REFLECTIONS ON THE JUSTICE SYSTEM OF PAKISTAN

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PAKISTAN LAW HOUSE

Zia Ullah Ranjah is Advocate Supreme Court of Pakistan. He holds a doctorate in law. He worked with RIAA Barker Gillette before establishing a law firm, Jurist Panel. He has appeared in a number of cases before the superior courts of Pakistan. He has published in prestigious international and national law journals such as the Asian Yearbook of Human Rights and Humanitarian Law, Brill, Journal for Law and Islam, Germany, South Asia Journal, and LUMS Law Journal. His opinions are published in influential newspapers including DAWN, The News, and The Friday Times.

He has the honour of delivering lectures at National Defense University, International Islamic University, Foreign Service Academy, National Police Academy, Civil Services Academy, Punjab Judicial Academy, Pakistan College of Law and Punjab University Law College. He was invited as a visiting scholar at SOAS, University of London. He has attended the Hague Academy of International Law courses. He also worked as a consultant in a Legal and Judicial Reforms Project in Pakistan conducted in collaboration with the Asian Development Bank.

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DR ZIA ULLAH RANJAH

ADVOCATE SUPREME COURT

فَأَصْلِحُوا بَيْنَهُمَا بِالْعَدْلِ وَأَقْسِطُوا إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ

So, reconcile between them in justice and fairness. Verily,
Allah loves those who are just. (49:9)

DEDICATION

To the members of the legal profession

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FOREWORD

I have the pleasure of reading the compilation of articles/columns on legal subjects authored and compiled by Mr. Zia Ullah Ranjah, which were published in leading daily newspapers like 'DAWN' and 'The News' and weekly 'The Friday Times'. This compilation is rich in ideas and attends to divergent legal topics and subjects. A common thread in these articles is modern and liberal legal thought of the author. He has a reformist approach towards important issues facing the legal system in Pakistan.

It is indeed appreciable that in these times of shrinking readership, particularly amongst the members of the legal fraternity, Mr. Ranjah is writing consistently about current and contemporary issues and controversies on the legal and judicial system of Pakistan.

The problems encountered by members of the legal fraternity can only be resolved by meaningful debate amongst judges, lawyers and academicians, with greater freedom of expression and frequency of interaction. Presently, the legal system in Pakistan is in serious disarray, like the state of affairs in other fields of public life. Mr. Ranjah has touched

upon various factors responsible for this unfortunate state of confusion being faced by judges, lawyers, litigants and academicians. His sensitivity towards these concerns in the backdrop of insensitivities of the system is commendable.

Why is the legal system in disarray? Is it a systemic failure? If so, who, among the important players, are responsible for it? To what degree can these failures be identified and, if so, rectified? All these questions need an immediate response.

Out of the principal players; judiciary, being the ultimate holder of judicial power, has the main responsibility. It is universally acknowledged that power has the tendency to corrupt its holders and that checks and restraints are needed to curb its excesses. The judicial power is no exception to this phenomenon. The way to reduce the possibility of abuse and misuse of the power is to minimize the discretion and to bring it within the confines of well-defined principles and precedents. When restraints are missing, the judicial power degenerates and the judges exercise it the way they choose. However, the judges do not want to impose any restraint on the exercise of their own powers as is obvious from the manner of exercise of powers and jurisdiction by the Supreme Court under Article 184(3). The judges ought to realize that the unbridled exercise of judicial powers is the nearest thing to tyranny.

In Pakistan, 'power' is equated with 'wisdom' and 'discretion' with 'arbitrariness'. Judicial power and discretion is no exception in this behalf. Men in authority tend to assume that they are fountains of knowledge and wisdom. Sometimes, they are made to believe so by sycophants around them. It is the people in Pakistan who become victims of injustice due to such arrogance of power and abuse of authority. This would also include those who are conferred with judicial power and authority. Some of the reflections made on the justice system in Pakistan by the author in his

various articles/columns refer to exercise of such arrogance of power and abuse of discretion.

The lawyers and their associations have failed to check this malaise in the judiciary because of want of coordinated and concerted action on their part. Lately, certain unethical and unprofessional practices have grown in a section of the bar which is rooted in personal interests rather than collective good. These are adversely affecting the quality of dispensation of justice and are inhibiting role of the bar as an upholder of the rule of law. It has also undermined the credibility of the legal fraternity in the public eye. This development, though limited to a small number of lawyers overall, has dire implications for the justice system in Pakistan. Pakistan has a history of oppressive regimes and very few sections of civil society ever put up resistance to injustices and inequities of these regimes. The lawyers, as a community in Pakistan, have been upholders of rule of law, the supremacy of constitution and independence of the judiciary. The bar as a body has historically stood up to military regimes and other dictatorships in Pakistan. Failure in this behalf does not bode well for the future of democracy and constitutionalism in Pakistan.

The litigants, as a class, has suffered the most from perversion, chaos and malfunctioning of the justice system. It is so unfortunate that inordinate delays in judicial proceedings; incompetence on the part of judges; malpractices and corruption in the judicial system have already eroded the confidence of the people in the justice system. The Superior Court judges are fond of commenting on the working of other organs of the state and departments of the government but there is little introspection on their part concerning the dispensation of justice under their own superintendence and governance. They can correct a lot if they reflect on their own performance keeping in view the difficulties and grievances of the poor litigant.

These concerns find a place in this book which would certainly give food for thought to many for improvement of the justice system in Pakistan, keeping in view the needs of the people and requirements of the time. I want to compliment Mr. Ranjah for sparing time to write about the collective concerns on the working of the judicial system in Pakistan. His writings are on serious subjects that concern everyone in our country. It is indeed commendable that despite the environment of limited readership, he continues to write on wide-ranging topics concerning legal and judicial system in Pakistan.

Hamid Khan

14 August 2020

INTRODUCTION

What does the term 'scholar-practitioner' mean?

On the one hand, it refers to a scholar who refuses to cloister him or herself in the university, shut away in an ivory tower of abstraction and academic self-indulgence. A 'scholar-practitioner' is a scholar who insists that his or her ideas—even the most nuanced, challenging, or profound ideas—can only find their true meaning in partnership with non-scholars, that is, with neighbours, opponents, and fellow citizens of many stripes. A scholar-practitioner is a scholar who *thinks*, not only *about* people and things in the world, but *with* them.

At the same time, a 'scholar-practitioner' is a professional who refuses to wallow in, or glorify, their own expertise-by-experience. The terms refer to professionals who clearly understand that doing something always means striving to do it better—not merely via personal trial-and-error but, constantly learning from others, 'standing on the shoulders of giants'. A scholar-practitioner is a *professional* who *does* whatever he or she does based on a deep awareness of what *scholars* refer to as 'the literature.'

Zia Ullah Ranjah is a scholar-practitioner. On the one hand, he is lawyer whose legal insight and careful *study* of

justice has been developed in *partnership* with those around him—in Kunjah and Gujrat, in Lahore and Islamabad, and indeed in London and The Hague. He is a lawyer who *practice* of law at every level, from community arbitration to the Supreme Court of Pakistan, is directly informed by his astute knowledge and careful *study* of constitutional and comparative law.

Scholar-practitioners deserve our attention. In the 1990s, when I was a PhD student at Columbia University in New York City, I travelled to Pakistan to conduct my doctoral research. And, during my time at Punjab University Law College, I met Zia Ullah Ranjah. His clarity of mind, his compassionate personality, his gentle sense of humour, his professional energy and ambition, his deep sense of fairness, and his hopes for the future—indeed, his relentless campaign against academic and professional cynicism (!)—captured my attention immediately.

As a Supreme Court lawyer, Zia is engaged in some of the most complex and consequential debates of our time. His PhD thesis explores the ways in which fundamental rights are protected, or not, in Pakistan. He does not argue that fundamental rights have been a victim of routine corruption or official malfeasance in Pakistan (although, in part, they have). He argues that, more often than not, fundamental rights have been caught in the crossfire between Pakistan's institutions of state and, specifically, their zero-sum battles for supremacy.

Who is committed to the rights of ordinary Pakistanis? Is it the legislature, the executive, or the judiciary? Is it, somehow, the army? At various points, each of these institutions has insisted that its role alone should prevail. Each has used its power, not merely to check the others, but to marginalise them, ostensibly 'on behalf of the people'.

Yet the fundamental rights of ordinary people remain unprotected: 'caught in the crossfire'. Zia has *studied* this

pattern and, every day, he *works* to address it. He is, again, a scholar-practitioner. He combines an academic understanding of the big picture with a lawyer's careful focus on pursuing justice one step at a time. And, of course, he does so with his *own* commitment to the well-being of Pakistan's people. He is not unaware that, like all of us, he is just one more participant in a much larger process.

Those engaged in high-level issues, grassroots issues, academic issues, and practical issues all at once rarely succeed on their own. And so too with Zia. Apart from the motivation he shares with his son, Ahmed Bilal, Zia has been supported every step of the way by a family of truly extraordinary women: his grandmother (who lived to a very advanced age), his mother (a source of exceptional strength and wisdom), his wife (a model of confidence and clarity), and his intelligent, perceptive, and enormously engaging daughters Sehar, Sajal, and Andleeb. I have been nourished by their delightful company and their gentle but illuminating conversations for years.

In fact, for at least twenty years, Zia and I have enjoyed an extremely rewarding academic and professional collaboration. My career has benefited enormously from Zia's insight and assistance. Several of the articles contained in this volume have been deliberated and debated, between us, before they appeared in print. Every indication suggests that our work, both as scholars and as practitioners, will continue for years to come.

Of course the articles collected in this volume offer little more than a glimpse of Zia's thinking about, and work within, the justice system of Pakistan and the global legal fraternity: from legal education to bar reforms to the power of parliament, from the reach of judges within a democracy to the rights of women and the spirit of Islam, from the global Covid-19 pandemic to the importance of international law (in Kashmir, in Myanmar, in Pakistan), this volume touches on,

and engages with, many of the key issues that interest scholars and practitioners alike. It is a fountain of fresh thinking.

Attracting the attention of scholars and practitioners in many fields, this volume introduces the work of an important voice in the legal system of Pakistan. It challenges the conventional wisdom without calling for revolutionary change. It questions elite opinion whilst recognising the responsibility of elites and embracing the value of opinion. It calls on lawyers and judges to understand the law and, then, to use it for those less fortunate. Zia Ullah Ranjah is a scholar-practitioner, calling for change, in ways that matter for the people of Pakistan.

Matthew J. Nelson – SOAS, University of London

A Simple Book

Continuous deterioration in our law and justice institutions has been irking the feeling and thought of many sensible citizens. While the deterioration has occurred over a long period, it has been noticeably fatal to a common citizen for the last two decades. The significance of its being seen to be fatal lies in the increasing role of the media—especially social media these days—that has enhanced access to information. Of even greater importance is the access to information that relates to essential public services such as access to justice.

As a sensible lawyer, Mr. Zia Ullah Ranjah, has been piercing his sharp vision into the trouble zones of our ailing law and justice system to search the fault lines and suggest solutions. The fact that Zia Ullah has chosen a journalistic path to accentuate his thoughts, suggests that he feels the warmness of the hearts of the ordinary citizens. His articles assembled in this collection are not confined to the creation of an enthralling effect on common readers, but have the potential to stimulate policymakers and practitioners, and encourage even researchers.

A close reading of this book would amply show that Zia Ullah has sought to write in a well-defined and well thought out manner. He has touched a myriad of subjects, ranging

from the legal profession's importance to ethics, education and the need to cleanse it from the current grimy politics. He has then turned toward the judiciary and curiously discussed the issue of independence, the need for introspection, the importance of ethics, the institutionalization of judicial policy reforms, the role of the judiciary in a democracy. The highlighting of the plight of the District Judiciary working at the grassroots level is what I would call a novel but bold step: a novel in the sense that it is not ordinarily talked about and bold for the reason that he has unveiled some hidden realities which the higher judiciary seem to be ignoring.

While Zia Ullah has written about many other areas, three among them here are worth appreciation. First, the need for justice sector reform in our country. He has discussed such a need with reference to, for example, some specific incidents, such as the lack of communication between the bar and bench vis-à-vis a certain incident in Multan and a judicial conference in Islamabad. At a critical angle, it may look a reductionist view. However, an overall impact that could be seen is his articles bring home what may be called a holistic approach to judicial reform. Second, the rule of law—a constitutional obligation—is another key area, in which we have not only been failing as a nation politically but also economically. Zia Ullah has, though to the extent of a newspaper reading, pinpointed important elements of the rule of law which we must establish. Third, the role of the higher judiciary in the domain of constitutional law is one more key area which Zia Ullah has discussed. In this perspective, on the issue of the suo motu power and the enforcement of fundamental rights, he has eloquently argued for consideration of the doctrine of separation of power.

The greatest success of Zia Ullah is that it is highly appealing to ordinary readers as a simple book, as such, will have a wide readership. The greatest challenge for Zia Ullah, however, is that he shall continue this noble deed. He would appreciate that he has to write about many other important

aspects, such as the ever-growing need of the use of the Information and Communication Technology in our law and justice system, the mainstreaming of international law in our jurisprudence and judicial appointments. I wish him success.

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AUTHOR'S NOTE

My intellectual journey for justice system reforms started when I began studying law in 1996 at the Punjab University Law College. Justice (R) Aamer Raza A. Khan inculcated a basic understanding of law and justice through his inspiring personality and lectures. Justice Ayesha A. Malik refined my sense of justice in the early years of my professional life. I started a law practice in 2003 in the District Courts of Lahore. I worked with a leading law firm RIAA Barker Gillette and benefited from the legal acumen of Justice Qazi Faez Isa and Ahsan Zaheer Rizvi. I handled cases of both ordinary litigants and corporate clients. I noticed the difference between 'what the law says' in books and 'what actually happens' in our courts. I saw how some cases are put in the cold storage for years and how the other cases are prioritized for quick disposal. It made me understand a proclamation by the pigs who control the government in the novel Animal Farm, by George Orwell that 'All animals are equal, but some animals are more equal than others'. I appreciated the difficulties of ordinary citizens in getting justice. I saw them stuck in courts for years. In the words of Qurratulain Hyder, our courts are like *Talsmati Jungle.* Once you get into it; you cannot get out of it. I realized that seeking the protection of even basic rights such as the right to life and

liberty is challenging in Pakistan due to the inefficiency of the justice system.

I was further exposed to the various forms of injustice and discrimination in our society when I started teaching law as a visiting faculty at my alma mater, the University Law College, Lahore. I also got an opportunity to deliver lectures at National Defense University, National Police Academy, Foreign Service Academy (Islamabad) and Pakistan College of Law, Punjab Judicial Academy, and Civil Services Academy (Lahore). I met with law students and civil servants having different socio-economic backgrounds. We discussed varied perceptions of justice. We debated the strengths and weaknesses of our justice system and tried to see how it works. I came to know how complainants and witnesses are threatened to pursue and establish their case in the courts of law. I learned how investigation in criminal cases is influenced in Pakistan. I was informed of how social taboos discourage women to file complaints and claim their legal rights in ancestral property. Discussions with ordinary but wise people in my home town, Kunjah (Gujrat) helped me to appreciate the perception of the people about the performance of our justice system. These conversations balanced my thinking and provided useful insights for the reformation of our justice system. Reader's comments and emails on my newspaper opinions enabled me to evaluate the performance of our justice system objectively.

My sense of justice sharpened with stay at Goodenough College, London. I met with international scholars and lawyers and we discussed the pros and cons of major justice systems of the world including our justice systems. The comparison of Pakistan's justice system with other justice systems was illuminating. For example, I noted how *equal* opportunity of hearing is granted to all litigants and their lawyers in the UK and the same is essentially denied in Pakistan. I was informed how legal education, legal services, and judicial performance is regularly evaluated in the

European countries as compared to the negligence in these areas in Pakistan. At SOAS, University of London, I was exposed to intellectual debates regarding the law and justice; participation in the courses at the Hague Academy of International Law provided with another opportunity to share my experience with international lawyers and judges. This exposure made my study visit a 'journey of pleasure and pain…'

It has been a pleasure to have observed the progress of the western society, and a pain because I have started comparing the state of affairs with my country. Landing at Heathrow airport was like a transition through time. A friend, George Howard, received me at the airport. We traveled by tube, to my temporary residence in Primrose Hill. On the way, I observed stunning technological and cultural advances. I found London to be an excessively multicultural, modern and vibrant city. Another challenge for me was learning the 'art of independent living'. My friend helped me again in learning cooking and cleaning. There, I realized the sacrifice of Asian women. They serve the family, mostly without due appreciation and acknowledgement. So, injustice to women starts from our home. Walking in Regent's Park the next morning, it was surprising to see people of all ages and genders (without any discrimination) jogging with their dogs. I saw the dogs playing with their masters and happy because they could 'walk with their masters'. Animals are privileged in Europe, whereas in our society, even humans are a neglected species. Again, a severe form of injustice. Putting these thoughts aside, I tried to jog alongside the people, but I could not make it far, which disillusioned me about my stamina. It gave me a good lesson for healthy living and I joined Nuffield Health the very next day.

Being new in the town, I spent a few days visiting places like a treasure hunter. I felt walking through the corridors of history – from colonial to the present United Kingdom. Walking on the banks of the river Thames was a wonderful

experience. I found demonstrations of human love and care flooding over the Thames while it is considered taboo in our society. It is, perhaps, as Dr. Iqbal penned, in *Astray Reflections*, that Christianity conceives God as a symbol of love while Islam a symbol of power. In fact, God is loving and caring for His creature. It is injustice and discrimination in the society that slash smile of the people early. Their faces often flashed on the screen of my mind making my stay in London, somehow, sad. Anyhow, I started enjoying my feelings of pain and pleasure against Jeremy Bentham's notion of happiness.

Returning to the Thames again, I may tell that Shakespeare Theatre, London Bridge and the Shard (the highest tower in Europe) are monuments of history and modernity on the river (preserving the old alongside the new gives the city its depth). The British Museum has preserved ancient and modern civilizations that reveal the rise and fall of great empires including Islamic civilization. The British Library contains historical documents. I saw the 9th century Quran and the original manuscripts of prominent scientists, artists and men of letters. The National Gallery displays the history of arts and painting from 12th to 20th century. The Tower of London sheds light on the history of Britain's Norman Conquest in the 10thcentury. Moreover, St. Paul's Cathedral stands in the middle of the city as a symbol of Christian belief. It reminded me how we have ignored to preserve our historical buildings and establish libraries.

I visited Lincoln's Inn, the Law Society, the Royal Courts of Justice and the UK Supreme Court. I thought of Jinnah, Iqbal and Sir Syed at Lincoln's Inn and imagined their spirits asking questions about Pakistan. I thought about Jinnah and Gandhi, first struggling for the freedom of British India and then parting ways for two nation states. Having a sense of optimism, I think that hope is something that sustains the world. However, I admitted to them that we could not fulfill their expectations in Pakistan. I had to tell

them that we failed to pay due respect to law and basic rights of the people. We could not do justice even to those families who left everything in India, sacrificed their families, and migrated to Pakistan.

We neither comprehend Iqbal's philosophy of 'self' nor Syed's passion for education. Iqbal's 'self' demands a recurrent evolution in knowledge and morality to strengthen justice in the society. Sayyed sees a wide-open quest for knowledge as a virtue. Instead of developing this 'self' and 'quest' for the progress of knowledge and justice in the society, we have developed a certain anxiety and a thirst for materialism. We have largely ignored to act upon even the first verse of the Quran ('*Iqra*…') and the teachings of the Prophet (PBUH) that emphasize on 'reading' and 'leaning'. In the heart of Western civilization, I felt the values envisioned by Iqbal, Syed and Jinnah in a restless, self-advancing, self-improving, optimistic, rational, confident and idealistic individual – a person who believes in constant evolution, progress and change in oneself and one's society. I then turned for a while to present Pakistan and thought about why are we failing to improve our institutions including our justice system? Iqbal, Jinnah, Syed, all looked a little sad! I assured their souls that I would convey their feelings to the people of Pakistan.

