N) won mostly in the Punjab, the ANP in NWFP and in Balochistan, owing to the boycott of the nationalist parties the PML (Q) won the majority seats with the PPP coming in second. Politics in Pakistan had become regionalized and ethnicised with the era of broad-based parties representing political and economic agendas being over. However, the PPP did win seats in all four provinces and, with its majority at the Centre it formed the government along with support from Nawaz Sharif's party (the second largest in the Centre) and some other parties.

Lawyers confront the Democratic government

With a democratically elected government in the saddle there was renewed hope and optimism in the country that change would eventually come, even though a powerful president was still at the helm of affairs. There was widespread expectation that the newly-elected government would soon restore the entire illegally deposed judiciary and rule of law would finally replace the law of the ruler. Immediately upon being elected as Prime Minister by a significant majority, Yousaf Raza Gillani of the PPP ordered the release of all the illegally detained judges and this seemed to be an indication that they would soon be restituted.

On March 9, 2008 the new Chariman of the PPP, Asif Ali Zardari and his team met with Nawaz Sharif and his party in Bhurban, Murree to sign a historic accord to restore the judges within 30 days of assuming power through a parliamentary resolution followed by executive action. The entire nation rejoiced and applauded as the two inked the accord that was expected to establish rule of law and ensure a strong and independent judiciary for the first time in sixty years.

As the entire nation joined the lawyers in their countdown to April 30th, the date set for the restoration, strange murmurings and rumblings began to be heard in the corridors of power. In an Executive Committee meeting of the PPP Asif Zardari lashed out at the judges for having become too political and failing to give him justice when he was in jail for long agonizing years without any charge against him being proved in a court of law. The PPP leaders, especially Chaudhary Ahmad Mukhtar, the Defence Minister, began to lavish generous praise on Musharraf for being a "saleable commodity" and bringing much-needed cash to the country. The PPP's lawyers began to sing a tune somewhat discordant with the chorus of the rest of the lawyers.

Senator Latif Khosa, law minister Farooq Naik and Senator Babar Awan of the PPP began to hint that the party was uncomfortable with Chief Justice Iftikhar Chaudhary who might not be restored. As the nation waited with bated breath and time passed at an exceedingly slow pace, dark clouds of doubt and fear began to gather on the legal horizon of the land. There were hints that the April 30th deadline would pass without any action. As frustration over the ominous signs intensified the PPP and PML (N) went into excruciatingly long parleys by committees and sub-committees over the modalities of the restoration.

There were vague mumblings and quiet whispers among political circles that a parliamentary resolution followed by an Executive order was not sufficient to restore the judges and that it would take a constitutional amendment to do so. A lot of people found it hard to understand why a constitutional amendment would be needed to undo a crime, that is, the illegal removal of the judges by a COAS. However, the maverick PPP law minister insisted that it could only be done through a constitutional amendment as executive order could not override a court decision in favor of the November 3 actions. The other side argued that since November 3, 2007 actions were illegal *ab initio* all that was needed was the executive to ensure that rule of law and the constitution were followed. Musharraf's November 3, 2007 had never received indemnity from parliament, therefore such actions could not be declared legal. The judges, therefore, were never removed and simply needed executive assistance in being enabled to return to their offices. However, a party angered by the stay order placed on the NRO (National Reconciliation Ordinance) which had wiped clean its slate and given it a new lease on life, was not about to let a judge return who considered the NRO contrary to the principles of the constitution.

Around the same time a vilification campaign began against the deposed CJ for being political and a fundamentalist. Since he was not to be restored all kinds of arguments had to be devised and formulated, with or without evidence, to suggest that he was not suited for the post. Ironically, Hameed Dogar, the CJ appointed by Musharraf after his demolition of the judiciary, was not considered political despite his open support to the PPP in removing the education condition for candidacy in record time and in upholding the actions of November 3, 2007. The volume of evidence that suggests that the deposed CJ was not 'soft on terrorists' or a religious fanatic was ignored and overlooked even by so-called 'civil society' activists, especially followers of the PPP. The US-backed and Musharraf/military supported smear campaign against the CJ was deployed to prevent restoration as the CJ had taken decisions that suited neither the army, US, Musharraf nor the PPP. In other words, the deal began to show.

April 30th came and went. Nothing happened. Nawaz Sharif, who had fought the election on the judicial restoration plank, tried to desperately convince the PPP to honor the Bhurban Accord but Asif Zardari, in a Geo TV interview, declared it to be merely "a political statement". As the nation waited with bated breath, long, grueling, intensive and hectic parleys took place between the PPP and PML (N) teams to work out the modalities of the restoration – without success. As the deadline drew close, the PPP Chairman took off for Dubai followed by the PML (N) team which implored, pleaded and begged Pakistan's new King to honor the pledge to the people but to no avail. The talks shifted to cold and dreary London with equal and resounding failure.

The PPP seemed more interested in retaining the so-called PCO judges than restoring the *de jure* Chief Justice. In its desperation to fulfill its election promises to the people, the PML (N) agreed to retain the PCO judges along with the *de jure* deposed ones, and extracted another promise from the PPP that the judiciary would be restored by May 12, 2008. Nawaz Sharif returned to Lahore and announced that there was an agreement on

the restitution of the judiciary by May 12, 2008 instilling a cautious optimism in the now skeptical and bruised nation.