This book reflects upon those feelings. It presents my thoughts about legal and judicial reforms, ethical lawyering, legal education, bar politics, capacity building of lawyers, future law firms, anatomy of the legal profession, fundamental rights, criminal trials, life imprisonment, terrorism, rule of law, civil service reforms, legacy of colonial laws, human rights in the digital age, law and technology, independence and accountability of the judiciary, women in the superior judiciary, judicial appointments and policymaking, the district judiciary, voice of litigants, supremacy of constitution and the parliament, international court of justice, international criminal court, and military

courts etc. It also highlights injustice being faced by the Muslims of Kashmir, Palestine and Myanmar. Two journal articles (without footnotes) titled, 'Supremacy of the Parliament in Pakistan', and 'Interpreting fundamental rights in Islam' are also included. The most of the content of this book was published in influential newspapers, journals, and blogs. The theme and topics discussed may remain same, however, changing contexts and shifting paradigms in legal and judicial system of Pakistan would require reappraisal of these themes. It is hoped others would reflect and write on these and other important topics to produce better ideas for the continuous improvement of our justice system.

Coming back to London, in the Royal Court of Justice, I met judges who were wise and willing to listen. I noticed that the lawyers were learned and well prepared. The court clerks were efficient and disciplined. The court proceedings were being recorded to ensure justice. The citizens believe and respect their courts. The people can visit courtrooms like any other public place. Schools and colleges arrange court visits to make the students familiar with the justice system. So, the children start learning the relevance of law and the importance of the rule of law from an early age. The Law Society is proactive in ensuring quality legal services through monitoring and continuous training of legal professionals.

A visit to the UK Supreme Court was very informative. Academia and judges collaborate to conduct discussions on important areas of law to bridge the gap between theory and practice. This brought me back to thinking about my country where an academic discussion is generally discouraged in the courts. Barring competent judges, we find description of facts and law but little jurisprudence in our courts' judgments. Unfortunately, our institutions fail to develop critical thinking, resulting in poor governance and weak justice system.

At Hague, I met with a few judges of International Court of Justice. Mohamed Bennouna J. taught us the letter

and spirit of international law. I found the ICJ judges academically sophisticated, intellectually refined, and humble.

As I was invited by Dr. Matthew Nelson at SOAS, University of London, I preferred spending more time there. However, I participated in a few academic discussions on law at Oxford and Cambridge and the British Institute of International and Comparative Law. Spending time with professors at SOAS, Oxford and Cambridge have been a great learning experience for me. I found the level of debate and engagement at these institutions very insightful.

Worldwide top-ranking universities focus on creativity and original research. They introduce students to a variety of views and encourage them to apply and appreciate these ideas in different contexts. The students can challenge these ideas. They consider that thought cannot freeze so it can be revised by employing new knowledge. The Muslims lost thrust and curiosity for knowledge while leaving 'ijtihad'. Creativity and independent thinking buried in the blind following. The conception of constantly growing knowledge and a renewed faith in a religion as a progressive universal force can be helpful for producing fresh thinking in our institutions.

Briefly, the views expressed in this book are mere 'suggestions' for the improvement of our justice system. No one can claim to know the absolute truth. The knowledge progress with objective and continuous dialogue. With these limitations of my knowledge and experience, the legal fraternity is invited to contest the views expressed in this book and reflect on the immediate reforms of Pakistan's Justice System.

In the end, I express my gratitude to Mr. Hamid Khan, Dr. Matthew J. Nelson, Dr. Khurshid Iqbal, Dr. Shahbaz Ahmad Cheema and Prof. Hamyoun Ihsan for their review and valuable comments on the book.

Dr. Zia Ullah Ranjah

Part I. Legal Profession

LEGAL REFORMS

In the wake of the Supreme Court judgement about the military courts, reforming our justice system has become imperative. We have a weak legal apparatus; of that there is no doubt. The World Justice Project's Rule of Law Index 2020 which collates data across various categories — including corruption, order and security, fundamental rights, and the civil and criminal justice systems, etc. — to arrive at its assessments, ranks Pakistan 120 out of 128 countries on rule of law.

The weaknesses in our judicial system cannot be attributed to the judiciary alone as the latter has certain procedural and institutional limits. Moreover, the bench works in coordination with other government departments which means the inefficiency of other departments also serves as a contributory factor in the overall performance of the judicial system.

However, charity begins at home, and legal reforms too should begin with the members of the legal profession. I look to the collective wisdom of the bench and the bar and invite their attention to three important reforms: capacity building

of lawyers, strengthening the judiciary, and reforming the bar councils.

The training of our young lawyers which underpins their professionalism and performance, is not adequately prioritised by our bar associations, law colleges and universities, and our government. There is an urgent need for capacity building of the lawyers through continuous legal education, a national law clerkship programme, and more extensive pro bono legal aid work.

A young lawyer in Pakistan faces a dilemma: either start practicing without proper on-the-job training or face long-term financial constraints working with senior members of the bar. There are few law firms that pay a young lawyer enough to raise a family. We therefore need to be concerned about our younger members.

The seniors should engage junior lawyers in preparing and presenting court cases so that they could be better trained and engaged in the profession. It should also be appreciated that many lawyers do not have flagship degrees; instead, they have potential and aspirations. They are, in fact, the backbone of this profession and have the ability and desire to make things happen.

These lawyers could also be engaged with the Supreme Court, high courts, district courts, and the offices of the attorney general and advocate general under a national law clerkship programme. The bar councils may allocate and generate special funds to put these ideas into practice while seeking additional support from government and international organisations.

The judgement on the military courts further indicates the need for improvements in the system itself. To this end, we need to prioritise legal reforms. The independence of the judiciary depends not only on the letter of the law, but also public confidence.

For the sake of public confidence and institutional integrity, Article 175-A may be amended to provide a double-ended constitutional mechanism for nomination of judges by the high courts. The composition of the Judicial Commission of Pakistan could also be reconsidered. In many countries, judicial appointments are a collaborative process without any fear of the judiciary's independence being compromised in the process.

If we have a strong higher judiciary, it will influence and better monitor the district judiciary's performance. The judges in the higher and lower courts both should be provided training in court/case management for expeditious disposal of cases. Continuous training in every profession is a common phenomenon in developed countries.

We have some exceptionally competent judges; however, our judicial system seems to have failed in managing the increasing workload. It is high time to learn from other jurisdictions.

There is a perception that our bar councils have become increasingly politicised. To address this, we must take steps to make our bar councils effective regulatory bodies focused on monitoring legal services. They need to introduce strict requirements and procedures for entering and continuing in the legal profession, and enforce professional standards, taking a cue from professional bodies such as the Law Society of England.

As to bar politics, the bar councils should allow a fair opportunity for contesting the elections and issue a code of conduct for the electoral process. As members of a learned profession, we should try to adhere to the values of decency and integrity to set an example that can be followed in politics on a national scale; thus, we should demand a fixed ceiling on expenses by amending Rule 10-A and Rule 31-A of the Pakistan Legal Practitioners and Bar Council Rules, 1976.

This measure will also save the lawyers some hard-earned income.

Finally, bar members must demonstrate their desire for reform by making changes in their own law and practice to support the larger judicial system.

ETHICAL LAWYERING

PAKISTAN'S legal fraternity is often criticised for the deterioration of the profession on the ground that some lawyers are involved in misconduct. This perception is reinforced when bar councils show reluctance in enforcing the professional code of conduct for lawyers, which has in turn weakened the justice system. Pakistan ranks 120th out of 128 in the World Justice Project's Rule of Law Index 2020. Thus, fostering the conformity of professional ethics is a must for the delivery of justice.

What are lawyers' professional ethics? In other words, how do they understand and perform their obligations, and respond to clients' requests for legal assistance? This question could be answered in two ways: first, a lawyer should do everything within the limits of the law for their client, notwithstanding their personal opinion about the client's ends. As per this view, a lawyer should suspend personal judgement for the interest of their client. For example, a lawyer engaged by a corporate client should pursue the latter's interest despite the loss of lives caused by a product manufactured it. According to this view, lawyers only have a

duty towards their client; they are not obligated to consider the interests of the public or innocent third parties.

The second view is that lawyers are officers of the court. They are not immoral technicians. 'Lawyering' involves not the suspension of moral judgement but rather the exercise of it. Lawyers cannot justify their actions on the logic of 'the best interest of the client'. Rather, they are obliged to take personal moral responsibility for the result of their actions. They are accountable to society for their actions taken on behalf of a client. As per this view, lawyers should even refuse to provide legal services in a case, which, in their opinion, goes against the public interest. Proponents of this approach argue that lawyers have a professional duty of engaging in reflective judgement and discretion to decide what is moral or immoral in a particular case. They are responsible for their conduct towards fellow lawyers, the court and the public.

Ethical lawyers will follow an ethical code of conduct. They will observe the code of conduct even at the cost of money or relations. At the same time, the contention is that the provision of this code, through an enabling institutional environment and operational mechanisms, will produce ethical conduct to an extent. The framework of legal practice (i.e., the role of bar councils, conduct of judges and behaviour of other lawyers) largely shapes the conduct of individual lawyers. Moral renewal or upgradation of the legal profession is not possible without overall reform of legal institutions — that reform must begin with the bar itself.

The bar council laws provide a code of conduct for lawyers, and the bar has a mandate to enforce the same. Section 13(d) of the Legal Practitioners and Bar Councils Act, 1973, provides that the Pakistan Bar Council (PBC) shall "lay down standards of professional conduct and etiquette for advocates". The PBC, thus, has approved and adopted the Canons of Professional Conduct and Etiquette and urges all advocates to conform to these canons in their conduct with

regard to members of the profession, their clients, the court and the public in general. Rule 134 of the Pakistan Legal Practitioners and Bar Councils Rules, 1976, states, "It is the duty of every advocate to uphold at all times the dignity and high standing of his profession, as well as his own dignity and high standing as a member thereof."

Notwithstanding the above, there is a conception that a segment of lawyers considers themselves above the law, and the bar councils have failed to rebut this perception. Legal action against members facing complaints of professional misconduct seems ineffective. The actual number of these complaints and their outcome is rarely made public. Naturally, ineffectual proceedings against lawyers weaken the bar and our justice system.

To promote the compliance of the professional code of conduct, Sections 11(b), disqualifications for membership of the PBC); 11(c), cessation of membership of the PBC; 28(a), person disqualified to be enrolled as advocate; 41, punishment of advocates for misconduct; 46, disciplinary powers of the PBC; 54, power of the Supreme Court and high court to suspend advocates from practice; 58, penalty for illegal practice; 59, power to frame and publish lists of touts of the 1973 act, and related sections pertaining to provincial bar councils, should be implemented to regulate the legal profession more effectively.

Finally, the bar councils should regularly review bar licenses on the basis of the 'adopted' 'Canons of Professional Conduct and Etiquette' to boost ethical lawyering and contribute to the reformation of our justice system.

BEING PROFESSIONAL

Our young lawyers are equipped to serve the legal profession with great distinction. But they are not provided with a fair opportunity. In Pakistan, the legal profession is largely monopolized and captured by bar-council politics and elite interest groups. The potential of many young lawyers is used in round-the-year election campaigns and seeking adjournment in court cases. Training, opportunity, and professional growth of young lawyers is rarely prioritized.

Some desire to upgrade the legal profession through bar politics, but most are seemingly engaged in politics as a simple matter of 'business'. Reportedly, millions of rupees are spent in national, provincial, and district bar council elections every year. The money is spent to influence votes, offering dinners and launching media campaigns, because it brings huge dividends. Those who have either weak or so-called high-profile cases assume that bar leaders can help them procure timely relief from the courts – often, buying time through strategic delays in the proceedings. In extreme cases, political positions might be used to pressure the courts for favorable

decisions. The bar councils often struggle to move against the 'winning faction'. The disciplinary committees of the bar councils are composed of winning candidates that are mainly interested to win more votes for the next term than the upgradation of the legal profession. In fact, the disciplinary committees need to be more disciplined. It can be done by bringing professional lawyers on board as non-elected or honorary members. Other committees such as legal education committee should represent jurists and academicians. In this regard, appropriate amendments in the bar council laws should be made.

Notwithstanding some exceptions, an elite background and connections are used to fertilize our legal profession. Elite lawyers are staunch supporters of legal reforms, the independence of the judiciary, the rule of law, and the supremacy of the constitution, but they might also go against these norms when it comes to getting relief in a particular case or availing an opportunity such as an appointment as a law officer or judge. Getting cases fixed before particular courts or transferred from one court to another, and attempting to leverage judges through sophisticated methods such as disparaging remarks against judges, distort our justice system in an invisible but effective manner.

Without any clear reference to merit, a good number of lawyers are appointed to the Advocate General's Office, the Attorney General's Office, and the judiciary. Appointments are made without proper advertisements or vetting, and without reference to collective judgment or an objective assessment of each candidate's credentials. The criterion for such jobs seems to combine subjectivity and secrecy. Further, there is a lack of effective regulation, performance evaluation, transparency, and accountability that weakens our justice system.

Can this be changed? Yes, but gradually, beginning with a reminder that bar councils are a regulatory body *of* lawyers

for lawyers. Bar council must not support those elements who damage the reputation and prestige of the bar by violating 'professional code of conduct'. Moreover, bar council election expenses must be curtailed. The lawyers appointed as law officers or elevated to the bench must demonstrate professional ability and personal integrity. An open merit system like the Central Superior Services examination, or an even better examination system, should be introduced to improve the standard of those inducted into the Advocate General's Office, the Attorney General's Office, and the district judiciary. Otherwise, the performance of our justice system could not be improved. In other words, without effective judicial and legal reforms in legal education, bar council's regulation, and appointments in legal institutions, our justice system would not be able to meet the expectations of the public.

In short, there should be proper guidance and training opportunities for young lawyers. Their potential should not be wasted in politics, strikes, violence, and seeking adjournments in courts. There must be equality before the law: an equal opportunity to secure a hearing is required for both junior and senior lawyers. Not only must justice be done; it must also be seen to be done. Merit and procedural fairness must be reflected in appointments to legal offices and judicial proceedings. Otherwise, our justice system will become weak and will lose its integrity in the eyes of the public at large.

DIGNITY OF THE LEGAL PROFESSION

The ex-chief justice of Pakistan (CJP), Asif Saeed Khosa, once urged the legal fraternity "to launch a movement for [the] restoration of the dignity of [the] legal profession." Recalling the days when nobility was attached to the legal profession and lawyers and judges were highly respected, he emphasised the need for "self-introspection to preserve the nobility of this profession." The CJP's statement indicates an urgent need for reforms in the legal profession. In this regard, I focus on three institutions: law schools, bar councils, and lower judiciary.

Law schools play an important role in the education and training of lawyers. Barring a few exceptions, these are intellectual graveyards. Public-sector law colleges have failed to provide cutting-edge legal knowledge for various reasons, including the politicisation of the faculty and the pursuit of administrative positions, (losing a focus on research and teaching), out dated methods of teaching and examination, and poor training in legal drafting, analysis and advocacy. Many private legal institutions are like tuition centres. They are interested more in number of students and less in

providing learning opportunities. Moreover, hasty and hot-headed intervention by the Pakistan Bar Council (PBC) and superior courts regarding the duration of a law degree, a fixed number of seats for admission in law schools notwithstanding their teaching quality and training capacity, and a nominal and numerical requirement of the faculty have further weakened law schools, eroding their space in legal-education policymaking.

The PBC and the superior courts have overwhelmingly focused on the quantity rather than the quality of legal education. Now, anyone with a poor faculty, but a fancy building can run a law school. Those who appreciate the merit and quality that come with strong faculty and intellectual engagement suffer. In my view, the focus should have been on the quality of teaching and legal research. Law schools should inculcate reading, logical thinking, and critical writing skills. They should enable the students to use technology, i.e. artificial intelligence, to cope with the emerging challenges in the legal profession.

The bar councils have a key role in training and regulating lawyers. The CJP lamented that "from 2007 to 2009, the legal community earned more respect as they championed… the independence of the judiciary," but "the situation at present is not that rosy." Lawyers have always struggled for the supremacy of the Constitution and the independence of the judiciary. However, bar councils seem to have lost their regulatory role due to over-politicisation, with the bar divided into factions who sometimes ignore the professional misconduct of their allies to win bar elections.

Some lawyers are said to be involved in misappropriating bar council funds and pressuring judges for dark motives (for example, getting court orders not warranted by the law). The bar councils need to look into these individual cases to uphold the dignity of the legal profession.

At the same time, the historical role of lawyers cannot be denied. If Muhammad Ali Jinnah and Allama Iqbal struggled for the creation of Pakistan, certainly the members of the legal profession sacrificed whenever constitutionalism, rule of law and democracy suffered under martial law regimes. This profession produced great lawyers and humans like A.R. Cornelius, Aamer Raza A. Khan, and Khalid Ishaque. Even now, there is no dearth of bright, honest, upright, and professional lawyers and judges. The bar councils need to initiate institutional reforms with the support of these lawyers and judges. They might initially face some resistance from those who want status quo. The traditional wisdom in the bench and bar may oppose innovation such as the integration of technology and automation of filing and handling of court cases. However, this reluctance can be converted into cooperation with continuous engagement with district bar councils and the judiciary. The ownership of these reforms can be sought at the grass-root level. The seminars at the district bars can help to educate the legal fraternity as to the importance of professional training and accountability and the use of technology etc. The PBC should also discuss legal reforms with the judicial policy makers and the government. Plato once said, "the price good men pay for indifference to public affairs is to be ruled by evil men." Right-thinking and young energetic lawyers can make a difference, with the support of senior members of the bar, by focusing on the training and accountability of lawyers.

The CJP has rightly emphasised the importance of 'self-introspection.' The standards of competence and integrity amongst judges continue to decline. Judicial misconduct and institutional overreach in matters of public importance—including matters of accountability itself—requires reform in the judiciary, starting with the accountability of judges themselves. More rigorous and transparent judicial accountability procedures that is, sharing the details of the

proceedings of the Supreme Judicial Council (SJC) with the PBC would enhance the integrity of our judiciary.

There is a perception that some members of the judiciary are not able to appreciate the niceties of the law and evidence, repeatedly failing to write reasoned judgments. For example, in Asia Bibi's case, the CJP observed that the courts below had failed to notice apparent flaws in the evidence. He has consistently expressed dissatisfaction regarding the rudimentary performance of our courts. He said, "If the lower courts could deal with the matters carefully, many cases would not come to the apex court." Sometimes, cases are admitted and relief is given to please certain members of the bar due to their clout. These cases create an unnecessary burden on the courts. If judges fail to maintain their neutrality in the so-called high-profile cases and pressure from political parties and individual bar members, the independence and integrity of the judiciary will be compromised.

Our lawyers and judges should listen to the sages of the ages. The bench and bar are wheels of the same chariot. We must improve the competence and restore the dignity of our justice system. This does not need any movement, but, an effective accountability within the existing mandate of the Supreme Judicial Council and the bar councils.

Part II. Legal Education

FLAWED LEGAL EDUCATION RULES

The Pakistan Bar Council (PBC) has attempted to reform legal education in Pakistan with the Legal Education Rules, 2015. Aside from other measures, these rules banned three-year law degrees and provide for a five-year law degree from 2016-2017. Given the need for reforms to legal education, the initiative should be appreciated; but it must hold up to a critical examination. Will these reforms as a whole improve legal education? Have they been introduced in accordance with the law? Scrutinising their capacity and legality will work to support the cause of the legal education.

There is no denying that the quality of legal education is poor, and universities granting affiliation to 'ghost' law colleges should be stopped. At the same time, placing an embargo on all law schools notwithstanding their reputation, capacity and resources seems unjustified.

The rules deal with the *form* and not the *substance* of legal education. For example, they increase the duration for acquiring a law degree from three to five years without clear

justification. In fact, the quality of legal education does not depend on the duration of courses alone; it hinges on the quality of admission methods (i.e. LSAT), teaching (i.e. Socratic and case law methods) and examination (judging analytical and reasoning skills). Surprisingly, the rules are silent on these important aspects of legal education.

The rules focus on monitoring infrastructure (the building size and the number of rooms, number of books in the library, etc.) rather than the manner in which legal education is imparted. One may ask, for example, whether the small building that houses the School of Oriental and African Studies in London reduces its worldwide reputation? The answer is no. The rules also fail to speak about the role of the PBC itself in the conduct of quality entry exams and continuous legal education for lawyers (e.g. on the pattern of the Law Society of England and State Bar Councils in the US).

The rules seem to have been drafted in haste without any meaningful consultation involving universities and law schools. For example, Rule 11 provides 40 per cent pass marks in each paper and 50pc as aggregate. It further provides a uniform first division at 60pc marks not divisible into further grading. At the same time, Rule 12 requires semester system examinations.

These rules are contradictory as grading of marks in the semester system cannot be devised in conformity with the grading specified in Rule 11. The mixing of a division-based annual system of examination with semester system grading shows the haphazard manner in which the rules have been devised.

Giving the PBC a supervisory role over universities offering purely academic degrees, i.e. LLM and PhD is similarly anomalous. Academic degrees are not subject to the approval of licensing authorities anywhere in the world. Giving PBC the authority to regulate purely academic degrees

is an exception apparently created without reflecting upon the propriety of having the PBC supervise these degrees, or its capacity to do so.

Finally, the PBC has drafted the rules in the exercise of powers conferred upon it under Sections 13, 26, and 55 of the Legal Practitioners & Bar Councils Act, 1973. A bare reading of the act suggests the PBC has misconstrued the relevant provisions. The universities have been constituted under an Act of Parliament. Under the relevant acts, universities are mandated to determine the content of their syllabi and the duration of their degrees. The Higher Education Commission (HEC) is also there to support universities in formulating and delivering courses. The PBC seems to have gone beyond its legal authority and interfered in the lawful sphere of the universities.

For example, Rule 3 (vi) states that a recognised degree includes a Bachelor's degree in law awarded by a university or a degree-awarding institution recognised by the PBC. So, the PBC's role as per its own rules is limited to the recognition of an LLB degree. This role may not be extended to the approval of syllabi for academic degrees like LLM or PhD. Further, rules 4, 5, 6, 7 and 10 bar BA/BSc graduates from admission in the three-year law programme, regulate the number of seats, the syllabi and duration of LLB programme courses and the timing of classes. These rules are arguably unconstitutional for being discriminatory, presumptive, and violative of fundamental rights.

Legal education reform requires a carefully considered legal education policy drafted with the meaningful consultation of all stakeholders. This new law does not provide the required policy. Rather, it added confusion in the existing legal education policy framework. The solution lies in revising the rules in joint sessions of the representatives of the PBC, HEC, universities, and law schools. Further assistance may be sought from foreign legal education policy experts,

who helped to establish and run top ranking law schools worldwide. In short, the focus of legal education reforms should be on the *quality* of legal education, not on *quantity* alone.

TRANSFORMING LEGAL EDUCATION

COVID-19 outbreak has forced the educational institutions to wrap-up the classes. The Higher Education Commission of Pakistan (HEC) directed chartered universities to move online. This is an appreciable step considering the hypersonic spread of the disease and the advancement of educational technology. Certainly, Pakistan is not a tech-savvy country and our institutions lack infrastructure and resources. The advantages of on-campus education such as peer learning and the importance of face-to-face interaction are also not denied. But it is equally important to experiment innovation in legal education, especially when there is a crisis and technology can help to handle it. Despite all challenges, our law schools should experiment online legal education in Pakistan.

In the absence of a clear national policy, legal education in Pakistan has come to a standstill. In the past, legal education was largely ignored by our policymakers and regulators. However, in 2018, the Supreme Court of Pakistan undertook to reform the legal profession and passed certain directions for the reformation of legal education. They

include a ban on three years LL. B and the conduct of evening classes; the closure and disaffiliation of unauthorized law colleges; the hiring of faculty; and the conduct of Law Admission Test (LAT); and the establishment of the Directorate of Legal Education in the Pakistan Bar Council (PBC).

Despite these broad directions, the regulators remained focused on numbers: the number of classrooms, the number of books in a library, the number of faculty at a law school, and the number of admissions. The quality of legal education altogether ignored. A one-size-fits-all policy was applied to all law schools notwithstanding their capacity and academic resources. It damaged those law schools who have a cause and commitment to the quality of legal education. The Pakistan Bar Council Legal Education Rules, 2015, seem to have been drafted in haste. These rule, absent strong rationality, present an insurmountable challenge for law schools. As a result, our legal education remains poor. The COVID crisis, however, presented us with an opportunity to revise our legal education policy.

The crisis has added to the difficulties of law schools. The faculty and students are desperately looking for online resources, alongside the issues of internet access and stability. The universities are struggling to conduct online classes and exams. In the circumstances, the government must support universities and law schools to improve their internet infrastructure and access to online databases. A free or subsidized internet package for students must be provided. The government must also provide free laptops to students, who cannot afford to buy expensive gadgets. In the meanwhile, law schools need to survey how institutions in other countries are coping with the crisis. It would help to deliver online legal education more effectively in Pakistan.

Moving beyond Covid-19, even otherwise, we need to revise institutional outlook and reconfigure teaching methods.

The law schools need to experiment with innovation in legal education, which already has become a reality in other countries. For example, the University of Law in the UK and the California School of Law in the US are offering online LL.B. Top-ranking institutions like Stanford, Yale, and Harvard provide various online courses. The organization like edX are offering online law courses. Our law schools should harness this opportunity. Online legal education is not only a necessity of time, but can also be offered as a selling point, as it brings numerous advantages to students i.e., reduced costs, flexibility, and customization of learning modules. Given these advantages, how can we not open to exploring such opportunities?

The law teachers should make available recorded lectures enabling the students to learn at their pace and convenience. The teachers can review the recorded lectures. Peers would learn and provide feedback for improvement. It will help to enhance teaching quality and thus quality of legal education. The subject of law has a rich philosophical content (jurisprudence) that may be taught more effectively in small-group face-to-face or video tutorials through Hi-Tec channels like Zoom. The decisions of the superior courts and the content of statutes are available online that can be used as reading materials.

For meaningful reforms in legal education, the SC may be requested to reconsider the issues about the numbers of faculty, students, and law school admissions. Now a law professor can teach hundreds of students through 100% online platforms or hybrid arrangements. Access to online databases can be provided through subscription. The relevant laws such as the HEC Ordinance, 2002, the Legal Practitioners and Bar Councils Act, 1973 and the Pakistan Bar Council Legal Education Rules, 2015, should also be amended in line with the changing paradigms in legal education. A law made in 1973 or 2002 cannot cater to the fast-changing landscape of legal education. Our policymakers

need to appreciate the phenomenal changes occurring worldwide in every sector. A new era begins now. In 2020. Therefore, the earlier we change our conception and mode of law teaching better it would be.

Briefly, our policymakers need to review the existing framework of legal education with the consultation of key stakeholders *including* law students. A thorough discussion on issues such as the kinds of legal skills that can be effectively taught online; capacity requirements for developing and delivering online courses, optimal class size, access, and administration for online delivery should take place to design and deliver hybrid courses in law. For introducing online legal education, the HEC and the government must support law schools. It will strengthen the legal profession.

LEGAL EDUCATION

PAKISTAN is facing a legal education crisis. Without a clear national policy, there is lack of institutional consensus regarding the entrance examinations for both law schools and the bar. There is confusion about the appropriate curriculum and method of teaching and sharp disagreements on the need for vocational training, the method of final examination, etc. In this regard, the Supreme Court constituted a special committee to look into this matter and submit a comprehensive report.

For years, the government and relevant institutions (e.g. the Higher Education Commission, the Pakistan Bar Council [PBC], and the Supreme Judicial Council [SJC]) have ignored the importance of proper legal education and training of lawyers and judges. The HEC is mandated to ensure the quality of higher education under the HEC Ordinance, 2002, yet under the Constitution's 18th Amendment, higher education was devolved to the provinces. So far, no province has drafted any policy or legal framework to regulate legal education.

The latter is still regulated by the PBC under the Legal Practitioners and Bar Councils Act, 1973. The PBC, however, finally attempted to reform legal education with the Pakistan Bar Council Legal Education Rules, 2015. The

SJC is obliged to monitor the capacity and conduct of superior court judges under the Constitution (Article 209). This legal framework is overlapping and fragmented; hence there is confusion.

Currently, legal education in Pakistan is being imparted under two models: a five-year LL.B programme; and the University of London external LL.B. The Rules, 2015, however, have created a further anomaly. When they replaced the three-year LL.B with the five-year LL.B, they were challenged before a full bench of the Lahore High Court. In my opinion, the court missed the opportunity to provide long-term substantive measures to reform legal education.

Substandard law colleges still exist across the country — with no effective mechanism to eliminate or monitor 'ghost' colleges. Law school admission is granted without any *standard* test. In fact, even after 2015, the word 'merit' is defined nowhere in the laws relating to legal education. Law schools generally follow outdated methods of teaching and examination. Likewise, the PBC has failed to put in place a quality exam for entry into the legal profession. The bar councils are engaged more in bar politics than regulating the legal profession. Further, continuous legal education is not mandatory under the law.

The SC, however, occasionally sought to address various problems with legal education. In a case titled 'Pakistan Bar Council versus Federal Government of Pakistan', the court identified several reasons for the decline of legal education: (i) mushroom growth of substandard law colleges; (ii) absence of eligibility criteria for admission; (iii) poor quality of teaching faculty; (iv) inadequate law college resources, facilities, and infrastructure; (v) a preference for commercial rather than academic considerations; (vi) lack of attention to professional ethics; and (viii) a below-par exam system. However, the court could not provide a comprehensive solution.

Once again, however, the SC embarked on an effort to reform our legal education in 2018. This time, the SC should have recommended specific standards regarding entry into law schools, syllabi, the method of teaching and examination, the need for a suitable bar exam, and the importance of continuous legal education. It should have examined the relevant literature and consult international legal education experts as well in order to recommend cutting-edge reforms in the legal profession. However, once again, the SC lost the opportunity to provide effective legal education framework in Pakistan.

For instance, the SC did not recommend a *high-quality* test for *admission* to law schools and the bar. The honorable court failed to appreciate that teaching and examination should be based on sound analysis and legal reasoning; continuous legal education should be mandatory; third-party audits of law colleges should be conducted by legal education experts; and, the regulatory regime for the members of the legal profession needs to be refined and implemented.

Besides these flaws and suggestions for the further improvement, in view of the complex nature of the issue, stakeholders across the country should come together to implement the court's recommendations, with the PBC and the SC working to monitor that implementation. At the same time, in the light of the lessons learned from the present legal education reforms, a robust legal education policy should be formulated with meaningful consultation of law professors. Of course, any appeal against a final order issued under University rules should stand with the SC provided there is any violation of such rules. However, the domain of legal education policy remains with government as provided by the constitutional doctrine of separation of powers.

IMPROVING LEGAL EDUCATION

Legal education has never been prioritised by our policymakers. Thus, it is no surprise if the judiciary is failing to match the expectations of the people. Unfortunately, by many, the legal profession is considered to be a profession of dropouts.

There has been a mushroom growth of law schools without any regulation by affiliated universities or bar councils. Reportedly, some members of the affiliation committees and the bar facilitate the creation and continuance of substandard law schools. Even after the SC recommendations for the improvement of legal education, some law schools do not have proper buildings, libraries, or classrooms. Some do not conduct proper classes. They operate like fee-collecting agents, promising admission without coaching. Dropouts from other fields manage to join these schools and then the bar without proper legal training and regulation.

To discourage such elements, there should be *strict* admission requirements for becoming a lawyer, e.g. a law

school admission test (LSAT). Libraries must be updated with online databases such as LexisNexis, JSTOR, etc., and the Socratic method of teaching should be used to encourage classroom discussions. Exams *must* include an *analysis* of case law.

Bar councils rarely offer apprenticeship certificates and other credentials. Instead, new lawyers are reportedly 'assisted' in the examination hall to pass the entry test, suggesting that they are recruited to increase the political strength of bar-council factions and not the prestige of the profession. Making the bar a professional and more respected institution requires immediate reforms. The bar must check fake degrees and certificates before granting licenses. It must conduct a fair bar examination.

Continuous legal education (CLE) will also provide a further opportunity for learning even after passing strict entry tests. Young lawyers will get a chance to learn from senior members of the bar. There is a dearth of good lawyers in Pakistan. CLE will help meet this challenge. However, adding more lawyers to the bar, without merit, will weaken the legal profession.

The law continues to change, so lawyers must learn continuously. CLE is mandatory in the developed countries such as the US and the UK. In the United States, every lawyer has to undergo a certain number of hours of compulsory education to remain a member within the state bar. In the United Kingdom, the four Inns of Court provide continuous training to barristers. The Law Society of England conducts such training for practicing solicitors.

In Pakistan, however, CLE is even more necessary due to our poor legal education system, flawed entry requirements, and lack of training for working lawyers. CLE is even helpful for those who are trained through external degree programmes as they appear to lack in the learning of important domestic laws such as the Civil and the Criminal

Procedure Code. In a nutshell, CLE will strengthen our bar and the legal profession.

Further legal education can be provided when lawyers are appointed as judges. In developed countries, constant learning in every profession is a norm. Every idea is being challenged and constantly improved. The performance of legal institutions is examined in the context of governance, sociology, and economics, etc. The education of judges, therefore, has become increasingly important. Lawyers are trained to draft pleadings, issue legal opinions, and argue before court. Judges, however, are required to do a very different job — evaluating legal arguments and writing judgements. Judges also need to perform administrative tasks. So, they also need suitable training.

Presiding over a court requires patience and other social skills to interact with the bar, the litigants and state functionaries. It is essential for judges to be trained in case management to use the court and its resources wisely. This is only possible through education at judicial academies.

In fact, no effort for legal reform can succeed without improving our legal education system. The Higher Education Commission must constantly review its policy regarding law schools' procedures for new registration and admission, and provide guidelines on the syllabus. Law schools must learn from other seats of legal learning in developed countries.

The Law and Justice Commission of Pakistan should ensure a study is done in collaboration with the HEC to make appropriate changes in rules relating to legal education. Bar councils must ensure that law schools impart education relevant to fast-changing needs of the legal profession. They should also review their mandate providing for CLE for lawyers and paralegal staff. The bar may consider making this training mandatory for renewal of license of every lawyer each year and offer awards to encourage participation in continuous legal education. It may give cash awards, medals,

and law books to new entrants in the profession and arrange international conferences of lawyers to support CLE efforts in Pakistan.

The focus must be on eradicating fake apprenticeship certificates and poor law degrees from substandard law schools. A proposal may be put before the government for establishing centers of excellence for legal education at the federal capital and provincial headquarters.

Part III. Bar Councils

CAPACITY BUILDING OF LAWYERS

The legal profession is considered one of the most respected and learned profession. The administration of justice largely depends on the assistance provided by the lawyers to the courts. The development and stability of a state is closely linked with the legal and judicial system of a country. It is said that 'a society can sustain cruelty but cannot survive without justice'. With this realisation, the government of Pakistan started reforming the legal and judicial system with the collaboration of the Asian Development Bank in 2002.The Bank's Access to Justice programme contributed to building some court rooms and increasing the salary of judicial officers. However, capacity building for lawyers was not prioritised. The responsibility to regulate and improve the legal profession then turns to the professional bodies of lawyers (Pakistan Bar Council, Provincial Bar Councils) and law schools. The bar councils are legally mandated to regulate the lawyers. However, they tend to remain involved in politics

rather than monitoring and improving the quality of the legal profession.

In the West, professional bodies of lawyers like the Law Society of England are largely focused on the provision of standard legal services to the citizens. The Law Society offers compulsory courses for the solicitors and regularly reviews its procedures ensuring the best quality legal services to the people

Citizens can find out about the credentials and the conduct of the lawyers registered with the regulatory society. The lawyers go through rigorous training from the law schools and bar councils. They are required even to insure their services so that the citizens may claim compensation if they suffer loss due to a lawyer's negligence or professional misconduct. The Bar Councils conduct regular exams and renew the terms and conditions of their members. This keeps the lawyers updated on law and legal developments in the profession. The Bar Councils also collaborate with academia to bridge the gap between theory and practice. Litigating against the lawyers for professional negligence is a normal phenomenon and the Bar Councils even assist citizens in this regard.

In Pakistan, however, the lawyers are alleged to consider themselves above the law. In some local bars there are reports of an unwritten consensus that if a lawyer is involved in a civil or criminal case, no lawyer from the local bar will represent the party opposing the lawyer. And, if a lawyer dares to represent that party, he is openly condemned in the bar for violating an 'unwritten code of conduct'. In big cities like Lahore, a few lawyers try to pressurise the courts to get favourable decisions. Locking court rooms and even harassing judges is often reported in the newspapers. Sometimes ordinary people and officials are beaten in the court premises. The professional lawyers are interrupted unreasonably by pressure groups and unprofessional

individuals during the court proceedings. Even in the Higher Courts a few try to influence the courts, violating the professional code of conduct.

The judicial organ of the legal profession being aware of the situation seems to transform and reinvigorate its role for uplifting the legal profession in the country. The Punjab Judicial Academy has started offering regular training courses to the judicial officers. However, it is important to note that lawyers are kept from this opportunity for professional development (though their role is crucial for the administration of justice).

Without capacity building of the lawyers and superior court judges, the training of the district judiciary would only be a partial success. Without proper assistance from lawyers, the courts can dispose of the cases but may not deliver justice. It may also be noted that judges of the High Courts and the Supreme Court of Pakistan are mostly elevated from the lawyers. Thus, if we fail to provide adequate professional training to our young lawyers, that will affect the performance of the Superior Courts. As a result, the people may not get their basic rights protected and the rule of law would suffer.

In this backdrop, the Bar Councils at various levels and the Judicial Academies of all provinces should collaborate to impart professional training to both lawyers and judges. Particularly, young lawyers should be trained in subjects like interviewing a client, preparing a fact sheet, writing a legal memorandum, writing a legal opinion, arguing in court, analysing case law, writing research articles and opinions, advising clients, and legal ethics. Finally, the Bar Councils should take disciplinary action against those who violate the rule of law in the name of protecting the law in Pakistan.

A SORRY STATE OF AFFAIRS

The professions of law and medicine are recognized for service to humanity. However, the ugly episode at the Punjab Institute of Cardiology (PIC) brought obvious disgrace to both the professions and depicts a sorry state of affairs in the country. If a section of educated lawyers and doctors can take law in their hands then how others could be persuaded to maintain the rule of law in the country. Therefore, both the professions need to promote the rule of law and meet rightly placed expectations of the people.