May 12th came and passed uneventfully. No restoration. This was the second betrayal by a political government that had spawned much hope in a long-suffering people. The lawyers, who had patiently sat by and put their movement on hold to give the government a chance, started to stir again. But the PPP had no intention of restoring a judge who had challenged their pet NRO – their road to power unencumbered by lawsuits and tainted pasts. The PML (N), which had agreed to be a part of the cabinet on the condition that the judiciary would be restored, finally quit the cabinet posts without withdrawing support for the PPP government. Hope gave way to despair as the country readied itself for another long struggle towards a dream that had evaded them again.

On June 13, 2008 a mammoth crowd of around four hundred thousand people gathered outside the seat of government in Islamabad to demand the restoration of the independent judiciary. Lawyers, activists, teachers, students, workers, professionals and journalists descended on the capital from all the four corners of the country for justice to be restored to Pakistan. The festive, yet charged atmosphere was heady. The entire city reverberated with the chant of “Go Musharraf Go” as the General’s menacing helicopter hovered over the crowd in a reconnaissance flight to gauge the level of a population’s anger. Its loud propeller was drowned out by the hatred on the ground that rang across time and space. People sang, made speeches, cheered and strangers greeted each other with the familiarity of old friends in this show of solidarity for a cause. Banners, posters and placards formed a colorful display of rage on the compound as television anchors ran their shows live from the ground. It was a day to remember, a day that made history, a day that proved that this was a living nation willing to fight for its rights.

Nonetheless, clouds of doubt and mistrust hung low over the Long March. It ended with a controversy over whether there should be a sit-in in front of the parliament or not. The lawyer leaders especially Aitzaz Ahsan and political leaders like Nawaz Sharif opposed the *dharna* (sit-in) for fear that it would signify that the crowd was against the elected parliament rather than an illegally elected president, their main tormentor. The sit-in controversy began what was to become a split in the lawyers’ movement. Many young and eager lawyers were dismayed. People were nonplussed and wondering what had happened to stop the sit-in. Rumors floated around that Asif Zardari had telephoned Aitzaz Ahsan and told him to call off the sit-in. Accusations were hurled at the leadership for selling out the lawyers.

By now the PPP lawyers had begun to split the movement. Those belonging to the People’s Lawyers Forum, who had earlier taken a lead in the movement, began to talk against the deposed CJ and to argue that a constitutional amendment was necessary for the judges to be restored and that a parliamentary resolution followed by executive action was not sufficient. Latif Khosa of the PPP was rewarded with the lucrative and powerful post of Attorney-General and Babar Awan became a minister for parliamentary affairs. At the same time the PPP floated a massive constitutional package designed to further

subordinate the judiciary to the executive and to further strengthen presidential powers.³ An elected government seemed to be as fearful and therefore as reluctant, to restore the judiciary as an unpopular military dictator. Independent judges can be ‘troublesome’ not just for dictators but also for corrupt though legally elected leaders.

Early in August 2008 the leaders of the PPP and the PML (N) met again to try to resolve the seemingly intractable issue. This time Asif Zardari in reality wanted support in becoming president by removing Musharraf. He made yet another promise to restore the judges immediately after the removal of Musharraf through impeachment. It was merely a tactic to bring the PML (N) on board to vote for the impeachment. But wary of broken promises and betrayals the PML (N) tried to get iron clad guarantees of judicial restoration immediately following impeachment by getting it in writing, signed and sealed as a solemn pledge. The PPP was also reminded of the CoD and the promise to revoke the 17th amendment, especially 58 (2) b (the presidential power to dismiss an elected assembly). If these were removed the PML (N) would not object to anyone becoming president, but in their presence the president would be chosen by mutual consent and consultation, preferably from a smaller and alienated province such as Balochistan.

Following this apparently iron-clad guarantee all the four provincial assemblies, which form the electoral college for the president, passed near-unanimous resolutions for Pervez Musharraf to step down or face impeachment. Musharraf desperately looked hither and thither for help from the Americans, the military and his hand-picked Supreme Court. This time his friends closed the door on him. They had moved on towards serving the new King of Pakistani politics, Asif Zardari. Alone, betrayed and bitter, the once blustering, fist-showing, arrogant and egotistical dictator finally resigned on August 18, 2008 after a lackluster and insipid speech about his ‘glorious’ contributions. The nation heaved a sigh of relief after the long, dark night that lasted over eight years.

One of the main aims of the lawyers’ struggle had been met. The “Go Musharraf Go” chant that had reverberated across the length and breadth of the country had finally forced an obtuse and obstinate autocrat to bite the dust. Musharraf did go, but the CJ did not come back. The other half of the struggle remained. Once again, for the third time, Asif Zardari made an about-face. He refused to restore the judges once again and attributed this third betrayal to “some friends who had helped in getting rid of Musharraf” and who were not interested in the return of Iftikhar Chaudhary. This was too big a blow for the PML (N) which was certain that Zardari would not let them down again. The PML (N) transformed itself from a government-supporting party to the main opposition. When Zardari put himself up for election as president, Punjab was the only province where he did not win and his rival, Justice Saeed-uz-Zaman Siddiqui, won more votes. All the other three provinces gave Zardari a massive and unchallenged mandate.