The videos that went viral show as if there is no regulatory mechanism in both the professions and the capacity of law enforcement agencies to control such incidents is weak. The professional bodies such as bar councils and medical commission seem to fail in the effective regulation of both the professions in Pakistan.

How can lawyers' and doctors' resort to violence in any civilized society? How can one be allowed to ransack emergency wards, operation theatre, and intensive care unit of a hospital? Can life-saving equipment such as drips of

patients, ventilators and oxygen supplying equipment be damaged and forcefully removed by any human? How can doctors be stopped from conducting operations endangering the lives of patients? Are such actions not a stain on our humanity? Even enemies do not attack hospitals during the war. One who belongs to the legal profession and believes in the rule of law cannot play such havoc. Anyone who claims to uphold the constitution and the rule of law cannot defend the attack on the PIC.

The regulatory bodies should have issued an outright apology to the nation and a strong condemnation against those who were engaged in the PIC storming, as the majority of lawyers and doctors are not cut from the same cloth. Those who bring a bad name to the profession should not be supported, as the regulatory bodies are supposed to upgrade the professions. The sanity and the rule of law must prevail; otherwise, our society may drift to anarchy and the law of jungle. The regulatory bodies and the government should have facilitated a peaceful resolution of the issue; the PIC sacking must have been avoided. Now, these authorities should play a proactive role to prevent any crisis in the future.

In future, effective disciplinary action under Section 9(k) of the Pakistan Medical Commission Ordinance, 2019, must be taken ensuring the enforcement of the code of ethics for doctors. Those who abused the black coat and humiliated lawyers must also be punished under the law.

In an unfortunate incident, one-sided blame-game against any profession, community or institution should be averted and quick judicial enquiry should be conducted to fix responsibility on wrong dowers. At the same time, unlawful arrest, harassment and torture of innocent professionals must be condemned.

Now, this issue may be examined from another angle? Why violence is increasing even in our educated class? Our consecutive governments may be held responsible for the

deteriorating educational standards and employment opportunities for the youth. The problem started with the failure of the governments to fix legal and medical education. The private sector was allowed to compromise on the quality of professional standards. Substandard law schools and medical colleges mushroomed throughout the country. They produced a large number of graduates who lacked professional aptitude and ethics.

The regulatory bodies further failed to upgrade the professions. These bodies got deeply politicized. They largely ignored the basic function of professional regulation and accountability. Young lawyers and doctors, in particular, were also ignored in mentor and financial support and a fair opportunity for professional growth. Sense of exclusion, discrimination, and social condemnation produces anger and violence. The PIC tragedy, therefore, may also be understood and explained in terms of failure of our governments and professional bodies to engage and channelize the potential of our youth in professional and other constructive social activities. Thus, we need to identify the reasons for increasing violence in our youth instead of outright blaming. It may help to appreciate the ugly episodes such as the PIC incident in a broader context and to introduce long-term social reform.

Briefly, the government should ensure a quality system of professional education and opportunities for employment. Institutional reform should be introduced through amendments in the Legal Practitioners and Bar Councils Act, 1973, and the Pakistan Medical Commission Ordinance, 2019, aiming to promote professionalism and accountability amongst both lawyers and doctors. It would help to uphold the rule of law and increase tolerance in our society.

BAR POLITICS

The bar councils are mandated to regulate the legal profession. However, they have become increasingly politicized. Politics is not bad per se. Bar politics for an objective purpose must be appreciated and is highly desired in Pakistan. But, politics for politics' sake and subjective aims is redundant in any civilized polity. Politics for supporting the legal profession and monitoring legal services is direly needed. However, political action focused on unnecessary strikes, pressure on courts and public authorities, or belligerence and hooliganism, does not suit members of the legal profession.

Traditionally, the bar has been a house of wisdom, knowledge, and integrity; a house that supported the rule of law during the lawyers' movement, that stood for the rule of law whenever dictators or usurpers tried to abridge the Constitution or infringe on fundamental rights. The law has been a profession of great leaders and a ray of hope for the victimized. Unfortunately, this is fast changing in Pakistan.

Campaigning for bar elections, without an objective manifesto, continues throughout the year. There is hardly a day when a lawyer does not receive a political call or message from his colleagues. Each day begins with courtesy messages, and each night adds reminders to vote for a particular

candidate. On special days, a lawyer is flooded with blessings like 'Juma Mubarak', 'Eid Mubarak', 'Ramazan Mubarak', and so on. Social media is extensively used for campaigning in bar council elections. Literature and quotes are frequently used for canvassing.

Campaigning for bar elections is never-ending. Bar politics extends to every ceremony of life and death, even to the extended family of a fellow lawyer. So, changing one's religious, moral and social orientation and behavior, sometimes, is considered essential to win bar council elections.

There are established political factions and groups in the bar. Caste and creed still play a significant role. There is an apparent divide between the urban and rural class and agrarian and non-agrarian lawyers, and so on. Every clan promises rewards to its cronies either through appointments in higher positions or by providing support in personal matters. There seems to be a systematic effort to 'purchase' the loyalty of younger members.

Bar politics appears to function like an enterprise, with younger lawyers campaigning over the year in every nook and corner of the country. It has become a contest in which mainly two teams pull at opposite ends of a rope until one drags the other over a central line — often with no serious objective. Occasionally, folk dancing and expensive parties welcome the winners.

But the bar in developed countries focuses on providing quality legal services. It conducts regular training sessions and tests to keep lawyers abreast of the latest developments in the law. It upholds standards through strict entry requirements, continuous legal education, mentoring, and professional support. It hears litigants against lawyers through effective committees and tribunals and penalizes those who fail to uphold professional standards.

The bar devises strict procedures ensuring the professional and financial integrity of lawyers. It makes the conduct of lawyers a matter of public record so that people are aware of their credibility. It promotes merit and transparency in the functioning of the justice system. Political activity, if any, is meant to support the legal profession as a whole.

Our bars are still regulated by outdated rules. For example, the rules relating to legal aid work, bar council elections, and legal education are not taken seriously. The provisions regulating entry are ineffective. The rules relating to disciplinary committees and tribunals also need reconsideration. It should be a matter of grave concern for our bar that some lawyers manage to practice with fake degrees.

It is to be noted that bar politics thrives on feasts, semi-commercial advertisements, and involves heavy investment in bar council elections. Younger members of the bar are often trapped in bar politics in the early years of their career. More often than not, they learn politics rather than the law. Is it surprising then there should be a dearth of professional lawyers in the country? And, our legal system continues to fail to deliver timely justice to the people.

As always, the solution lies in reform, beginning with an educational leaflet to gather support for a 'vote for change' at the national level. A high-powered committee should be constituted under the Pakistan Bar Council to review outdated bar council rules and recommend appropriate reforms. A national legal education programme focusing on professionalism and legal ethics should be introduced in law schools and bar councils with the active support of the government and international professional bodies.

Visits of bar representatives should be arranged to observe the functioning of professional bodies in developed countries. Reputed institutions such as the International Bar

Association may be asked to help promote professionalism through depoliticized and strong bar councils. The legal profession has immense potential. The bar need to realize that potential by way of robust internal reforms. Finally, the bar leaders and young lawyers *must* speak loud for saving our justice system. Notwithstanding the political clout, seniority or position in the bar or bench, those who are responsible for the deterioration of Pakistan's justice system and bring bad name to the legal profession must be held accountable. Otherwise, the whole process of bar politics and judicial accountability would become meaningless.

Part IV. Judiciary

JUDICIAL INDEPENDENCE IN PAKISTAN

Judicial independence is an essential feature of constitutional democracy. Pakistan's judiciary has been struggling to secure its independence from the executive since 1947. Both civil and military governments have attempted to keep the judiciary subservient. Some pliant judges have also damaged the independence of the judiciary, endorsing extra-constitutional regime changes, for example in 1958 by General Iskandar Mirza (*Dosso's* case), in 1977 by General Ziaul Haq (*Nusrat Bhutto* case), and in 1999 by General Pervaiz Musharraf (*Zafar Ali Shah* case). The shadow of this chequered constitutional history looms large over our judiciary.

In the recent past, Pervaiz Musharraf took over the government in 1999 and issued a Provisional Constitutional

Order (PCO) barring the courts from reviewing the acts of Musharraf as a self-declared Chief Executive. Violating their oath, several judges were asked to take a fresh oath to the Chief Executive; those who refused were removed. This coup was challenged before the Supreme Court of Pakistan (SC), but the judges who had taken Musharraf's oath upheld the PCO. Musharraf made drastic amendments in the Constitution through a Seventeenth Amendment (including the revival of an infamous article, Article 58 (2)(b), which the president had often used in the past to dissolve elected governments), and when this amendment was challenged before the SC it too was upheld by the PCO judges (*Pakistan Lawyers Forum* case).

Ex-Chief Justice Iftikhar Muhammad Chaudhry started taking *suo motu* notice of human rights cases. Threatening the writ of Musharraf's government, Musharraf told Justice Chaudhry to resign, but he refused, so Musharraf put him under house arrest. A presidential reference was filed before the Supreme Judicial Council (SJC), but Chaudhry challenged this reference as malafide and, in the *Justice Iftikhar Muhammad Chaudhry* case, the SC restored the Justice. When a nationwide lawyers' movement started against Pervaiz Musharraf, he passed another PCO in November 2007 with a fresh oath. In the *Wajihuddin Ahmad* case, however, a seven- member SC bench passed a restraining order against the PCO, but these judges too were put under house arrest, allowing judges who had taken the fresh oath to declared the findings of *Wajihuddin Ahmad* unlawful (upholding the PCO in *Tikka Iqbal Muhammad* case).

These unconstitutional developments fuelled a massive lawyers' protest movement, eventually leading to the restoration of the deposed judges on 17 March 2009. Musharraf was subsequently made to resign and, in the *Sindh High Court Bar Association* case, the SC declared all of the actions taken by Musharraf unconstitutional. In 2010, an Eighteenth Amendment was passed restoring the

Constitution in its original form (without Article 58 (2)(b)). The Eighteenth amendment also provided a role for a parliamentary committee to be involved in the approval of judges' appointments, but this was challenged in *Nadeem Ahmad Adv* case, wherein the SC referred the matter back to the legislature with a proposal to ensure the separation and independence of the judiciary from both the executive and the legislature. The legislature amended its proposal and, in the *Munir Hussain Bhatti* case, the SC reiterated the exclusive role of a purely judicial committee in judges' appointment: The Nineteenth Amendment subsequently incorporated the SC's recommendations regarding the appointment of judges (Article 175A).

Nevertheless, this history seeking to constrain the judiciary seems to have been repeated in a recent presidential reference against Supreme Court Justice Qazi Faez Isa. The government filed a reference before the SJC claiming that Justice Isa had concealed his beneficial ownership of properties in London when filing wealth statements before the tax authorities, but Justice Isa denied these allegations and stated that the properties belonged to his non-dependent spouse and children. He maintained that the reference was malafide, aiming to silence him and make the judiciary weak and subservient after his judgment in the so-called *Faizabad* case, dealing with a massive anti-government protest that ended with images of Pakistani soldiers *paying* protesters to desist, irked Pakistan's establishment quarters. Again, the SC declared the reference completely 'invalid' whilst directing revenue officials to conduct an enquiry of the spouse and the children of Justice Isa as to the source of the funds that allowed them to buy the London properties.

Some have argued that the SC decisions in both the *Justice Chaudhry* and the *Justice Isa* cases firmly established the independence of the judiciary, the rule of law, and constitutionalism in Pakistan. But in hindsight, they might only show that in exceptional circumstances (e.g. malafide

proceedings against a SC judge), the SC will bypass the constitutional mandate of the SJC to throw out the malafide reference, seeing these references and the work of the SJC as justiciable insofar as it pertains to 'the independence of the judiciary' as a matter directly tied to the protection of fundamental rights (Article 184). In fact, these cases suggest that, sometimes, even the honorable judges of the SC do not consider SJC proceedings transparent. These arguments gain weightage when references against Shoukat Aziz Siddique and Justice Isa reportedly proceeded while ignoring other complaints before the SJC and most importantly the public discourse on the subject in the perspective of liberal democracy.

Of course, some disagree; they contend that, while quashing the references against Iftikhar Chaudhry and Justice Isa and, thus, the work of the SJC, the SC has effectively made the superior judiciary immune from accountability. It is argued that a decision on a reference by the SC ousts the jurisdiction of the SJC, which is against the dictates of the Constitution. This argument sustains if the SJC proceedings are made more transparent and fairer with appropriate amendments in Article 209 and the Supreme Judicial Council Procedure of Enquiry 2005. For example, the number of the SC judges comprising the SJC may be increased; the procedure for filing a reference by the President be made objective; a reference shall be decided in priority with reference to the date of its filing and the findings of the proceedings shall be published on the SJC website.

In short, the government must demonstrate a credible commitment to the independence of the judiciary. The procedures for appointment, transfer and promotion and constituting of benches should be made more inclusive and objective. The remuneration of judges should commensurate with judicial responsibility. The SC and the legislature should provide guidance and a clear procedure for the independence and accountability of both the superior and the district

judiciary. Finally, the independence of the judicial system should be prioritized to consolidate the gains from the democratic transition in Pakistan.

JUDICIAL INTROSPECTION

Justice (R), Asif Saeed Khosa, reached beyond constitutional questions and matters of legal reasoning in his criticism of high courts' judgments. He challenged the Lahore High Court for misreading basic evidence in the Khadija stabbing case. In the Asia Bibi case, he observed that the courts below failed to address "downright falsehood" in evidence. He questioned an Islamabad High Court ruling regarding the grant of bail to former prime minister Nawaz Sharif. He lamented over the performance of lower courts and high courts in ignoring important evidence or discrepancies in criminal cases.

Justice Khosa consistently expressed his dismay over the performance of our lower courts. He said, "if the lower courts could deal with the matters carefully, many cases would not come to the apex court." He categorically stated that those who cannot dispense justice must go home. These remarks by the top judge indicate an urgent need for judicial introspection and reform.

The question remains: how can judiciary be purged from inefficient or incompetent judges? At the superior-court level, it may involve two judicial institutions outlined in our constitution: The Supreme Judicial Council (Art.209) and the Judicial Commission of Pakistan (Art.175-A).

The Supreme Judicial Council (SJC) is mandated to proceed against a judge of the Supreme Court or High Court if a judge is incapable of performing duties of his office for the reason of mental 'incapacity' or has been found guilty of 'misconduct'.

The Supreme Judicial Council Procedure of Enquiry 2005 provides that" [i]ncapacity will include all forms of physical or mental incapacity howsoever described or narrated, which render the Judge incapable of performing the duties of his office". It further provides that" [m]is conduct includes (i) conduct unbecoming of a Judge, (ii) is found to be inefficient or has ceased to be efficient" (Rule 3). The Procedure also includes conduct that "is in disregard of the Code of Conduct issued under Article 209(8) of the Constitution". This Code prescribes that, "[i]n his judicial work a Judge [of the Supreme Court or the High Courts] shall take all steps to decide cases within the shortest time…through proper written judgments. A Judge who is unmindful or indifferent towards this aspect of his duty is not faithful to his work, which is a grave fault" (Article X).

It is high time, therefore, to strengthen the judiciary by enforcing the Code of Conduct and actualizing the provisions of "incapacity" and "misconduct" against those who are unable to deliver justice. There should be an across-the-board accountability-without any kind of victimization

Ex-CJP, Anwer Zaheer Jamali marked the Judicial Year 2015-2016 as "a year of judicial accountability". The outgoing Chief Justice Mian Saqib Nisar admitted his failure to set his own judicial house in order. A sign of judicial introspection and accountability emerges from the statements of senior judges amidst a new focus on accountability in the country. The legal fraternity has repeatedly urged that pending complaints before the SJC may be decided expeditiously. It is high time, therefore, to strengthen the judiciary by enforcing the Code of Conduct and actualizing the provisions of

"incapacity" and "misconduct" against those who are unable to deliver justice. There should be an across-the-board accountability-without any kind of victimization. While inefficient judges should be held accountable; competent ones must be appreciated for their commitment and devotion to the cause of dispensation of justice. Additional training and support may also be provided to judges.

The Judicial Commission of Pakistan (JCP) is empowered to appoint those who are able to provide justice to the people of Pakistan. Article 175-A (appointment of judges) and the Judicial Commission of Pakistan Rules 2010 (the Rules) could be revised to make judicial appointments more transparent and competitive manner.

The existing rules provide a Chief Justice with discretion to nominate a candidate for appointment as a judge. These rules may be amended to ensure that this discretion is exercised objectively. For example, the first nomination may be made by a body of judges headed by a Chief Justice. Further, the whole process of appointment should require candidates to go through a multi-stage process of appointment. It may include short-listing of candidates on the basis of assessment reports, written test, and interview etc.

In the UK, for example, Judges of the High Court and the Supreme Court are appointed in an open competition by the Queen on the advice of both the Lord Chancellor and the Prime Minister. The Judicial Appointments Commission of the UK recommends a candidate to the appropriate authority for appointment after considering reports written by the panels (comprising of judicial and non-judicial members), evidence provided in independent assessments, and any comments from statutory consultees.

In Pakistan, however, the appointments process remains opaque and non-inclusive, as the first nominations made at the subjective discretion of a Chief Justice of a High Court. An effective institutional consultation is neither made with

the parliamentary committee nor with the bar. Even the basic attributes of judgeship i.e., judgment writing skills, legal reasoning, and judicial aptitude are not assessed in any systematic manner. The appointment of lower-court judges should also be made more competitive on the pattern of civil superior services.

Given the mystique and lack of competitiveness surrounding judicial appointments and persistent fragility in the removal of inefficient judges at each level, our justice system is weak. It is hoped that our judicial policy makers usher in an era of judicial reforms-starting with reforms in the judicial policy-making and the appointment and removal of judges.

JUDICIAL POLICY REFORMS

The National Judicial Policy Making Committee (NJPMC) – a body of all chief justices charged with bringing judicial reforms in the country – once resolved that applications under section 22-A of the Criminal Procedure Code (CrPC) may not be entertained by courts unless accompanied by a pronouncement from the district SP Complaints. The bar councils oppose such reforms.

Some argue that the bar councils oppose judicial reforms to protect their legal practice. These reforms refer to the National Judicial Policy 2009 for early disposal of cases, formulated by former chief justice (CJ) Iftikhar Muhammad Chaudhry and the reforms of chief justice Asif Saeed Khosa to reduce unnecessary burden on courts. It was argued that lawyers oppose these reforms because they benefit from numerous cases with extended delays. My contention is that judicial reforms in Pakistan cannot succeed without meaningful institutional engagement from the bar. The Bar and Bench being two wheels of a chariot need to work together to reform our justice system.

Justice Khosa apparently believed that our courts are burdened with cases which may be resolved elsewhere – for example, under the Police Complaint Redressal Mechanism at the district level. This mechanism addresses issues related to the registration of cases by police, the transfer of investigations from one police officer to another, and forms of neglect, failure or excess committed by a police authority in relation to its functions and duties (Section 22-A (6) of CrPC). Justice Khosa wanted to avoid the involvement of the judiciary in the functions of the executive; he emphasized on the constitutional doctrine of "separation of powers". Those who opposed these judicial reforms argued that diverting these cases to the police may further expand their power and open a new avenue of corruption; the new mechanism will cause further inconvenience to the complainants.

In any case, the focus on judicial reforms is appreciated given Pakistan's ranking (120 out of 128 countries) in the World Justice Project 'Rule of Law Index' 2020. Unfortunately, judicial reforms in the past have largely failed due to none or limited consultation with key stakeholders. Therefore, an institutional mechanism for effective consultation between the bench and the bar is required. Further, the process of judicial reforms should be institutionalized to sustain any change of chief justice.

Section 3 of the National Judicial (Policy Making) Committee Ordinance, 2002 may be amended to provide representation to the national and provincial bar councils in judicial policy making. For comprehensive judicial reforms, periodic national surveys can also be conducted to project perceptions as to the functioning of our justice system.

NJPMC's opinion that the issuance of directions by Justices of the Peace under Section 22A of CrPC, which were proposed to be issued by district level SP Complaints, are executive in nature and cannot overrule earlier judgments of the Supreme Court. A five-member SC bench has ruled (PLD

2016 SC 581) that the functions of an ex-officio Justice of the Peace are not executive, administrative or ministerial inasmuch as he does not carry out, manage or deal with things mechanically. The SC held that "the functions of a Justice of the Peace are quasi-judicial as he entertains applications, examines the record, hears the parties, passes orders and issues directions with due application of mind."

It is the function of courts to direct the executive to act in accordance with the law. If the issuance of 'quasi-judicial' directions is construed as an 'executive function', then the mandate of courts to deliver justice to citizens against the executive authority of the state would fail. The concept of judicial review dictates that courts must ensure that executive officials comply with the letter and spirit of the law. The NJPMC's argument, therefore, challenges the constitutional doctrine of separation of powers.

However, Justice Khosa's argument seems valid on the ground that if a complainant is provided a remedy within the hierarchy of police then recourse to the courts in the first instance may be avoided to reduce the burden on the courts. It is not clear whether the proposed reforms will increase malpractice and inconvenience or enhance the powers of the police. Conversely, they could make the SHO more accountable within the police department. Nonetheless, orders passed by the police will remain subject to review by the courts.

In a nutshell, the proposed judicial reforms can reduce some of the burden on our courts. The long-term solution for delay-reduction, however, lies in increasing the number and capacity of judges at each level and cultivating a widespread public appreciation for the degree to which judicial rulings, in keeping with existing laws, will be enforced. Given the fragile performance of our legal system, all the stakeholders should work for earnest judicial reforms. As such, the government

and the bar should be encouraged to engage with the process and support effective judicial reforms in Pakistan.

WOMEN IN THE SUPERIOR JUDICIARY

Pakistan is the only country in South Asia to have never appointed a woman as Supreme Court judge. Women lawyers are terribly under-represented in the superior judiciary, though the 1973 Constitution does not bar the appointment of women in the superior judiciary. Rather, the Constitution provides that "all citizens are equal before the law…that there shall be no discrimination on the basis of sex" (Article 25).

Moreover, the international Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) states that "State parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government" (Article 7). Further, Pakistan is signatory to the International Conference on Population and Development in Cairo, 1994; the UN Conference on Women in Beijing, 1995. Pakistan has

also signed the UN's Millennium Development Goals and Sustainable Development Goals, which set out gender equality as one of its main goal. Pakistan, having signed these international instruments, is obliged to promote gender equality in the superior judiciary as well.

The Human Rights Commission of Pakistan's report on the State of Human Rights in Pakistan (2016) observed that only 5.3 per cent of Pakistan's high court judges are women, the lowest in the region. The report demonstrates that working conditions and opportunities immeasurably discriminate against women, who are, as a result, rendered less able to progress despite their brilliance in the legal profession.

The 18th and the 19th Amendments to the Constitution stipulate a nine-member Judicial Commission of Pakistan and an eight-member parliamentary Committee for the appointment of judges in the superior judiciary. These bodies do not provide specific representation to women. Further, the criteria on which nomination for judicial appointments are made is arbitrary considering that only few women have been appointed in the superior judiciary.

In 1974, Justice Khalida Rashid Khan was appointed a Peshawar High Court judge. Twenty years later in 1994, Justice Majida Rizvi was appointed a high court judge in Sindh. The same year Nasira Javaid Iqbal was appointed a high court judge in Lahore. Justice Syeda Tahira Safdar was confirmed as a judge of the Balochistan High Court in 2011. Justice Ayesha A. Malik, an eminent lawyer, was elevated to the Lahore High Court in 2012. Justice Aalia Neelum was appointed in the Lahore High Court in 2013. Justice Ashraf Jehan was appointed as a judge of the Federal Shari'at Court in 2013.

Other countries in the region have much better indicators regarding gender equality in the superior judiciary. Sri Widoyati Wiratmo Soekito became the first Indonesian

woman to be elevated to the Supreme Court in 1968. India had its first female judge of the Supreme Court, Fathima Beevi, in 1989. In 2012, Maria Lourdes Sereno was named the first female chief justice of the Philippines. Sushila Karki was the first female judge to head Nepal's Supreme Court in 2016.

Superior judiciaries of developed countries like the UK, the US and Canada might be infested with gender bias, but several female lawyers have been able to serve in the apex courts. Brenda Hale, a British judge served as president of the Supreme Court of the United Kingdom; she was also the first female lawyer to be elevated as a Law Lord in 2004. In the US, Sandra Day O'Connor was appointed in 1981 as the first woman to serve on the Supreme Court of the United States. Ruth Bader-Ginsberg was appointed as Supreme Court judge in 1993. Sonia Sotomayor has been serving since 2009, and Elena Kagan was appointed as a Supreme Court judge in 2010. Justice Rosalie Abella was elevated as a judge of Canada's Supreme Court in 2004. Beverley McLachlin served as the Chief Justice of Canada from 2000 to 2017.

In order to eradicate gender imbalance in Pakistan's superior judiciary, Article 175A could be revised to ensure due representation of women — both in the Judicial Commission of Pakistan and in the Parliamentary Committee. A specific quota for women in the superior judiciary may also be prescribed within the mandate of Article 25 of the Constitution. The population of women in the country and proportion of women in the legal profession may guide our policymakers regarding fixing an appropriate quota for women in the superior judiciary.

Women lawyers should be provided a conducive environment so that they may grow as professional lawyers and then be considered for judicial appointments. The emergence of globalised and progressive societies worldwide requires change in traditional perception about the role of

women in Pakistan as well. In fact, no country can afford to restrict employment of women in any field in today's world.

If women are provided due representation in the superior judiciary, they will surely contribute to the overall betterment of society as decisions of superior courts are binding on all institutions. In order to guarantee fundamental rights and achieve equality and social justice, the judicial appointment process has to be made merit-based, transparent, and non-discriminatory. An inclusive approach will help to provide access to justice for all. More specifically, it would help to redress grievances of the marginalised in society, including women and children.

DARK CLOUDS OVER THE JUDICIARY

Given a flawed system for appointment and accountability of judges, there should be no surprise if Pakistan is penalised with six billion dollars by an international tribunal as a contract with a foreign company was annulled by a former chief justice, or if a video is leaked about the exceptional conduct of an accountability court judge.

Our judiciary has noble and the finest judges; however, the conduct of judges like Malik Qayyum and Arshad Malik bring our justice system under the cloud. In the context of this crisis in the judiciary, the role of judicial policymakers becomes more important. It is time that the Supreme Judicial Council (SJC) plays its role in letter and spirit of Article 209 of the Constitution. Otherwise, suspicion as to the credibility, competence, and the independence of the judiciary would get strengthened.

If a judge can be allegedly influenced, bribed or blackmailed even under the direct monitoring of a Supreme Court judge, how and where would people depose trust for a just adjudication of their cases? When judgments given by a

Supreme Court judge are reviewed by colleague judges after the retirement (in case of judge Saqib Nisar) or set aside by international tribunals with heavy fines (in case of judge Iftikhar Chaudhry), how would people appreciate the legal acumen of judges? When cases are delayed for years or dismissed without a fair opportunity of hearing, how can one believe in the efficiency and impartiality of our justice system? Finally, when some lawyers with allegedly poor professional and personal character are appointed as judges, how can others be convinced as to the unbiased, meritious, and effective role of the Judicial Commission of Pakistan?

What is at stake is not a particular judge or a specific case, but institutional role, capacity, conduct and independence of the judiciary. I sought the indulgence of the legal fraternity in an earlier piece as to the state of affairs in our lower courts and conduct of unbecoming a judge. With more forethought, timely decisions, and confidence this judicial dilemma could have been averted. Alas! It could not happen in Pakistan so far due to the reasons best known to the SJC. It is urged, again, to remove 'inefficient' and 'pliant' judges without further delay to save our justice system. Justice is the foundation of society. Without a fair, impartial, independent and strong justice system, it is impossible for any society to sustain. It must now be realised by our judicial policymakers.

Salahuddin Ahmed has rightly noted in daily Dawn that "The Supreme Court — and all its judges — are now at crossroads. They must navigate through the dark clouds that hang around their institutional credibility and public legitimacy as well as the positions they shall occupy, collectively and individually, in the public pantheon." Hamid Khan, in his book, 'A History of the Judiciary in Pakistan', paid tribute to some judges as honest and upright, and at the same time, called a few others as corrupt, incompetent, and spineless. The difference with Hamid Khan's opinion

regarding a particular judge notwithstanding, his overall analysis of our judicial history seems largely convincing.

With mixed baggage of history and the present context of scandal and suspicion about the conduct of a few judges, our chief justice and other upright judges need to show their strength and reform our justice system on priority. After all, they are the protectors of the Constitution, fundamental rights, the rule of law, democracy, and the fountain of justice. The people trust and look towards the judiciary with the highest esteem and respect. Judicial institution is always the last hope for those whose voice is not heard elsewhere. This hope must be kept alive. The independence, integrity, and respect of the judiciary must be upheld. The bar and the civil society must support the judiciary in the face of any intrigue, conspiracy and allegation aimed to weaken this institution. Our honourable, independent, honest, upstanding, and ethical judges must be appreciated and protected.

Justice Khosa once stated that those who cannot dispense justice must go home. These remarks indicate an urgent need for the accountability of judges and long-term judicial reforms. The SJC is mandated to proceed against judges on the grounds of mental incapacity and misconduct; so, SJC may conduct a regular judicial review of the capacity and conduct of judges based on their performance and behaviour. In this regard, SJC may collect information from valid sources and also conduct public perception surveys amongst the bar members and the litigants.

Transferring, censuring, or punishing a judge occasionally or selectively is not a permanent solution. Overhauling of the justice system is needed—that does not seem possible without making a robust procedure for the appointment and accountability of the judges. In this regard, Article 175A (appointment of judges) and Article 209 (accountability of judges) may be revised with the consultation of bar councils and a select committee of the

parliament. The appointment and performance review procedures given under other judicial systems may also be studied to recommend an effective reform and amendment in the Constitution.

DISTRICT JUDICIARY

The District judiciary is the backbone of the national judiciary. This branch of the judiciary deals with the legal disputes of the people at the grassroots level. However, there is a sense of neglect amongst a section of the District judiciary. This impression needs to be dispelled by our judicial policymakers. To strengthen our justice system, the concerns of the District judiciary have to be prioritized in judicial policy and effectively addressed. This article focuses on important issues including non-participation of the District judiciary in administrative decisions, flawed service structure, and lack of proper support for the District judiciary.

The District judiciary is hardly consulted in judicial policy and administrative decisions. National Judicial Policy Making Committee (NJPMC) – comprises of all chief justices charged with bringing judicial reforms in the country. In High Courts, Administrative Committees are responsible for administrative decision making for the District judiciary. The District judiciary is nowhere figured in administrative decision making. It creates a structural divide between different tiers of the judiciary affecting the fate of the District judiciary. For example, the transfers and postings of district-level judges are made without following a concrete policy. The District and Sessions judges are rarely elevated, especially since the

lawyers' movement for the restoration of Justice Iftikhar Choudhry.

The service structure of the District judiciary is seriously flawed. A great number of judges are recruited as civil judges. However, their chances of promotion to higher ranks remain minimal due to direct induction of lawyers. Arguably, there should be no bar on direct induction of lawyers at senior positions in the judiciary; however, these inductions need to be balanced with the legitimate right to the promotion of the District judiciary. Otherwise, the District judiciary would become a demoralized and weak institution.

The institutional support and appreciation for the District judiciary are lacking. The District judiciary deals with the highest number of cases in the first instance. They have to interact with numerous individuals and agencies while conducting trials. However, in case of non-cooperation from elements in the bar, the District judiciary is rarely supported. The lack of institutional support and appreciation lowers judicial passion and interest in work. There is also a perception that the salary and pension of the district judicial officers do not commensurate with their responsibility. The compensation structure should appreciate the post-retirement constraints of the judges.

The District judiciary also lacks IT support and on-job training. There is some progress in the training; however, our judicial academies are not as stable as other training institutions like the civil services academy. Foreign training and judicial exchange programs are rare. It may be enhanced to enrich the judicial experience. The judges do not have independent access to quality judicial software and law sites. Technology has revolutionized judicial systems worldwide. However, the District judiciary yet to benefit from technology. In this regard, 'online courts' need to be established in Pakistan.

The lack of support by the bar councils further undermines the working of district judges. Unnecessary strikes and adjournments are a common practice in our courts. How can judges perform without professional assistance and cooperation of bar members? The institutional coordination between these two chariots of the justice system is a must. The judicial policymakers and the bar councils should make a robust policy supporting the District judiciary to deliver justice effectively. For example, the District judiciary may be provided research support and given a day off to concentrate on writing judgments.

The performance of the District judiciary is affected due to the absence of specialized cadres and overwhelming focus on the quantity of disposal of cases. The cases are assigned notwithstanding the lack of interest of judges in particular areas of the law. The performance evaluation is conducted by the Administration Committee of a High Court. The quantity of decided cases appears to be the only tool used for performance evaluation. Therefore, judges focus on the number of disposal of cases while ignoring the quality of judgments. There is a need to define performance evaluation criteria like those for the executive civil servants. The speedy justice is appreciable; however, the speed of delivery needs to be balanced with the quality of justice.

The system of disciplinary proceedings is inherently defective. A separate service tribunal exists for the District judiciary. The tribunal comprises of justices of High Court who are, sometimes, junior to those sitting on the Administration Committee. Questions of impartiality could thus be raised, creating a negative impact on a fair hearing, as a fundamental right of judges of the District judiciary. Virtually the District judiciary has no effective right to hearing before the judiciary.

Finally, the support staff i.e., stenographer and reader should be hired on merit and trained properly. The qualified

staff increases the capacity of the courts in terms of case management, service of summons and record keeping. The induction of support staff, therefore, should be made through a provincial competitive exam making the appointment process more transparent. The optimal performance of judges cannot be expected with handicap staff.

Briefly, the District judiciary could be uplifted through training and institutional support, policy-oriented postings, transfers, and promotions, and quality evaluation of performance. The superior judiciary needs to formulate a policy to address these issues. Article 175 of the constitution envisages the concept of one judiciary. The independence of judiciary means and covers the independence of all branches of the judiciary. Without supporting the District judiciary, the delivery of justice to common people would remain a dream. Of course, the credit of strengthening our justice system goes to NJPMC.

JUDGES UNDER SIEGE?

Amidst an increased focus on accountability in the country, perhaps we should not be surprised by judicial references against judges of superior courts. The award of punishments to senior military officers for espionage and leaking sensitive information to foreign spy agencies is also a welcome step. However, each accountability drive has to be judged independently.

The reference against Justice Qazi Faez Isa focuses on the matter of "misconduct," that is, that he allegedly concealed his property in London in wealth returns.

However, as with any push for accountability, this reference should be judged in terms of its background and context. Few would dispute Justice Isa's professional reputation. His independence, integrity, and honesty are beyond doubt. He is known as a fearless, plain-speaking, and upright person. He was a leading lawyer before his elevation to the judiciary. Throughout his career, there was not a single complaint of professional misconduct or dishonesty against him. He always stood for truth, justice, and moral values. He

taught professional ethics both to those who worked with him as juniors and to those who served as opposite counsel. Inevitable differences of opinion as to the content and tone of his judgments notwithstanding, he spoke for constitutionalism, fundamental rights, democracy, and freedom of expression.

For example, the judicial commission comprising Justice Isa investigated the August 8 attack in Quetta illuminated institutional and procedural flaws in terms of their effect on the security of citizens, and he proposed a way forward for institutional reforms. In the Faizabad dharna case, he attempted to establish the writ of the state within constitutional parameters. It might have ruffled a few feathers, but the context of the current reference against Justice Isa is important for any student of law and every independent observer.

The Senate adopted a majority resolution demanding the withdrawal of the references against Justice Isa. The resolution said, "There is a lingering suspicion that the arbitrary and suspicious filing of references is linked with some recent verdicts of these judges." It termed the filing of the reference "a direct attack on the independence of the judiciary aimed at stifling the voices of reason, truth, and justice in the highest judiciary." The Senate expressed solidarity with the judges under probe. Senior members of the legal fraternity and elected representatives of the bar councils also questioned the intent of the reference and demanded its withdrawal. The resignation of Additional Attorney General Zahid F. Ebrahim supported the argument that the reference was not a straightforward matter of judicial accountability. Rather, it appear to be part of something bigger and more complex. Zahid F. Ebrahim termed the reference as "a reckless attempt to tarnish the reputation of independent individuals and browbeat the judiciary."

Further, the manner in which Justice Isa's identity was made known to the public through a media leak, even before the Supreme Judicial Council's (SJC) notice to the judge, raises questions about transparency. Justice Isa himself felt compelled to write to President Arif Alvi, noting that, "Selective leaks amount to character assassination, jeopardise my right to due process and fair trial, and undermine the institution of the judiciary."

Under Article 209 of the Constitution, the SJC is mandated to proceed against a judge of the Supreme Court or high court if the judge is incapable of performing the duties of his office for the reason of mental incapacity or has been found guilty of "conduct unbecoming of a judge."

The SJC Procedure of Enquiry (2005) also discourages conduct that is in disregard of the Code of Conduct issued under Article 209, which dictates inter alia, that a judge has "to be above reproach, and for this purpose to keep his conduct in all things, official and private, free from impropriety as expected of a judge."

Again, the precise reference against Justice Isa is built on the ground of "misconduct," that is, that he allegedly concealed his property in London in wealth returns. The SJC is constitutionally mandated to examine this ground, and indeed the legal fraternity has always urged the SJC to hold judges accountable for misconduct provided that the accountability proceedings are bona fide, transparent, and all-inclusive.

A reference filed with any kind of prejudice jeopardises the independence of the judiciary and tarnishes the dignity of honourable judges. Thus, lawyers demand that "accountability" proceedings should never be an avenue for targeted retribution or selective victimisation. Concerns that the accountability measures against Justice Isa, and perhaps more widely, took a disturbingly selective turn provoked high-level criticism. While conduct unbecoming of a judge should

be penalised, judges of good conduct and reputation must be fully protected.

Given the context and malafide of the reference against Justice Isa, hasty judgments and scurrilous remarks could have been avoided. Now, when the SC has dismissed the reference against Justice Isa, those who made malicious remarks against the honorable judge and acted with malafide in law should be held liable. Judicial integrity and the due process of law are sacrosanct. In any case, the requirements of the law must be observed while commenting and reporting on any state institution.

CHANGING JUDICIAL BEHAVIOUR

The code of conduct for judges' attempts to regulate the behaviour of judges. However, it fails to provide any guidance as to the regulation of judges' emotional behaviour. Judges, like all other people, feel a broad range of emotions while hearing cases. They are bound to react to these emotional situations, but they are given almost no direction as to how to regulate these emotions. Sometimes, it leads to odd episodes in our courts. A section of lawyers may also be attributed the responsibility of such incidents but it is the behaviour of a judge that largely determines decorum of the court.