Zardari had achieved his real purpose. He did not need the PML (N) anymore. He did not need to restore the judges anymore. In the Punjab he assigned the Governor, Salman Taseer, the task of ensuring that the PML (N)’s government remained unstable and

³ Saigol, Rubina *Constitutional Package 2008: A Critical Appraisal*. AURAT Foundation. June 2008.

shaky. The volleys of verbal attacks by Taseer against the Sharifs are ample testimony of the desire to dislodge the government of Shahbaz Sharif and replace it with some kind of alliance between the discredited PML (Q) and the PPP. In order to save his government in the Punjab, Nawaz Sharif took on a mantle of studied silence on the issue of restoration. The issue of justice thus fell prey to party politics and shady deals between the politicians, the military, the USA and vested interests.

Following his election as president, Asif Zardari and his legal eagle, Farooq Naik invented an ingenious scheme for judicial restoration which set aside their own argument that a constitutional amendment was required. They began to reappoint the judges as fresh appointments but with the same seniority as they held when they were deposed. This was a clear constitutional violation of seniority rules but whenever it suited the PPP government it had no qualms in decimating the constitution. On the other hand, when it did not suit their vested interest they kept lamenting that they could not violate the constitution by restoring judges through an executive order. They continued to speak from all sides of the hydra-headed monster's mouth. Through this anomalous mechanism they managed to bring back several judges except the few who preferred to follow the dictates of their conscience. Reappointment of the judges was a tacit acceptance of the actions of November 3, 2007. It meant that Musharraf's wrongful dismissal was accepted and his action indemnified. This was the greatest danger in this newest ploy by the party that in the past had always fought for democracy.

Late autumn of 2008 saw Aitzaz Ahsan's term as President Supreme Court Bar Association coming to an end. With the election of Ali Ahmad Kurd, the fiery leader and famed 'lion' of the lawyers' movement, as the new SCBA president it is promised that a new wind will be added to the sails of the waning movement. The enthusiastic response to Kurd's election, the euphoria surrounding his victory despite the government-engineered move to enable his rival candidate to win, injected some fresh blood into the movement. Kurd promises to go full swing ahead for the restoration of the Chief Justice but it remains to be seen how things unfold. The struggle goes on.

Part II

Part I of the paper was mainly a description of how the movement for judicial independence and rule of law began in 2007 and its status today. In part II we can try to unpack some of the discourses around judicial issues that arose prior to this movement but have been sharpened and deepened by it. The exploration here is tentative as the movement is too recent and current for a detached analysis to take place. At some future date this movement is bound to be thoroughly analyzed by legal experts and others. Right now one can offer some initial insights into the reasons why things happened the way they did by delving into the past where it all began.

Inter-institutional conflicts and the 'doctrine of necessity'

I sincerely wish... we could see our government so secured as to depend less on the character of the person in whose hands it is trusted. Bad men

will sometimes get in and with such an immense patronage may make great progress in corrupting the public mind and principles.

Thomas Jefferson (1801)

The conflict between the COAS-President and the Chief Justice that became a conflagration in 2007 did not arise suddenly, nor was it a merely a disagreement between two stubborn, incorrigible and hard-headed men. The dispute has its origins in Pakistan's early history when struggles for democracy became sharpened against forces attempting to subvert democratic development in the country. According to Baseer Naveed of the Asian Human Rights Commission:

In 1954, just seven years after the creation of Pakistan, Governor General Ghulam Mohammad dissolved the first constitutional assembly and the government of Prime Minister Khawja Nazim Uddin. The president of the assembly, Moulvi Tamiz Uddin, challenged him in the Sindh High Court and won: the dissolution was held to be illegal and unconstitutional. On appeal to the Chief Court of Pakistan, which was later renamed the Supreme Court, Chief Justice Munir decided in favour of the governor general. The basis for his decision was the "doctrine of necessity": meaning that to preserve the country the constitution had to be abandoned...From this point on, a so-called doctrine, rather than the constitution, national or international law, became the basis for every decision on the legitimacy of a military takeover. With one blow, Chief Justice Munir destroyed the foundations of constitutional rule in Pakistan. In one move, he opened wide the door for the army to walk into government any time it wanted.....Since Chief Justice Munir sacrificed constitutional law for expediency, the judiciary of Pakistan has been forced into a role not as the arbiter of justice but as the defender of the armed forces. However illegal or unconstitutional its actions may be, under the doctrine of necessity the army can do no wrong. The doctrine can at any time be used to throw out an elected government and keep the constitution in abeyance. Under these circumstances, the people of Pakistan can only ask, what is the point of an election or a constitution at all?⁴

In his verdict, Justice Munir declared that it was necessary to go beyond the constitution to what he claimed was the Common Law, general legal maxims, and English historical precedent. He relied on Bracton's maxim 'that which is otherwise not lawful is made lawful by necessity', and the Roman law maxim urged by Jennings, 'the well-being of the people is the supreme law.' Justice Munir, in Maulvi Tamizuddin Khan's case, declared that the Assembly was not a sovereign body and that the Constitutional Assembly had 'lived in a fool's paradise if it was ever seized with the notion that it was the sovereign body of the state.'

Munir was not able to find in the dominion constitution any empowerment of the Governor General which allowed his dissolution of the Constitutional Assembly. But this he dismissed as a 'lacuna' in the Independence Act. He insisted that to understand the role of Pakistan's Governor-General it was necessary to go 'far back in the history and to trace the origin and development of the British Empire itself.'⁵

According to Allen McGrath, author of the *Destruction of Pakistan's Democracy*, 'when Justice Munir denied the principle of the Assembly's sovereignty, he destroyed Pakistan's

⁴ Naveed, Baseer. *The Doctrine of Necessity and Pakistan's Poodle Judiciary*. AHRC. Posted 6-19-2006.

⁵ Ghazali, Abdus Sattar. *Hegemony of the Ruling Elite in Pakistan: Judiciary and Politics in Pakistan*. <http://www.ghazali.net/book3/ch4/ch4.html>

existing constitutional basis. He did further harm when he did not indicate where sovereignty resided. He thereby created a vacuum which was an opportunity for Ghulam Mohammed. The absence of a constitutional foundation is a harm which has lived on in Pakistan since Ghulam Mohammad left office.’⁶

In further elaborating the questionable principle of state necessity, Chief Justice Munir observed: "Subject to the condition of absoluteness, extremeness, and imminence, an act which would otherwise be illegal becomes legal if it is done bona fide under stress of necessity, the necessity being referable to an intention to preserve the Constitution, the state, or the society, and to prevent it from dissolution, and affirms...that necessity knows no law...necessity makes lawful which otherwise is not lawful."

According to Ghazali, ‘three years later, in 1958, the same Chief Justice placed a judicial stamp of approval on President Iskandar Mirza's action to dissolve the parliament and abrogate the 1956 constitution. Chief Justice Munir's decision in *Dosso v. Federation of Pakistan*, case set the constitutional stage for General Ayub Khan's 1958 military takeover of the government, which took place one day after the court's decision was announced.’⁷ In 1958 when the assembly was dissolved by Iskandar Mirza and the country placed under martial law, Justice Munir was ready again to provide a judicial stamp of approval by invoking the notion of a necessary revolution. In the case of *Dosso v. Federation*, Justice Munir observed:

It sometimes happens, however, that the Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing constitution but also the validity of the national legal order...For the purpose of the doctrine here explained, a change is, in law, a revolution if it annuls the constitution and the annulment is effective...Thus the essential condition to determine whether a constitution has been annulled is the efficacy of the change...Thus a victorious revolution, or a successful coup d'etat is an internally recognized legal method of changing a constitution...After a change of the character I have mentioned has taken place, the national legal order must for its validity, depend upon the new law-creating organ. Even courts lose their existing jurisdiction and can function only to the extent and in the manner determined by the new constitution...If what I have already stated is correct, then the revolution having been successful, it satisfies the test of efficacy and becomes a basic law-creating factor.

Ghazali reveals that Justice Munir attempted to garner respectability for his legal theory of revolution by claiming it was based on Hans Kelsen's *The Pure Theory of Law*, but Kelsen subsequently took pains to deny that his work could serve as a basis for Munir's theory of revolution. According to Venkatesan

Today, in law schools across the world, the study of jurisprudence is deemed incomplete without a discussion of Hans Kelsen's *Grundnorm*, or the basic norm, thesis. The Pakistan Supreme Court is credited with the first invocation of this thesis to uphold the validity of a coup headed by Iskandar Mirza, who was President of Pakistan under its first Constitution (1956). Since then, the theory has been applied in similar situations in other

⁶ Ghazali, Abdus Sattar. *Judiciary and Politics in Pakistan*.

⁷ Sattar. *Judiciary and Politics in Pakistan*.

countries. In his main work, *General Theory of Law and State* (1946), Kelsen advances his case for a *Grundnorm* from which the entire legal system derives its validity. He argued that a successful *coup d'état* or revolution could create a new basic norm and, therefore, could be the supporting plank for a "new legal order". Once the revolution was shown to be efficacious in nullifying the old basic norm, it had to be regarded as a law-creating fact giving validity to a "new legal order".⁸

However, Kelsen's theory was itself later repudiated by Pakistan's Supreme Court. In the Asma Jilani case in 1972, Justice Munir's interpretations supporting military takeovers were overturned by the Supreme Court. The Supreme Court declared that General Yahya Khan had usurped power, and that his action was not justified by the revolutionary legality doctrine. Consequently his martial law was illegal. The court, after its detailed reasoning, came to the conclusion that, "With the utmost respect, therefore, I would agree with the criticism that the learned Chief Justice (Mohammad Munir CJ) not only misapplied the doctrine of Hans Kelsen, but also fell into error that it was a generally accepted doctrine of modern jurisprudence. Even the disciples of Kelsen have hesitated to go far as Kelsen had gone...I am unable to resist the conclusion that Mohammad Munir erred both in interpreting Kelsen's theory and applying the same to the facts and circumstances of the case before him. The principle enunciated by him is wholly unsustainable."