The traditional model of judging expects judges to set emotions aside while conducting court proceedings. This model insists that a good judge should be able to successfully hide or restrain their feelings. The old script of judicial dispassion is rooted in notions of rationality and objectivity in court proceedings. In 1651, for example, Thomas Hobbes said that the ideal judge is "divested of all fear, anger, hatred, love, and compassion."

Over the course of time, however, the notion of judicial dispassion has been moderated. Early 20th century legal realists, particularly Benjamin Cardozo, and a small group of judges at the end of the century, for example, Justice William J. Brennan, urged examining the interplay of "reason and passion" in judging. Justice Asif Saeed Khosa, in his book titled 'Judging with passion' seems to persuade fellow judges to judge with passion while maintaining judicial decorum and discipline. The legal fraternity, thus, needs to appreciate sane voices and dismantle the traditional model of the dispassionate judge. Our legal profession, in fact, needs to produce emotionally disciplined lawyers, who will go on to become judges.

According to psychologist James J. Gross, "emotion regulation" is expected from a good judge. Under both the traditional "dispassionate" account of judging and the more recent moderate conception of "emotionally-balanced judging," judges are expected to manage interaction between passion and reason to reach a balanced decision. Notwithstanding this expectation, the subject of 'judicial emotions' or 'regulating judicial behavior' is neither taught in law schools nor in our judicial academies. The bar councils fail to prescribe such courses for lawyers as well. Our legal culture apparently fails to appreciate the value of intelligent "emotion regulation". On the contrary, our judges are expected to simply suppress or restrain their emotions even in extremely emotional situations arising in the court.

According to James J. Gross, emotion regulation encompasses "what emotions we have, when we have them, and how those emotions are experienced or expressed." So, in order to regulate emotions more effectively, judges should engage in the study of "emotional regulations" alongside their understanding of the law. Equipped with the strategies of emotional regulation, judges could handle situations in a cool and composed manner.

The traditional model of judicial behaviour needs to be re-examined in light of the latest scientific studies on emotional regulation. The traditional assumptions that judges can manage emotions easily or they should hide emotions successfully are misplaced. Advanced psychological studies demonstrate that emotional regulation is a complex phenomenon. Even common sense informs that hiding one's emotions is nearly impossible. So, lawyers and litigants should not demand from judges to meet these high expectations.

It is scientifically established that the suppression of emotions damages the thinking process and increases the influence of suppressed emotions on one's judgment. It also affects overall health and happiness of a human being. A more engaged approach would, thus, prepare judges to identify their emotions and learn about their impact on their judgment. This approach would equip judges to employ emotions skillfully to conduct proceedings in a sober and effective manner—the hallmark of a good judge.

Our judges are angered in courts, resulting in a boycott of court proceedings and, thus, a delay in the delivery of justice. Judges sometimes encounter rude behaviour. They are exposed to false statements and concocted stories. The institutional limitation of judges to fix the ills of society may make them depressed and frustrated. Thus, we should not expect that judges should remain silent. Rather, the legal profession should encourage judges to employ their emotions in an appropriate manner. Engaging or regulating emotions, in my opinion, would enable judges to handle emotional situations more effectively. Judicial "emotion regulation" would, in fact, improve behaviour as well as the quality of judging. It would strengthen the working relationship between the bench and bar that is essential for proper functioning of any judicial system.

INDEPENDENCE OF JUDICIARY

"All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary".

Andrew Jackson

The independent judiciary is the core of any justice system. Our Constitution provides that "the independence of the judiciary shall be fully secured". While deciding the reference against Justice Qazi Faez Isa, the SC has promoted the constitutional aim and established the independence of the judiciary. The judgment has given hope to the people as to the supremacy of the constitution and the rule of law in Pakistan.

Briefly, the reference against Justice Isa stated that he has committed gross misconduct by concealing properties abroad and that the source to acquire these properties was not disclosed in tax returns. It alleged that he violated Section

116 (1) (b) and Section 116 (2) of the Income Tax Ordinance 2001 by concealing foreign properties. While doing so, he violated Article II and III of the judges' code of conduct, and thus was liable to be removed by the Supreme Judicial Council (SJC) under Article 209 of the Constitution.

Justice Isa and various bar councils called the reference unconstitutional, illegal and mala fide, and thus an attack on the independence of the judiciary. More specifically, Justice Isa argued that he cannot be held accountable for properties owned by his spouse and children purchased through independent financial means. He claimed that the reference had been framed on the basis of information collected unlawfully as his judgments irked certain quarters.

The SC quashed the reference; however, it directed the FBR to seek an explanation from spouse and children of Justice Isa regarding the source of funds for acquiring the three foreign properties. However, three judges, namely, Justice Maqbool Baqir, Justice Syed Mansoor Ali Shah and Justice Yahya Afridi, did not agree with the sending of the matter to the FBR. They observed, "One of our pivotal Constitutional values is that the independence of the judiciary shall be fully secured,". They reiterated, "in our constitutional democracy, neither the petitioner judge, nor any other judge, or any individual or any institution, is above the law. At the same time, they stressed: "it is equally important, that a judge like any other citizen of Pakistan enjoys the inalienable constitutional right to be treated in accordance with law". The rationality of the minority opinion may be appreciated as it concludes the reference on an objective assessment of the nature and background of the reference apparently filed to malign an independent judge and enfeeble the judiciary.

Seemingly, the SC has attempted to create a balance between judicial independence and judicial accountability, as both are essential for the strong and free judiciary. Of course, judicial accountability and judicial independence are equally

important. However, as SC has emphasized, the accountability of judges has to be in accordance with the law. For understanding and application of the law, its context has to be appreciated. It also applies in Justice Isa's case.

In this regard, two cases are important: first, the judicial commission report on the August 8 attack in Quetta that illuminated failure of the state institutions in the security of citizens; second, the Faizabad dharna case, in which Justice Isa made judicial comments urging all institutions to work within the parameters of the constitution. These comments made those in corridors of power uncomfortable. Rest is open history. The honorable judge and his family were subjected to harassment through a social media campaign. The so-called evidence forming the basis of the reference was collected through unlawful means. Therefore, the Senate termed the filing of the reference "a direct attack on the independence of the judiciary aimed at stifling the voices of reason, truth, and justice in the highest judiciary." The legal fraternity questioned the intent of the reference and demanded its withdrawal but it was ignored.

The government persisted to pursue a tainted reference while ignoring sane advice. The SJC issued a show-cause notice to Justice Isa. Again, the honorable judge pleaded before both the SJC and the SC that the reference is filed with a malafide intent against the petitioner and to weaken the judiciary. While accepting the petitions, the SC quashed the reference declaring it 'invalid'. However, the FBR directed to conduct an enquiry from Justice Isa's family regarding the purchase of the three foreign properties and submit its report to the SJC, which may take an appropriate decision thereon. With due respect, given mala fide intent of the reference and a reasonable explanation as to the source of money for buying the properties by Justice Isa's spouse, the FBR enquiry was unnecessary.

Our history is replete with attacks on the independence of the judiciary; therefore, the bench and the bar need to remain vigilant. Any onslaught on judicial independence must always be resisted to promote rule of law and constitutionalism in Pakistan. While pursuing the noble cause of accountability the independence of the judiciary must also be protected.

JUDICIARY AND DEMOCRACY

The Panama Papers verdict triggered a constitutional and political debate regarding the power of the Supreme Court (SC) to disqualify an elected member of the parliament on the basis of a criteria laid down in Articles 62 and 63 of the Constitution. Subsequent judgments in cases relating to Imran Khan and Sheikh Rasheed Ahmed raised questions regarding SC's independence. There is a perception that the SC has disqualified some not sufficiently honest politicians while others, facing broadly similar charges, were declared adequately honest and truthful. If this perception is allowed to continue, the fairness of our electoral process and the legitimacy of SC judgments may be called into question.

With reference to the disqualification of parliamentarians by the SC, in terms of the Representation of the People Act, 1976 (ROPA) and Article 62 (1)(f) of the Constitution, the SC judge Qazi Faez Isa, in his dissenting opinion, said, "When the facts are clear but different benches of this court, comprising of the same number of judges, have taken divergent views, the matter needs urgent resolution." Further, the honourable judge requested the chief justice of

Pakistan (CJP) to form a full court bench to decide the following questions of law: Does every nondisclosure or misdeclaration in a nomination form result in disqualification of a candidate or only those whereby one has circumvented some inherent legal disability to participate in an election? If a petition does not disclose the particular facts, on the basis of which disqualification is sought, can these be considered when subsequently disclosed in the affidavit-in-evidence of the petitioner or which may otherwise be discovered during the hearing before the court? Does Article 225 of the Constitution [regarding the determination of elections disputes by the election tribunals] exclude the application of Article 184(3) of the Constitution [regarding qualification or disqualification of an elected member of parliament] to election disputes? If Article 225 of the Constitution does not exclude the application of Article 184(3), then is an election dispute regarding an individual's qualification or disqualification a matter of "public importance" which requires the "enforcement" of a fundamental right? If it is a matter of public importance requiring the enforcement of a fundamental right, are the procedural and evidentiary rules governing election petitions and appeals under the ROPA the same as those governing petitions under Article 184(3)? Does the "court of law" mentioned in Article 62(1)(f) of the Constitution include the Supreme Court when exercising jurisdiction under Article 184 (3)? If a candidate is disqualified on account of nondisclosure or misdeclaration does such disqualification subsist only till the next elections or is it permanent?

Given the confusion within the legal fraternity and the public, clarity by a larger bench would help as every error in declarations in the nomination forms may not be basis for disqualification. Obvious conflicts between the jurisdiction of election tribunals to decide election disputes and the suo motu power of the SC to hear cases of violation of fundamental rights may not be allowed to persist. Also, the

issue of duration of disqualification may be resolved to ensure political stability.

SC judge Azmat Saeed said, "If the course of action as suggested by my learned brother Qazi Faez Isa, J., is followed, then all election disputes which will inevitably crop up…would also not be adjudicated upon till the decision of this Appeal as such election disputes, too,… revolve around the questions raised. In such circumstances, the very validity of the proposed general elections of 2018 would become questionable and the acceptance of its result by the participants almost impossible. In fact, the entire electoral process would be put at risk." With due reverence to this opinion, one may argue that inconsistency and confusion of any kind, in fact, leads into prolonged legal battles and political turmoil.

The divergence of judicial opinion is common. Dissenting opinions help in the growth of jurisprudence. While independence of each judge enhances people's trust in the judicial system, unpredictability and uneven application of the law can also create distrust. When there is a sharp difference of opinion between two judges and benches of an equal number of judges, as appears to be in the present case, it seems logical to benefit from the wisdom of a larger bench.

Answering legal questions as to the disqualification of parliamentarians and the powers of the SC is of paramount importance for the project of democracy in Pakistan. When a significant political party builds its case on a narrative of judicial victimisation, addressing legal questions becomes essential for the strengthening of both judicial and political institutions. In the larger national interest, the SC should have constituted a full court bench to decide the important questions posed by Justice Qazi Faez Isa. Even otherwise, when honorable judges of the superior courts sharply differ on any important question of law, guidance should be sought from a larger bench. It would provide clarity to the legal

fraternity and the public. It will also promote certainty and coherence in the law .

Part V. Justice System Reforms

REFORMS FOR JUSTICE

In his first speech, Prime Minister Imran Khan emphasised the need for institutional reforms in almost every sector, including the justice system.

However, without reforming the justice system, reforms in other sectors may not be entirely successful. In this article, we will focus on two major reforms: the merit-based appointment of superior courts judges and state counsels, and the systematic performance reviews for these officials.

In the past, justice sector reforms have often emerged and ended with a particular chief justice and haven't been properly institutionalised. For instance, Justice Syed Mansoor Ali Shah initiated reforms in the Lahore High Court. But soon after the honourable judge was elevated to the Supreme Court, these reforms slowed down. The same pattern of judicial reforms surrounds the Supreme Court chief justices.

These institutionalisation failures weaken the implementation of reforms. At the 8th Judicial Conference, held in May 2018, in Islamabad, it was declared that the judicial reforms would be executed in four months. The declaration included extremely ambitious recommendations on regional economic integration and effective dispute resolution in the context of CPEC; alternative dispute resolution methodologies; strategies for delay reduction and expeditious case disposals; legal education and uniform judicial selection criteria; and revamping the criminal justice system. So far, no reforms have materialised. Even the champion of these reforms, ex-chief justice Mian Saqib Nisar, said occasionally before his retirement, "he has been unable to put his house in order".

Superior Court judges are appointed under Article 175-A of the constitution, which authorises the chief justice of a high court to nominate a lawyer for judicial appointments by the Judicial Commission of Pakistan. Those with the right connections are often appointed notwithstanding their competence or integrity. Article 175-A may be amended to provide a fair opportunity to those who have the right legal skills and judicial aptitude.

In the UK, candidates have to go through a written test, situational questions, role-playing exercises, and interviews under the Constitutional Reform Act, 2005. Candidates are accordingly shortlisted and then considered for judicial appointments. In Pakistan, the judicial policy makers may consider introducing a competitive judicial examination or an open merit-based criteria for appointment at each level.

The composition of the Judicial Commission of Pakistan may also be revised to make appointments more collaborative. There is no harm if, as in the UK, professionals from non-legal fields are also represented in the commission. The judges are to deliver decisions in a complex sociopolitical and economic context. Their judgements have effects beyond

the matter in dispute. Therefore, the judicial appointment process has to be more dynamic, transparent, and inclusive.

Professional competence and integrity should be the only basis for judicial appointments and extraneous factors like socio-political stature shouldn't be taken into account. In order to enhance the jurisprudential quality of judgments, renowned law professors may also be appointed as superior court judges.

Further, appointments in the attorney-general's office and the advocate-general's office may be made on merit rather than the sole discretion of the president and the governor of each province. Article 100 and Article 140 of the constitution, which provide for such appointments, may be amended to encourage this. If these offices are stuffed with political appointees and their performance is not monitored, the cause of good governance and rule of law, as highlighted by PM Khan, will be compromised.

Finally, there should be systematic reviews to gauge the performance of superior court judges as well as the attorney-general and the advocate-general's office, particularly with reference to their understanding of law, their ability to ascertain relevant facts, and their skills in logical reasoning, legal analysis, judgment writing, case management, and efficiency.

It is a common grievance that cases aren't decided in a speedy fashion due to the lack of adequate legal assistance by state counsels or the poor appreciation of facts or law by judges. Some cases are heard quickly while others are thrown into cold storage. The selective or random prioritisation of particular cases delays the disposal of other cases. As a result, the performance of judges and state counsels should be reviewed far more rigorously. Anonymised performance data should be made available to researchers and the Supreme Judicial Council, enabling them to conduct objective studies and recommend justice sector policy changes.

There is a huge backlog of cases in high courts and district courts. Usually, court cases remain pending for years. Our justice system is poorly ranked. Pakistan ranks at 120 out of 128 countries in the World Justice Rule of Law Index 2020. It must be enough for opening our eyes. We need to come out of our comfortable intellectual zone and move beyond ceremonial speeches to deliver justice to the people. Otherwise, history will not forgive us.

It is a welcome step that the PM has expressed a strong desire to improve rule of law and ensure the delivery of justice. It is expected that our governments and judicial policymakers will consider essential reforms like the ones proposed here. As the PM pointed out, there is a pressing need for the quick disposal of cases involving widows and orphans. But it is not just a matter of a speedy disposal for particular types of cases. Sector-wide judicial reforms must be institutionalised.

A SILVER LINING

Our judiciary is in a gloomy position, with millions of cases awaiting disposal. The state has failed to fulfil its social contract to provide speedy and substantive justice for its citizens. Regardless of who is responsible, it's the people who suffer — their basic rights exist in law but not in practice and many have yet to realise the fundamental rights as provided in the 1973 Constitution. Notwithstanding such a complex reality, we saw a ray of hope in Punjab's judiciary.

'Every cloud has a silver lining, and so I do not despair.' The Punjab judiciary started showing signs of change. Speeding up the dismissal of corrupt elements from the lower ranks of the judiciary and integrating case management technology are to be applauded. The introduction of a mobile app, updating litigants on the status of their cases and issuing summons and notices electronically, is commendable. A Case Management Plan was approved in a meeting of the Lahore High Court. This included centralised and multicolour cause lists, formulation of time-specific dockets, constitution of special benches based on categories of cases, three-month rosters, auditing of all pending cases, specialised division benches and revisions of objection sheets. The Lahore High Court chief justice, Syed Mansoor Ali Shah, and his team deserve the credit for launching such reforms in Punjab.

There is no denying Justice Shah's contributions, but the process of judicial reforms was, again, not institutionalised. Moreover, the chief justice's tenure is not secured in the Constitution and, therefore, reforms initiated by one chief justice often die later on. We have experienced this at the national level after the retirement of Chief Justice Iftikhar Chaudhry. Despite such robust initiatives of reforms, the battle against corruption, incompetence and delay has not yet succeeded. Reform processes must be institutionalised under the Constitution, and rules and orders relating to proceedings in the high courts, ensuring space for evolution and improvement.

Currently, judicial policymaking is flawed on three grounds. First, there is no reliable data to inform policymakers (e.g. there is no data on citizens' perceptions of judicial performance).Forming policy without stakeholder consultation has no credibility.

Second, judicial policy is often made without formal input from lawyers and relevant government departments, so even policies conceived by a brilliant judicial leader don't produce the desired results. In order to make reforms a success, *meaningful* consultation between the bench and bar is a must.

Third, there is no specific criterion to monitor implementation and measure the performance of the judiciary. The Supreme Court chief justice and other members of the superior judiciary may address these lacunae. Having professional and progressive judges like Justice Qazi Faez Isa, Justice Syed Mansoor Ali Shah, Justice Umer Ata Bandial, and Justice Ayesha A. Malik, we hope that judicial policymaking and consultation will come to be institutionalised.

A few points deserve special attention. Case management should focus on managing proceedings within the courts. Too often, lawyers surround the rostrum, creating

difficulty for themselves (e.g. preventing young lawyers from being heard) and the court (e.g. preventing a clear debate and privileging haphazard interjections). Also, petitions are often clubbed together assuming they involve a similar point of law, but such assumption needs to be made carefully. The handling of cases in such a manner, sometimes, leaves important legal issues undecided, causing multiplication of litigation. Unorganized proceedings waste time, increase the number of adjournments and prevent judges from appreciating the complexities of law and facts, thus undermining the quality of decisions.

Haphazard proceedings paint a poor image of the judiciary within the population as a whole. All lawyers and litigants should be given equal and a fair opportunity of hearing. Time slots may be provided for different categories and stages of cases. Fixed timings for hearings in each case should be stated in the list of cases displayed outside the courtrooms. The lawyers may be persuaded to file written submissions and complete their arguments within the given time frame. Indeed, it would help lawyers deliver a more precise and effective argument. It would also reduce adjournments and the number of leftover cases.

The government, judges, lawyers and civil society need to support judicial reforms in Pakistan. They need to work together to ensure the provision of speedy justice. This requires an informed policymaking process based on research and step-by-step implementation. It needs a thorough appraisal of the judiciary as well as of the legal profession as a whole. The Supreme Judicial Council and the Pakistan Bar Council need to play their roles effectively. Those who fail to act in a professional manner should be proceeded against by the relevant authorities — and those who deliver must be appreciated through promotion and prestigious awards. Simply punishing the lower judiciary and reprimanding young lawyers is not enough.

SPEEDY JUSTICE

The report of the Senate Committee of the Whole (December-2015) suggested reforms in the existing justice system: It proposed certain amendments in the civil and criminal law to ensure inexpensive and speedy justice in the country. However, it conveniently ignored the role of relevant stakeholders. Legal amendments are necessary to deal with delays; however, amendments in the procedure alone are never sufficient. Amendments pertaining to the training and conduct of key stakeholders, i.e. lawyers and judges, is equally important.