In the Jilani case, argues Venkatesan, the court stated that 'Kelsen could not have intended to lay down that "every person who was successful in grabbing power" could claim to be the source of law and sovereignty. On the contrary, he meant to say that the state was not above the law and that might did not make right. Besides, his theory required that an effective Constitution be in existence in order to give validity to any rule made under it. Therefore, the Kelsenian concept that the efficacy of a law would *ipso facto* confer legality upon it was expressly repudiated.'⁹ The court, in Venkatesan's view, almost 'emasculated the doctrine of necessity in the Jilani case. The court's pronouncement that the army regime was illegal could have meant invalidation of a considerable number of actions that took place under its authority. The doctrine of necessity, therefore, came in handy in order to avoid damage and inconvenience on so large a scale. This doctrine gave to *de facto* actions the same status as *de jure* ones. But the court limited the doctrine's application.'¹⁰

Asma Jilani case was a measure of victory for democratic forces vying against illegal usurpers and an attempt by the judiciary to free itself of the stranglehold of authoritarian and praetorian power. It seemed at that point that some balance had been restored between the relative powers of various institutions of the state with the judiciary taking a stand independent of the armed forces. Justice Yakub Khan commented that the previous judgments of the court in cases of illegal takeovers had converted the country into an autocracy and military dictatorship. He openly observed that Iskandar Mirza and Ayub Khan had committed treason by abrogating the constitution of 1956 and forcibly taking over the reigns of government.

⁸ Venkatesan, V. 'Coups and Courts'. In *Frontline*. Volume 24, Issue 23, November 24-December 7, 2007.

⁹ Venkatesan, V. 'Coups and Courts.'

¹⁰ Venkatesan, 'Coups and Courts'.

Nevertheless, this victory was not long lasting and on November 10, 1977 the Supreme Court once again validated the imposition of martial law invoking the infamous ‘doctrine of necessity’. In its judgment dismissing Begum Nusrat Bhutto’s challenge against the detention of Prime Minister Zulfikar Ali Bhutto and ten others, the Supreme Court, headed by Justice Anwar-ul-Haque, observed that massive rigging of the 1977 national elections had led to a breakdown in law and order making it necessary for the armed forces to intervene to save the country and thus allowing the court to validate the action of military takeover. Arguing that the Chief Martial Law Administrator, General Zia, had only taken over to ensure fair and free elections under the 1973 constitution and that no wrong or *mala fide* intention could be imputed to his action, the court observed that:

In the presence of these unambiguous declarations, it would be highly unfair and uncharitable to attribute any other intention to the Chief Martial Law Administrator, and to insinuate that he has not assumed power for the purposes stated by him, or that he does not intend to restore democratic situations in terms of the 1973 constitution.

General Zia ruled the country for eleven years until his flight into oblivion on August 17, 1988. Virtually every institution of state and government was destroyed in his frenzied attempts to legitimize his rule through a misguided ‘Islamization’ that gave Pakistan the scourge of religious extremism and terrorism. He was generously aided in his demolition of Pakistan’s institutions by the Reagan administration, who gave his government four billion dollars to create religious extremists and a terrorist force on the borders of Afghanistan and Pakistan. The judiciary had once again aided and abetted the institution of the armed forces against the people and democratic forces of Pakistan. Subsequently, the domination of the army continued and the SC remained its adjunct, as is evident from one of the cases - the Federation of Pakistan v Saifullah Khan case in which the Supreme Court held that the dismissal of Mohammad Khan Junejo's government by General Zia in May 1988 was unconstitutional but it refused to restore the National Assembly.

The bureaucracy was not to remain behind the army in demolishing elected institutions. In 1990 Ghulam Ishaq Khan, a wily old bureaucrat dismissed Benazir Bhutto’s government and she received no relief from the courts. In 1993 the same bureaucrat dismissed the government of Nawaz Sharif and the Supreme Court headed by Justice Nasim Hasan Shah overturned the dismissal but both Nawaz Sharif and Ghulam Ishaq Khan were persuaded to leave by the ultimate power brokers in Pakistan, the army generals. However, Ghulam Ishaq Khan’s successor, Farooq Ahmad Khan Leghari, a political animal raised within the PPP itself, dismissed the PPP’s government led by Benazir Bhutto in November 1996. The article 58(2) b inserted into the constitution by General Zia became the nemesis of democracy and allowed virtually every president to dismiss elected assemblies and install themselves as omnipotent heads of state. In spite of the fact that this Article was revoked by the National Assembly in 1997, the feat of dismissal of elected governments was next accomplished by Pervez Musharraf in October 1999 when he removed Nawaz Sharif from office in a military coup once again and forced him into exile.

The politicians were not innocent in this game of chess between democratic/elected and undemocratic/non-elected forces, as they kept inviting the army to intervene against each

another and invariably became part of palace intrigue and conspiracy. The pliant parliamentarians continued to oblige the powerful military by indemnifying its interventions through constitutional amendments. General Zia forced the Eighth amendment to provide cover to all his illegal acts and General Musharraf extracted the Seventeenth amendment to give a stamp of legitimacy to his misdeeds.¹¹ There seemed to be collusion between the ruling classes, military and civil bureaucracy, politicians, landlords, capitalists and technocrats to ensure class continuity in power.

Every time a coup was staged, the new occupant of the Presidency issued a Provisional Constitutional Order (PCO) for which there was in fact no provision in the constitution. The latter document does not provide for its own abrogation. Each time a PCO was issued, judges had to take new oaths violating their previous oaths under the constitution so that they could then give judgments in favor of the new incumbent in the presidency. A few judges responded to the call of conscience and refused to take oath and were thus forcibly retired. However, each time others chose to take oath under the PCO in order to retain their jobs.

Iftikhar Chaudhary was one of the judges who did take oath at the time of Musharraf's first coup in 1999. However, when Musharraf promulgated his emergency cum martial law of November 3, 2007 around sixty judges of the superior courts, including Iftikhar Chaudhary, defied him and refused to take oath under his new PCO. For the first time in the history of the blighted land, the superior judiciary was on a collision course with the army and its generals. In the past a few individual judges did refuse PCO oaths, but in November 2007 the number was so large that the entire superior judiciary was demolished with one sleight of hand by an immensely power-hungry dictator adamant to continue in office for another five years.

The brief historical account of the judiciary's alternating accommodation and confrontation with the army demonstrates that the dispute between General Musharraf and Iftikhar Chaudhary, was not merely a personal one between two individuals; nor was it based simply on individual egos and obduracy. It was primarily a conflict between two widely divergent worldviews reflecting a clash of paradigms. General Musharraf and his institution, the army, were aiming at the prolonging of one-man rule – a continuation of absolute dictatorship with the parliament as a mere rubber stamp to legitimize the arbitrary actions of the ruler and give it a democratic façade. The Chief Justice, on the other hand, was standing up for rule of law in place of law of the ruler. He was seeking adherence to the constitution in letter and spirit. The paradigm of rule by systems, institutions and laws was in conflict with the opposing paradigm of one man's arbitrary and absolute rule.

The increasing tendency to present the conflict as one between two obstinate and egotistical individuals was either a simplistic understanding or a deliberate attempt to obfuscate the issues. Irrespective of the two individuals involved, the underlying principle was one of constitutional rule as opposed to law of the jungle in a Hobbesian

¹¹ Article 270A was inserted to indemnify General Zia's takeover and Article 270AA indemnified General Musharraf's first military intervention.

state of nature. Had it been two different individuals, it would not matter as the principle would remain that rule by institutions, by law, by many rather than one is democratically superior to one man's whims and fancies. Therefore arguments about who was the better man were completely misguided and irrelevant. Even if one supposes, for the sake of argument, that Musharraf was a much better man than Chaudhary (not true in reality), it still does not matter as the two represented opposing systems. The army represents authoritarianism, hierarchy, strict obedience to command, violence, war, weapons and total submission to seniority. The Supreme Court represents justice, equality, fairness, equal application of law to everyone, impersonal treatment, impartiality and security of people's rights. This, of course, is an ideal version of the Supreme Court and in reality it may deviate greatly from this vision as we have seen above. Nonetheless, the two institutions appear to operate along mutually exclusive and contradictory principles. The Supreme Court is entrusted with the task of protecting the constitution and people's rights but the army often imposes martial law by canceling the constitution and violating rights in order to rule with an iron hand.

The tension between the two institutions is almost built-in into their structures, functions and principles of operation. In the past the Supreme Court had invariably bowed its head in front of the army and found ways of reinforcing and justifying the military's use of intemperate and illegitimate power. Iftikhar Chaudhary, in the moment of his existential "No", tried to rupture the old pattern of collusion and write a new chapter in the history of justice. Going from collusion to collision with the army, Iftikhar Chaudhary the person receded, and Iftikhar Chaudhary the symbol became the pivot around which a tired and helpless nation came together.

Class interests of rulers

It is the responsibility of the patriot to protect his country from its government.

Thomas Paine

The question still remains why General Musharraf decided to dismiss the Chief Justice on that fateful day in March 2007. There are many theories addressing this question and as time passes many more will be posited. Here I wish to postulate that the fundamental reason for the dismissal of CJ Iftikhar Chaudhary was that the class interests of the interrelated ruling classes of Pakistan were threatened. The reason that the current government has failed to restore him is exactly the same – Chaudhary challenges the unbridled use of class power exercised against the poor and hapless citizens of Pakistan by all rulers be they civil, military, political, economic or social elites. His efforts to provide relief to those who cannot afford the expensive justice system came to be labeled 'judicial activism' in a pejorative way.

Iftikhar Chaudhary took decisions and actions that threatened the economic might of the entrenched Pakistani elite that is used to corrupt deals to make millions from the money that belongs essentially to Pakistan's public. The scandals with regard to land grabbing, money laundering and kickbacks involving politicians, generals and bureaucrats are innumerable and cover the pages of national dailies on a regular basis. However, since few trails are left and the ruling classes have enough clout to ensure cover ups, most

white collar crimes go unpunished. The millions that are raked in often find destinations in off shore banks with few, if any, tracks left. Accountability processes and mechanisms are notoriously weak and often used only against the political opposition or rival groups. Often it becomes hard to unearth major scandals and they come to light only when a party is out of power, for example, the massive land allotted to the JUI (F) by Musharraf to buy support for the 17th amendment has only recently come to light.

Chief Justice Iftikhar Chaudhary had the propensity to either take *suo moto* notices of a scam in the making and thereby preventing it, or he would deal strictly with cases against the powerful that were brought before him. One of the most well-known cases was the attempted sale of Pakistan's national asset, the Steel Mill, at a throwaway price to the cronies of Musharraf and former Premier Shaukat Aziz. The sale was proceeding quietly, without transparency or accountability. Once CJ Iftikhar Chaudhary learned about it, his court banned the sale causing the loss of potential economic gain for some of the friends of former masters of Pakistan. The President and the Prime Minister were incensed and accused the Chief Justice of interfering in the privatization program of the government.