The report basically provided timelines for the conduct of civil and criminal cases. Regarding civil suits, the report proposed that the limit for filing a written statement shall not exceed two months; pre-trial hearings shall be made mandatory (providing a 'Case Scheduling Order'); rules shall be amended to provide a timeline for the payment of process fees; the trial court shall pronounce a judgment within 30 days; any first appeal shall be decided within 45 days; and first and second appeals by the High Courts, as well as the hearing in revision and constitutional jurisdiction, shall be decided within 60 days. It recommended the abolition of revisional powers and intra-court appeal. Moreover, it suggested an increase in the number of judges in the district judiciary and

the Supreme Court to rationalise the judge-to-case ratio. The report further suggested frequent use of alternative dispute resolution mechanisms.

In criminal cases, the report stressed the timely completion of investigation and the submission of a report within 14 days and the conclusion of a trial within six months. It says that criminal cases may be adjourned only in exceptional circumstances and not for more than two days with no more than two to three adjournments during the whole trial. It further suggested the training of investigation officers and the protection of witnesses, prosecutors, and judges, especially in cases of heinous crimes including terrorism cases. It also proposed consequences of default for litigants through a cast-iron statutory opportunity of a one-time extension of time by a judicial order leading expressly to a guillotine. Finally, it recommended provision of free legal aid at every bar association level so that all cases could be concluded expeditiously.

The report merits deep appreciation as it recommends reforms to our justice system. However, the report fails to suggest changes in the laws regulating the professional conduct of lawyers and judges. It rightly points out that reason for delay in the disposal of suits involves the granting of frequent and unnecessary adjournments. Surprisingly, it fails to trace the reasons or suggest the means for reducing adjournments. Adjournments on the part of litigants and the executive branch of our government notwithstanding, the conduct and expertise of lawyers and judges may be one factor leading to excessive adjournments. Adjournments are often sought and granted on the grounds that the counsel is busy before another court or the bar has announced a strike, etc. The courts seem to be conveniently granting adjournments even on the lame excuses. Leftovers and adjournments have become the norm and proceedings an exception. Neither do the courts appear to regulate the non-appearance of counsel, nor do the lawyers seem to realise that

due to frequent adjournments our justice system as a whole is losing its efficacy and credibility in eyes of the people. Many times, hearings in cases are postponed with little appreciation of the fact that it wastes lots of state resources and time of concerned stake holders. Indeed, it raises serious questions as to the overall performance and management of our justice sector. When delays occur, the report suggests measures for litigants but not for lawyers and judges. Any system of effective accountability and professional management of the bench and bar is missing from the report.

Adjournments can be reduced by providing adequate training in case management and consequences for the bench and the bar. Thus, appropriate amendments should be made in the laws dealing with the management training and professional conduct of lawyers and judges. Only those should be allowed to steer the chariot of justice who meet a specific performance threshold. Failing to conduct cases within the prescribed time limits should attract appropriate action against those who are found responsible in causing delay in the disposal of cases. The bar councils should regulate members of the legal profession. The apex courts should set examples of high performance and efficient accountability, increasing overall efficacy of our legal system. Dealing with *old cases* at priority while allowing the *new cases* to get older is not a solution but only a 'part of the problem'.

JUDICIAL REFORMS

Amidst criticism targeting the performance of the judiciary, the Law and Justice Commission of Pakistan (LJCP) organised a judicial conference in 2018. The conference concluded with the passing of the 'Islamabad Declaration 2018' aimed at bringing reforms in the judicial system within *four* months.

The timeframe was overly ambitious, but our senior judiciary seemed genuinely committed to bring about reforms. The declaration was; indeed, very timely given Pakistan ranks 105 out of 113 countries in the World Justice Project Rule of Law Index 2017-2018.

The Islamabad Declaration included recommendations on (1) regional economic integration and effective dispute resolution in the context of CPEC; (2) alternative dispute resolution methodologies; (3) strategies for delay reduction and expeditious case disposals; (4) legal education and uniform judicial selection criteria; and (5) revamping the criminal justice system.

Of all these themes, reduction in delays and expeditious disposal of cases stand out the most. Subject to the LJCP's recommendations, the conference's participants noted that the four-tier court system should be replaced with the three-

tier system: trial court, high court, and the Supreme Court (SC). This means that a trial conducted in the trial court must attain finality in the first appeal before a high court. The SC should only interpret and adjudicate points of law. This would decrease the burden of the SC and further help in reducing delays.

When a leave-to-appeal is granted, the SC has to undertake a reappraisal of the evidence which consumes a lot of time. Moreover, the time spent in the appreciation of evidence in the trial and high courts is effectively wasted. If facts are determined in the high court, a substantial amount of time in the final adjudication of the cases in the SC will be reduced.

The conference's participants also criticised the proliferation of separate or special courts in Pakistan, noting that the additional sessions judges –rather than separate anti-terrorism and military courts – could try anti-terrorism cases. Environmental, corruption and narcotics cases etc. can also be tried by the additional sessions judges rather than by special courts and tribunals. In this way, in case there is an objection of jurisdiction, the time and effort put into getting cases transferred from an anti-terrorism court to another court of criminal jurisdiction would be saved. Furthermore, assigning a particular category of cases to the additional sessions judges would keep all courts under one hierarchy, helping in quick administration and disposal of cases. This would also enable the sessions judges to handle various types of cases under the mainstream judicial system.

Moreover, the participants noted that laws causing delays should be repealed – for example Sections 22-A and 22-B of the Criminal Procedure Code (CrPC), 1898 – under which the sessions judges pass judicial orders concerning registration or non-registration of a criminal case or harassment by police. They pointed out that the complaint-handling mechanisms envisaged in the Police Order, 2002,

should be effectively used. Complaints against police officials may be addressed by executive orders within the hierarchy of the police department. This would save courts the time spent on the disposal of complaints against the police force. The district courts would then be able to spend more time on other cases by conducting day-to-day trials.

With regard to processing of cases in the trial courts as well as in the appellate and constitutional courts, the attendees recommended that the process could be expedited with the help of technology. Fresh cases could be filed electronically and automatically fixed for hearings. Even judgments could be dictated with the help of voice-recognition software. Similarly, technology can be used in compiling evidence and presenting it in criminal trials via video-link. The legal fraternity could also use technology to examine large swathes of existing case laws more quickly, helping them refine their arguments and save more time in court.

Furthermore, alternative dispute resolution (ADR) methods could be integrated in two ways to reduce the existing backlog of cases – both for formal judicial processes and for those who cannot afford to bring their disputes before the courts and hence, avoid litigation. This is a particularly important proposal because it promises to deliver justice to the voiceless in our society.

Finally, and perhaps most importantly, the problem of unnecessary adjournments was also discussed in the conference. It was observed that adjournments should not be sought by the bar and neither should they be granted by the courts, except in exceptional circumstances. The Code of Civil Procedure, 1908, and the CrPC 1898, may be amended to specify 'inevitable exceptions' for adjournments. Moreover, meaningful cooperation between the bench and bar was highlighted to avoid frequent adjournments.

The chief justice of Pakistan (CJP) demonstrated a strong will to implement these recommendations by constituting a committee headed by a senior SC judge, Justice Asif Saeed Khosa. It was not expected that these reforms will be executed over the next four months. However, all stakeholders indicated their initial support these reforms for the overall improvement of our justice system. Despite the 'Islamabad Declaration' from the highest judicial forum and the lapse of even two years, our justice system remains unchanged.

In 2018, if Pakistan ranked at 105 out of 113 countries; in 2020, it ranks 120 out of 128 countries. Pakistan's score places it at 5 out of 6 countries (Pakistan, Afghanistan, Bangladesh, India, Nepal, Sri Lanka) in the South Asia region. Thus, the government, the judiciary and the bar need to consider immediate legal and judicial reforms in the light of alarming indicators.

CELEBRATING JUSTICE

The Lahore High Court conducted its 150th anniversary with great ostentatious display in 2016. The event comprised of symposia on implementation of law, photography and essay-writing contests themed on the rule of law, and a display of old pictures of the Lahore High Court building. Students, artists and writers from all over the province were invited to participate in the art and literature competitions and exhibitions. The bar associations, the Punjab government and the civil society was also invited to participate in the celebrations.

The celebrations aimed to bring people closer to the Court, introducing them to those who are responsible for delivering justice. The aim was to inculcate an appreciation for accountability in society. Further, the purpose of holding sesquicentennial celebrations was to reach out to the common man being the ultimate beneficiary of the system of administration of justice, and to demonstrate that a competent and functional judiciary is there to dispense justice to the masses.

The Lahore High Court as one of the oldest seats of judicial dispensation in the country has been engaged in interpreting and enforcing the fundamental rights to bring in its fold all conceivable civil-political, socio-economic and collective group rights. The Court has specifically dealt with security of person, slavery, forced labour, protection against retrospective punishment, freedom of assembly, freedom of association, freedom of trade business or profession, freedom of speech, freedom to profess religion and to manage religious institutions, equality of citizens and safeguard against discrimination in services. Apart from celebrating the judiciary and promoting the rule of law, fundamental rights and constitutionalism, the occasion provided a welcome opportunity to focus on the capacity building of legal and judicial institutions. While celebrating its performance over so many years, the judiciary might have reflected on the quality of the legal profession and the conduct of court proceedings.

There is a perception that appointments in the superior judiciary are not made purely on merit. The process of appointment is alleged to be closed, selective and exclusionary. Clan and connections are factored in, affecting the overall credibility of the judiciary. The role of the Supreme Judicial Council is desired to be stronger in terms of enforcing professional standards and the code of conduct for the judiciary.

There is a weak system of judicial performance evaluation. District judges earn points for deciding particular types of cases, stressing quantity alone. The quality of performance is often ignored. Superior court judges are captains of their own ship; there appears to be no hard and fast formula to measure their performance. Still, the performance of superior court judges and the quality of decisions is hardly discussed openly. Talking about the quality of judgements is perceived as an attack on the independence of the judiciary. The Supreme Judicial

Council is mandated to monitor conduct and performance of superior court judges, but in practice, it seems quite weak.

The quality of the legal profession is not up to the mark. The method of admission and teaching in law schools is not standardised. The examination tests memory more than reasoning and legal drafting. The bar council examination is a mere formality. Knowing a member of the bar is considered enough to get through the examination and the interview. The bar councils are more focused on politics than providing any further education or training.

The court proceedings are haphazard. Cases are adjourned without any cogent reason more often than they are heard. Junior lawyers are required to fight a proxy war on behalf of their seniors; they are rarely invited to provide substantial input on their own. The decorum of the courts is poorly observed. The process of hearing is unsystematic.

So, while celebrating the delivery of justice, members of the legal fraternity may consider the overall performance of our justice sector. It is suggested that common people may also be invited to speak about their experiences: those whose family members died in prison awaiting decision; those who do not enjoy freedom of religion or expression; those who feel deprived of their right to nutrition, shelter, health and education; those who feel the sting of systematic discrimination; those who are excluded from participation in the political process; and those who are deprived of an economic opportunity. Perhaps some of the women, labourers, and children wandering around the premises of the courts to earn a living can tell their stories and perception of justice. This would make celebrations more meaningful — not merely a celebration of the past but a resolve to carry our commitment to justice into the future as well.

VOICE OF LITIGANTS

The litigants are the ultimate stakeholders in any justice system. Yet seemingly they are the most neglected subjects of our justice system. They pay through taxes and fee to get justice from the courts of law. The people have always sacrificed for the rule of law and the independence of the judiciary. However, when it comes to the protection of their legal rights, they suffer a lot. The litigants have to take care of self-security and bear enormous expenses to reach the doors of justice. Years after years are spent until the cases are finally heard and decided. Social barriers and taboos further make access to justice a challenge in Pakistan.

The issues of litigants can be broadly divided into two kinds: formal and informal hardships.

The formal difficulties involve the inability of litigants to understand the language of the law and the cost and delay in getting justice. Article 251 of the constitution provides that, "The National language of Pakistan is Urdu, and arrangements shall be made for its being used for official and other purposes…". Section 558 of the Code of Criminal Procedure, 1898, and Section 137 of the Code of Civil Procedure, 1908, authorizes provincial governments to decide the language of the courts. Despite, the language of our

courts remains English. It makes the understanding of the pleadings and orders of the court difficult. The ignorance of the law is quoted as no excuse even a large portion of our population is unable to understand the language of the law. Given these difficulties, the constitutional promise of 'inexpensive and expeditious justice' remains merely a dream.

The social barriers include the issues of the security of life, bureaucratic influence, and under-regulated legal institutions. In family cases, for example, women and children have to go to great length against their family members. Claiming legal rights, sometimes, offends the so-called ego and dignity of the family. So, women often have to compromise on their rights for the sake of the family. Frivolous civil cases, criminal complaints and FIRs, harassment, violence, social boycott and even threat and extinction of life are commonly used to silence those who insist to claim their legal rights. The life of complainant and witnesses is always at risk in criminal cases.

Thus, access to justice, particularly for women, children, minorities, and the fragile segment of our society needs the attention of the relevant stakeholders. In this regard, the laws should be translated in Urdu and other local languages and be made available in public libraries, union councils, educational institutions, courts and on social media platforms. As per the constitution, arrangements should be made for using the Urdu language for official purposes. The colonial laws created to subjugate the people must be changed. Media should educate the people about their basic rights such as the right to life, liberty, and the dignity of man. The complainants and witnesses could be provided with state protection. State sponsored legal aid programme be introduced enabling poor litigants to pursue their cases.

The legal ethics for lawyers and the code of conduct for judges need to be enforced in letter and spirit. The relationship between a lawyer and a client is that of

confidence and trust. The lawyers are obliged to protect the rights, communication and reputation of their clients. The lawyers must know the law and provide accurate advice to litigants. The case of clients has to be defended professionally. At the same time, being officers of the court, the lawyers are supposed to assist the court in reaching a just decision. Misleading or misrepresenting by anyone before the courts of law are perjury. In any case, the cause of justice must prevail over any other consideration.

Censuring in open courts damages institutional decorum. The judges should speak through their judgments. The lawyers are expected to behave respectfully with case parties, witnesses, and public officials as they are ambassadors of justice and the torchbearer of the rule of law. Patience, forbearance and grace are the cannons of legal ethics. If a litigant distrust on a court of law, his case must be transferred to another court. If a client is dissatisfied with a lawyer, s/he has every right to engage another counsel.

Finally, to audit the overall performance of our justice system, a perception survey of litigants may be conducted occasionally to collect feedback of the users of our justice system. These findings can be used by the bar councils to improve the professional conduct of lawyers and the provision of legal service. The judiciary may utilize this information for the judicial policymaking and judicial reforms.

Briefly, our constitution ensures 'inexpensive and expeditious justice' to the people. Thus, State needs to ensure the delivery of justice. In other words, the voice of litigants must be duly heard.

AILING JUSTICE SYSTEM

The ugly scenes played out at the premises of our courts are only a symptom of an ailing justice system. The way once the matter of alleged contempt of court by the President of the Multan bench was handled shows that there is a gap of institutional communication or trust between the bench and the bar. Those who are responsible to help others get justice are sometimes seen at loggerheads with each other. The decorum, integrity, and respect of legal institutions are compromised when the judges are intimidated and the lawyers and the members of the public are thrashed in the premises of a courtroom.

Strengthening our justice system requires curing the disease than treating the symptoms in a haphazard manner. In this regard, I draw the attention of the bench and bar on three chronic issues: over politicisation of bar councils, lack of institutional approach for legal reforms, and poor accountability of the bench and the bar.

Firstly, the primary mandate of the bar councils is to regulate the legal profession. However, they seem to ignore its

primary function and are heavily focused on the politics of it. A few members who hold stakes in bar politics generally support entrants in the legal profession not as a 'mentor' but rather as 'bar leaders'. Increased political activities sometimes translate into abuse and violence against individuals, groups of lawyers, and members of the judiciary. It affects the overall decorum of the legal profession and also puts a question mark on the ability of bar leaders to upgrade the legal profession and handle crisis.

Secondly, a collaborative and integrated approach for legal reforms is seldom adopted. Lack of institutional approach for legal reforms, thus, makes the process of reforms intensively subjective and unsystematic — the best legal reforms, sometimes, badly fail. Individualistic approach for legal reforms fails to get cooperation and ownership by the relevant stakeholders. It potentially widens the gap between the bench and the bar. It occasionally turns into hatred, distrust, and contempt towards each other.

Thirdly, the accountability of the bench and the bar is selective, secretive and weak. The accountability procedure provided under the Bar Council Acts, in case of lawyers, and the 1973 Constitution, in case of superior court judges, are both flawed. These laws provide overwhelming powers to lawyers and judges, in case of accountability, which offends the basic principle of accountability — that neutral arbitrators should hold them accountable. Further, an audit of the accountability is rarely conducted or made public in order to improve the system. Reportedly, there are complaints pending against the lawyers and superior court judges but were of no effective conclusion. Once a lawyer is granted a license to practice and a judge is appointed, his unbecoming conduct and poor performance are rarely made the basis for their removal or there is hardly ever any effective legal action against them. Such a weak mechanism of accountability promotes corruption and incompetence in our justice system.

It is yet to be realised in Pakistan that the bench and the bar are wheels of a chariot. If lawyers are obliged to bow in courts, the judges should also respect them. None of them can claim superiority of any kind over the others. The bench cannot deliver justice without the proper assistance of the lawyers. If any of them is incompetent, the quality of justice would decline and the people would suffer. It must be acknowledged that lawyers and judges are both prone to human error; thus, they should be willing to listen each other and neutral public to improve their professional conduct. The unholy attack on the edifice of justice and manhandling of lawyers or public is not a long-lasting solution but are rather a part of the problem.

The sooner the legal community is able to recognise their professional duty towards people, adopt an institutional approach for introducing integrated legal reforms, and refine accountability mechanisms for lawyers and judges, the better it will be for everyone concerned. People feel dissatisfied and lose their hope when they see judicial institution crumbling at the hands of those who are, in fact, responsible to protect the same. By the way, how can the bench and bar command moral authority over others without observing the code of conduct? It is high time for members of the legal profession to prevent the disease rather than treating the symptoms. It is expected that the legal fraternity reform our justice system and bow before the majesty of law to protect basic rights of people.

DELIVERY OF JUSTICE

Who will guard the guards? The people. The judiciary seems not to be at ease since the establishment of military courts through the 21st constitutional amendment passed in wake of the tragedy in the Army Public School Peshawar. This amendment was challenged before the Supreme Court of Pakistan. In this case, the SC faced a difficult constitutional and socio-political question. On the one hand, the judiciary had to uphold constitutional principles i.e., the due process of law, the separation of powers, the independence of judiciary. On the other hand, it was required to appreciate the concerns and grievances of the people subjected to heinous terrorism. Thus, any answer to this question was bound to augment a hot debate as to the independence of judiciary, legitimacy and capacity of the civil judicial system to deliver justice, and the role and ability of the parliament, military, and other law enforcement agencies to fight against terrorism.

The judiciary is considered to be one of the important pillars of state. The stability of any state largely depends on the performance of judicial system. In Pakistan, however, the judiciary seems to fall short of higher expectations of the

people. Some consider that the judiciary has failed to deliver its basic duty: timely delivery of justice. The constitution and the fundamental rights have a sacred status in theory. However, in practice, it makes little sense to those who have been unable to reap its benefits since 1947. Even after the successful lawyer's movement for the restoration of the judiciary, the people have to see its real gain in terms of the delivery of justice to the common man. This ambivalent state of affairs may partly be attributed to both the bench and the bar.