The deposed CJ did not spare the powerful Chief Minister of the Punjab, Pervez Elahi, another close associate and rabid supporter of the dictator. Pervez Elahi was happily going forward with his pet 'New Murree Project' which would have been an environmental disaster for it involved the cutting down of thousands of trees thus depriving Pakistan of its already meager forest cover. Chief Justice Chaudhary stopped this project from going forward as human rights activists and environmentalists campaigned against the destruction of Pakistan's precious forest cover.

Pakistan's powerful political and economic elite often comes from feudal and tribal backgrounds where women are bought, sold, exchanged and 'given away' as peace offering to settle disputes. CJ Iftikhar Chaudhary had taken strict notice of such practices and ordered the recovery of young girls given away in customs such as *vani* and *swarah*. One such case was that of Mir Hazar Khan Bajarani who in 2006 was a member of a *jirga* (tribal courts with no legal standing) that ordered the giving away of five little girls, aged two to five years, in marriage to settle a tribal dispute. CJ Iftikhar Chaudhary took *suo moto* notice of the crime thus enraging another member of the powerful ruling elite of Pakistan. Bajarani has been rewarded by being made minister of education in the PPP government's 55-member cabinet. Israrullah Zehri, who openly supported the burying alive of five women in Balochistan for honor, also belongs to the PPP and has been made minister for postal services! Similarly, PPP representatives Sattar and Fateh Umrani were believed to be directly involved in the blood-curdling incidence of violence and live burial of women but no action was taken – CJ Iftikhar was there no more.

Iftikhar Chaudhary had the audacity to challenge not only the secular ruling elite of Pakistan he also overturned major actions by the entrenched fundamentalist and religious elite of the country. In 2005 the NWFP provincial assembly passed the Hasba Act, which would have allowed the government to determine vice and virtue and punish people accordingly. It would have led to a version of 'Islamization' that contradicted the basic law of the land. Finding many of its provisions contrary to the fundamental rights chapter

of the constitution, the court of Iftikhar Chaudhary struck it down as *ultra vires* of the constitution. Maulana Fazl-ur-Rehman's opposition to his restoration is not hard to comprehend. And of course Zardari's opposition to restoration is widely believed to be based on the stay order that the deposed Chief Justice placed on the NRO.

The deposed Chief Justice was not averse to taking on even global superpowers for the sake of defending the constitution and rights of the people of Pakistan. He took very strong notice of the 'missing people'- Pakistan's disappeared who have landed in secret American prisons to be subjected to torture. All this has been done without regard for due process, human rights and justice; or the principles of right to a fair trial and presumption of innocence until guilt is established by a competent legal authority. On page 237 of his autobiography *In the Line of Fire*, Pervez Musharraf boasts

We have captured 689 [members of Al Qaeda] and handed over 369 to the United States. We have earned bounties totalling millions of dollars. Those who habitually accuse us of 'not doing enough' in the war on terror should simply ask CIA how much prize money it has paid to the government of Pakistan.

Despite such confessions of crimes by the former dictator of Pakistan, he has not been brought to justice and Pakistan's present rulers make pious announcements that they have forgiven him for crimes unlimited! (*The News*, November 12, 2008). They do not specify when and where the citizens of Pakistan allowed them to forgive on their behalf. Accountability requires that the government should 'include in the charge-sheet against the General his admission of carting individuals to the US in utter disregard of our legal and constitutional provisions.'¹² Harvard educated lawyer, Babar Sattar, rightly asks:

Can a government indulge in a trade more reprehensible than trafficking citizens? The general states...that "the policy followed by Pakistan on the extradition of foreigners has been first to ask their countries of origin to take them back. If a country of origin refuses (as is normally the case), we hand the prisoner over to the United States." Whence did the general derive this authority to script his own extradition policy? Did no one tell this man – who, to the misfortune of our troubled land and its battered populace, has been at the country's helm for too long – that in Pakistan the extradition of citizens and foreigners alike is governed by a law called The Extradition Act, 1972? This law mandates that "every fugitive offender shall be liable to be apprehended and surrendered in the manner provide in this Act."¹³

CJ Iftikhar had not unilaterally assumed the right to forgive crimes of such a heinous nature. He was demanding that the mysteriously 'disappeared' be produced in a court of law and be proceeded against according to legal requirements. He had ordered Pakistan's many secret agencies, busy picking up people and selling them to the US, to produce the 'missing persons' whose relatives were knocking on his door for justice. The US administration, obsessed with the cruel farce called 'war on terror', was annoyed that a mere Chief Justice of a poor country had the gall to demand the production of missing citizens. The US was much too eager to support its favorite dictator and keep him in

¹² Sattar, Babar. 'Peddle-a-Citizen Inc.'. Legal Eye. *The News*. August 16, 2008.

¹³ Sattar, Babar. 'Peddle-a-Citizen Inc.'. Legal Eye. *The News*. August 16, 2008.

power to worry over small things like justice, fair play, due process, human rights and the right to a fair trial.

It was only after Yvonne Ridley, a British journalist, broke the story of Afia Siddiqui, a Pakistani American reportedly abducted by secret agencies from Karachi and handed over to the US, that there was uproar in Pakistan about its citizens being kidnapped and their rendition to a place of legalized torture. Afia Siddiqui was apparently kept at Bagram airbase in Afghanistan and subjected to rape, torture and beatings. Iftikhar Chaudhary was mainly punished for insisting that Afia Siddiqui and others like her be produced in court and heard in a fair hearing. In their maddened quest for 'terrorists' in the so-called 'war on terror', the US and Pakistani administrations had lost common sense, a belief in justice, respect for due process, regard for fairness and an understanding of human rights.

Irrespective of whether it was minor girls being trafficked for dispute settlement, missing persons being trafficked by a dollar-hungry ruling elite, hacking away trees to create resorts for the very rich, selling off national assets heartlessly to friends, or demanding the release of Munoo Bheel, a poor Hindu Hari kidnapped by powerful landlords, CJ Iftikhar found himself in the position of challenging the class power of the very rich. He also found himself defending religious minorities when a park belonging to the Christian minority was being taken away and the deposed CJ stopped it. And he defended citizens against the imposition of laws like the Hasba Act which would have rendered them helpless against the religious mafia in the country. It is not surprising that he made so many enemies – religious leaders, the military, the dictator, politicians, landlords, tribal chiefs, child traffickers, in short, all those who stood to gain from the absence of rule of law and justice. Such an impediment to the unfettered exercise of class power had to be removed.

The totally illegal removal (both times) was justified by accusing the deposed Chief Justice of various irregularities and by a systematic campaign of demonizing. General Musharraf went around carrying petrol receipts worth around rupees 28,000 (USD 333) that the judge had supposedly 'misused' and he showed these to foreign journalists while staying at public expense in London at a hotel that cost rupees two million a night! On the other hand the General has never explained how his army salary managed to buy him a house worth rupees 300 million (USD 357,142) in Chak Shahzad in Islamabad. The alleged corruption by the deposed CJ was spread around through media friendly to the General but there were not many takers.

The deposed CJ Iftikhar Chaudhary was also demonized as a religious zealot who was 'soft' on terrorists. The evidence provided for this was that he ordered the release of the Lal Masjid 'terrorists' after the General's massacre of women and children during Operation Silence. The supporters of the CJ revealed that the secret agencies and the government failed to produce evidence against those arrested and legal procedure did not allow them to be kept in jail. The CJ characteristically followed the law and constitution which state that no person can be kept incarcerated without charges being brought against her/him. Some newspapers reflected that the government deliberately did not bring

charges against the people who had been arraigned knowing that the CJ would be forced to order their release. This was done it was speculated, to put him in a bad light. Facts aside for a minute, it seems logically inconsistent that a Chief Justice who had struck down the Hasba Act would go out of his way to protect terrorists on religious basis. His being a religious man (as most people in Pakistan are without being terrorists) was used against him.

Another charge that was invented by the PPP government for its failure to reconstitute the Chief Justice was that he had become too 'political' and 'controversial' as he had led rallies and made speeches. Again the supporters and the legal fraternity claim that Iftikhar Chaudhary only addressed the Bar Associations which invited him as their Chief. He did not address a single political rally. In fact each time people in large numbers joined a rally or gathering, the CJ refused to speak. Wherever his caravan went, people spontaneously turned out to greet him, to see the face of the man who had come to represent dissent, justice and conscience in the public imagination. He had stood up to power – he said dared to 'speak truth to power'. He was an icon around whom the rage of eight years had crystallized. People came out to catch a glimpse of the awkward-looking, diminutive, frail, unassuming man who had demonstrated the courage to stand up to an army of boots lined up to frighten him.

It was alleged that CJ Iftikhar had the support of certain political parties therefore he should not be restored. What was *not* said was that the Musharraf-installed CJ Hameed Dogar too had the support of some parties, mainly the PPP and of course, the army. What was *not* said was that by justifying the acts of November 3, 2007 Hameed Dogar had become a party and was therefore not impartial or neutral. The justification of the acts of November 3, 2007 was also an extremely political act, and a highly partisan one, which benefited the Dogar court itself. He was thus a judge in his own cause. CJ Dogar had also 'permitted' Musharraf to make constitutional amendments when the Supreme Court itself has no power to make constitutional amendments and therefore cannot confer this power on anyone else. The parliament's prerogative to make constitutional amendments was thus usurped apart from usurping the position of the Chief Justice. Those accusing CJ Iftikhar of being political never once mentioned that Hameed Dogar was political to the core and completely aligned with the powers of the day.

In these times of moral ambiguities and complexities, in these times of the decay of the values of justice and fair play, in these times of a failure to distinguish between right and wrong, in these times of the erosion of the boundaries between legal and illegal, in these times of the blurring of the barriers between principles and expediency, in these times of 'all is fair in the war on terror', the lawyers' movement swings between hope and despair, victory and challenge, success and renewed battle. But it has not lost heart. In the person of Ali Ahmad Kurd the movement has gained a proverbial lion. In the person of Iftikhar Muhammad Chaudhary, there is a beacon of light showing the way.