The Bar is a professional body of lawyers. Law has been a profession of the nobles and great leaders in history. Abraham Lincoln, Nelson Mandela, Muhammad Ali Jinnah, and Muhammad Iqbal are just a few examples. It is a profession of humility, reverence, and wisdom. The lawyers submit 'respectfully' and pray 'humbly'. They are called 'learned friends'. They are also credited for struggling for the protection of the rule of law in the country. They stand firmly and speak boldly for the voiceless and weak. They have been a ray of hope for the hopeless people throughout the constitutional and political history of the world. Unfortunately, this aura is changing in Pakistan.

Some black sheep in the legal profession seem to believe in belligerence and hooliganism. They consider that torching public property, blocking roads, and boycotting the courts is justified when other institutions fail to act in accordance with the law. They 'take on' the bench and their own colleagues as an art or part of advocacy. So, the Bar should think about these questions: How can we improve our judicial and legal system? How can we shine the dark corners of rights with the light of law? How can we spread the fragrance of justice and peace in our society? And, how can we make ourselves accountable to law of the land?

The Bench is a fountain of justice. It is the last hope of the people. Delivering justice is the characteristic of God and

the best virtue. Great judges in history decided against even their close relatives and the most powerful. Prophet Muhammad (PBUH), Caliph Umar (RA), Justice Marshall, and Justice Cornelius are a few examples. They shaped history by upholding the rule of law and justice. The judiciary in Pakistan has also succeeded to some extent in providing a kind of check on the excesses of the executive and nullifying laws against the constitution and fundamental rights of the people.

At the same time, there is a space where the judiciary is expected to do more. It should ensure constitutionally promised 'expeditious justice' to the people. It should be independent but accountable. It should make the appointment process more transparent as it will lend further credibility and independence to the judiciary.

The 18th amendment attempted to make the appointment process of judges little inclusive by allocating some role to the Parliamentary Committee (Art.175-A). However, this resulted in a tug of war between the parliament and the judiciary, and in2010, the judiciary declared Art.175 A against the basic structure of the constitution. Soon thereafter, the 19th amendment was passed, confirming once again the dominance of the judiciary over the appointment process. The Munir Bhatti's case and the Presidential Reference No. 01 of 2012, reverted effects of the 18th amendment. But this may not be an end of history. There is always a possibility of transformation. A few examples from other countries may provide useful insight.

In the United States, the Senate Judiciary Committee consisting of 18 members has due role in the appointment process. In Canada, the lawyers submit a written application to a screening committee consisting of judges, lawyers, government officials and other public members. In the United Kingdom, applications are invited by public advertisement for vacancies in the High Court. In Bulgaria

and Poland, the National Judicial Council consists of twenty-five members. Likewise, In Pakistan, the Judicial Commission may also provide a fair representation to the judicial, legal, and non-legal members. The recommendation of the Judicial Commission may also be discussed in a select committee of the parliament. The judicial appointments should be pinnacle of an open process involving applications, interviews, and assessment of judicial skills. The legal fraternity should have access as to why a particular lawyer has been preferred for appointment, confirmation, and promotion over others.

Another important area for reforms is case management. Technology has to play its part too for development of an efficient system for fixation of cases for hearing. Only those cases should be fixed which are to be decided on a particular day. Time slot for hearing may also be allotted to each case. In our courts, fresh cases gradually grow older and then become the 'oldest cases'. The 'oldest cases' are fixed and the rest are left to get older. The old cases are displayed on a red coloured list as an ornament on the face of our court rooms, reminding us the immediate need for judicial reforms. The litigants show frustration with our justice system.

How to get out of this situation? In this regard, cooperation between the bench and the bar is essential for timely delivery of justice. The culture of 'left over and adjournment' of cases must be discouraged. Almost each case file reveals sad but true facts that the case is adjourned due to the strike of lawyers, leave of the court, absence of the lawyer, non-preparation of the lawyers, absence of record or evidence, non-appearance of the parties, etc. Sometimes, the cases are left over due to painfully slow court proceedings. Precision in arguments and judgments is becoming a relic.

The black-coat community claims to have buried the monster of the 'doctrine of necessity' in Pakistan. I am afraid without first fighting with the menace of delay in decisions of

cases, left over and adjournments, tussle between the Bench and the Bar, professional incompetence, lack of integrity and sense of duty and discipline, mismanagement and corruption, unnecessary strikes, and boycotting the courts, monster of 'necessity' will die hard. By the way, how can our justice system be strong without opting an objective, open, and inclusive appointment process saying good bye to the age of judicial mystique? How can the judiciary score independence and respect without delivering quick justice to the people? How can judges command authority without wearing laws on their sleeves? How can the Bar claim any victory without putting its own house in order? How can the lawyers earn professional dignity without learning the law, assisting the courts, and helping the people in protecting their rights? How can justice make sense to an ordinary person without the protection of one's rights? And, finally, how can the empire of law govern without due process and the equal protection of law and providing access to justice to people? So, let's bow before the 'majesty of law' in order to promote the rule of law and protect the monument of justice in Pakistan.

Part VI. Fundamental Rights

DEFINING FUNDAMENTAL RIGHTS

Pakistan's Constitution contains many provisions on fundamental rights. However, during the tenure of our most recent chief justices, Iftikhar Muhammad Chaudhry and Mian Saqib Nisar, the Supreme Court (SC) has used its judicial powers to enforce an unusually broad understanding of "fundamental rights" in areas ordinarily seen as the purview of the legislature and, more specifically, government policy.

This has produced significant tension between the judiciary and the legislature. Limits of judicial power to define and enforce fundamental rights are now a critical topic of debate in Pakistan.

Iftikhar Chaudhry used his courtroom as a theatre to censure various state actors in the public eye. To do this, he

interpreted the phrase 'fundamental rights' very broadly in the realm of public administration, reaching even as far as the price of sugar. However, he conducted proceedings in his courtroom only.

Saqib Nisar went further. He acted even outside of the courtroom, visiting hospitals, filtration plants and hearing people who stopped his car. He clearly overreached judicial powers while collecting funds for the dam and abolishing tax on phone cards. Instead, he maintained that the superior judiciary did not transgress its constitutional authority. Does this interpretation of 'constitutional authority' not violate a constitutional separation or balance-of-powers between the legislature, the executive, and the judiciary?

Both judges apparently stepped into the shoes of the government to address urgent policy issues confronting the society. However, they failed to set their own judicial house in order. The sincerity of their interest in issues beyond the judiciary is not doubted; however, one may question their appreciation of our constitutional separation-of-powers: Should a judge abolish tax on phone cards or fix the price of sugar as a matter of 'fundamental rights'? Should a judge collect funds for a public cause? Should a judge inspect hospitals and regulate salaries of doctors?

Due to an increasingly active SC, the balance of power has seemingly tilted too far in the direction of the judiciary. Critics argue that owing to the apparently unlimited power of the SC to enforce fundamental rights, the balance of powers between state institutions has been disturbed. What some see as a proudly "independent" judiciary, others see as an increasingly "unaccountable" court.

Article 184 (3) of the Constitution says that, "Without prejudice to the provisions of Article 199 [Jurisdiction of High Court for the enforcement of fundamental rights], the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the

Fundamental Rights…is involved, have the power to make an order of the nature mentioned in the said Article." Even a brief reading of this article establishes an SC mandate to enforce fundamental rights. However, the question remains 'to what extent' should the SC go to enforce fundamental rights, and how should we understand the legal meaning of fundamental rights (including the right to life)?

My contention is that while maintaining its appreciation for the enforcement of fundamental rights, the SC must also appreciate our constitutional separation of powers. It would be helpful if the SC could draw a much clearer legal line between the domain of fundamental rights and government policy. When, exactly, can an appeal to fundamental rights be invoked in relation to flaws or gaps in existing policies? Currently, there is a very strong sense that the judiciary's vast definition of fundamental rights has traded short-term populism for long-term constitutional imbalance.

Therefore, the SC should ensure the protection of fundamental rights without interfering in the policymaking powers of the executive. There should, for instance, be a clear link between the text of Articles 8–28 and a SC order for the enforcement of fundamental rights. If a constitutional article prohibiting 'deprivation of life without legal due process' allows judges to visit hospitals and examine healthcare standards, what is the need of any executive agency for this purpose? Which fundamental rights provisions permit the SC to regulate and decide the policy matters (e.g. commodity prices, educational or health standards)?

Article 9 simply says, "No person shall be deprived of life or liberty save in accordance with [the government's] law." Article 25-A states that "the State shall provide…education to all children of the age of five to sixteen years in such manner as may be determined by law." The text of these articles suggests that, even if "deprivation of life following legal due process" and "provision of education

in accordance with law" are fundamental rights, the delineation of specific laws regarding hospital standards and school fees remain in the domain of government policy.

If the SC fails to regulate its powers with reference to the enforcement of fundamental rights and define boundaries for the application of provisions for fundamental rights, this will leave a grey area open – increasing the possibility of conflict and, then, a crisis between institutions. The Constitution provides that the government is responsible for matters of public policy and the SC is responsible for ensuring that our constitutional provisions are met. The SC is expected to illuminate this balance within a clarified definition of fundamental rights.

HUMAN RIGHTS IN THE DIGITAL AGE

Our digitally connected world poses serious challenges to human rights. Internet use and mobile connectivity, low-cost and fast computing systems, and rapid AI advances have, on the one hand, provided new opportunities. But, on the other hand, they present unprecedented challenges to the protections of core human rights.

Modern technologies like Al have a huge potential to violate privacy, polarize societies, and incite prejudice, extremism, racism, hatred, and violence across the globe in a short span of time. Breaches of data security protocols and social media campaigns can create opportunities for blackmail and influence political processes. Defenders of human rights and democracy need to address these challenges as priority.

There is an urgent need to examine the international treaties and conventions that codify human rights to provide robust policy guidelines regarding international cooperation for the protection of human rights in the digital age.

International courts, tribunals, and national courts, for example, should interpret international human rights

conventions and national fundamental rights laws to clarify duty of care, sharpen the right to privacy, and ensure rights to speech, religious freedom, and association in the digital context. The vulnerability of women and children need immediate attention. Women experience a higher level of online harassment than men. Children are more exposed to online persecution and sexual exploitation than adults. So, special privacy protection rules should be made for women and children. There should be specific design and data consent standards for online services. The American Children's Online Privacy Protection Rule of 2013 and the Age Appropriate Design Code announced by the UK in 2019, for example, prescribe such standards for digital services.

Digital technologies have put privacy at risk. AI has tremendously enhanced the possibility of electronic surveillance and interception. Thus, legitimate national security and business interests need to be balanced against a basic right to privacy. How can the latter be ensured without undermining the former? International agencies like the UN should help state parties negotiate and implement data-protection treaties and laws to ensure that governments, non-state actors, and companies cannot misuse the personal information of their citizens.

Reportedly, the 2016 US presidential election and Brexit were shaped by malicious use of digital technology. It is entirely possible that powerful countries and multinational corporations will employ AI to rob the economy of already-poor countries and weaken their national security. In view of the increasing misuse of digital technology in economic and political affairs, the developing countries, in particular, need to raise a voice at regional and international forums for an effective mechanism of cooperation and protection of the developing world.

The UN, state governments, social media companies, and private business must ensure that digital technology is

employed for the welfare of humanity in a transparent and responsible manner. AI systems must follow strict ethical standards. It is becoming evident that AI can be used to create discrimination as biases can be fed into algorithms to produce a specific pattern or result. For example, the Al system can be exploited to decide who is eligible for a particular job or entitled for a pertinent public service such as housing loan or healthcare. Therefore, there are ongoing global efforts to make AI developers subject to law and ethical values.

Those who develop and employ Al for political or business or war purposes must be held accountable for their actions. People are held liable for their actions under all legal systems. So, those who design, develop, adapt or deploy AI must also be held responsible for the consequences of their decisions. The liability of these actions becomes more critical when lethal autonomous weapons systems are used in striking violation of international human rights and humanitarian law. The UN secretary-general once stated that "machines with the power and discretion to take lives without human involvement are politically unacceptable, morally repugnant and should be prohibited by international law".

As we live in an age of digital interdependence governments, citizens, human rights defenders and AI companies should work together to enhance digital cooperation for the protection of human rights. Common human values like equality, privacy, dignity, freedom, inclusiveness, respect, and sustainability should be preserved. These human values must serve as a beacon to guide our conduct in the digital age.

ENFORCING FUNDAMENTAL RIGHTS

The Supreme Court's approach for enforcement of fundamental rights under Article 184-3 of the Constitution has significantly changed after the elevation of Justice Khosa, as a Chief Justice. He neither took a suo motu notice nor entertained any case forwarded by the Supreme Court Human Rights Cell, which was a major policy shift from the era of ex-CJP Mian Saqib Nisar.

Justice Khosa said in his first speech that an effort shall be made – either through a full court meeting or through a judicial exercise – to determine the scope and parameters of the exercise of original SC jurisdiction under Article 184-3. He then convened a full court meeting to consider amendments in Order XXV of the Supreme Court Rules 1980 relating to this jurisdiction. However, the SC judges could not reach a consensus in this regard. In these circumstances, this matter may be taken up on the judicial side.

Justice Khosa and ex-CJP Mian Saqib Nisar sharply differed in their approach to public interest cases for the enforcement of fundamental rights; both top judges claimed to act "in accordance with the Constitution," but a full bench of the SC (preferably 17 members) may be necessary to provide jurisprudential guidance. It would reduce confusion amongst the legal fraternity settling a longstanding debate on the use of suo motu powers for the enforcement of fundamental rights of public importance.

Two questions matter: what is a 'fundamental right' (as outlined in the Constitution) and when should such a fundamental rights question be treated as a matter of 'public importance'? Article 184-3 of the Constitution says that, "without prejudice to the provisions of Article 199 [jurisdiction of High Court to enforce fundamental rights], the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights [outlined in the Constitution itself]…is involved, have the power to make an order of the nature mentioned in the said Article."

Even a brief reading of this article establishes an SC mandate to enforce fundamental rights outlined in the Constitution. However, how broadly should the rights outlined in the Constitution be interpreted, and 'to what extent' should the SC go to enforce these rights on its own initiative, that is, how should we understand the legal meaning of 'public importance'?

While maintaining its appreciation for the enforcement of fundamental rights, the SC must also appreciate constitutional separation of powers between the judiciary and the executive. It would be helpful if the SC could draw a much clearer legal line between the domain of 'fundamental rights' and 'government policy.' When, exactly, can an appeal to fundamental rights be invoked in relation to flaws or gaps in government policies? There is a strong perception that

Justice Nisar's vast definition of fundamental rights traded short-term popularity for a long-term constitutional imbalance between institutions. The Constitution provides that the government is responsible for matters of public policy and the SC is responsible for ensuring that, within such policies, our constitutional rights are not violated. In other words, the SC should ensure the enforcement of fundamental rights without interfering in the policymaking powers of the executive.

Article 176 states that the SC comprises the chief justice and judges of the SC. It may be argued that the suo motu powers articulated in Article 184-3 are powers of the SC judges acting in concert and not those of a single chief justice acting alone. A full bench, therefore, may be needed to explain two further questions: who can exercise suo motu powers under Article 184-3, and who could decide upon the admissibility of a 'public interest' petition filed before the SC?

The Pakistan Bar Council (PBC) has repeatedly urged the SC to restrain or regulate its suo motu powers, noting that "The SC should suitably amend the Supreme Court Rules (1980) to regulate and structure the parameters of the exercise of suo motu powers, and a special bench of the court should be constituted to hear suo motu cases." To strengthen the constitutional balance of power in Pakistan, the PBC believes that the top court should exercise its authority under Article 184-3 sparingly in order to "maintain the principle of trichotomy of powers." There are concerns that, because of the top court's active use of suo motu powers by ex-CJPs Iftikhar Muhammad Chaudhry and Mian Saqib Nisar, this balance tilted too far in the direction of a politically unaccountable judiciary.

Although Justice Khosa has exercised a visible restraint in his exercise of suo motu powers, it is still a matter of serious debate whether judicial restraint helps to protect fundamental rights in Pakistan. It is time that a full bench of

the SC decides the scope of Article 184-3 with reference to matters taken up by the SC for the enforcement of fundamental rights. It would ensure that our chief justices do not define the scope of Article 184-3 on the basis of personal sensibilities and a whimsical sense of self-righteousness.

An ordinary Citizen's Rights

Pakistan is the result of a historical struggle of the Muslims of the sub-continent. The Muslims made every kind of sacrifice hoping to live a better life in an independent state. Now, many Pakistani citizens seem to have this question in mind: Are we the citizens of Pakistan? They are Pakistani citizen by birth but do they enjoy the actual rights of citizenship? Do they have the right to life, the right to health, and the right to education? One hypothetical example may illustrate how does an ordinary citizen think about the fundamental rights. The story goes as follows:

One fine morning, I was walking by the shrine of a famous sufi saint in Lahore (*Data Darbar*). I saw a poor boy sleeping on the footpath. A bunch of flies was hovering around his body. I woke him up. Our conversation proceeds…

Me: May I talk to you?

Boy: As you like.

Me: Why are you sleeping on the footpath?

Boy: I am homeless. I have to sleep either on the footpath or under the metro bus bridge.

Me: Oh, sad! Don't you know that you have so many rights under the constitution of Pakistan? Why don't you claim your rights from the government and seek their enforcement from the courts of law?

Boy: I do not think that I have any right as such. I have nothing to eat except the food I collect from garbage or beg from the people. I can hardly afford my clothes. Thanks to the government who built the metro bus elevated road; I often sleep under the bridge. I do not think there exists any constitution or the courts for the poor people like me.

Me: You are mistaken. You have and must know your rights. Our constitution provides all rights which are available to the citizens of any other country. Why are you so disappointed from the state and our justice system?

Boy: I may be wrong but, in my view, Pakistan is neither 'Islamic' nor 'Republic' in true sense of the word. The constitution talks about the rights of the rich people and not the poor like me. True. In Islam, everyone has rights. Islamic republic provides these rights to the people. However, mere mentioning of rights in the constitution (without their realization) is meaningless. I have also heard that our justice system is very expensive and an ordinary person cannot get timely relief from the courts. Many people come to *Data Darbar* for prayers as they feel disappointed with the governments and courts.

Me: You seem to have lost hope. This is not good. You are equal to any other citizen of Pakistan and all rights are available to you (under the law). You need to know that you are talking against the government and courts without any justification.

Boy: But, I don't think so. My father died when I was a child; I could not afford education even food. What to talk of

my basic rights? Even those who can manage to go to school are not getting proper education. Many schools are working like commercial enterprises and seem least interested in imparting quality education. There are various education systems in Pakistan; a poor child cannot get access to quality education. The constitution provides about the right to education and the equality of citizens but in my case, it does not seem applicable. As the government does not think about me then why should I think about or against the government?

Me: I think you lack information and awareness. Our constitution also provides the 'right to information'. Simply, know your rights and recourse to the court for the enforcement of these rights.

Boy: Thanks. After this conversation, I have learned that there is a constitution which provides basic rights (for the poor people) and there are courts which can protect rights (of the poor).I have also learned that there is a government as well. In my view, the government and the courts also need to know the ground realities in Pakistan. They must know that the poor and weak are suffering badly. They have no rights as such in practice. Instead, they remain loyal to the state and ready to sacrifice their lives for the country. But, they are ignored. The government officers and judges pass by the *Data Darbar* and the localities of the poor, but they do not bother even to notice our presence. They seem to be colour blind or have lost feelings for the people.

Me: No, the government has complete data of the poor and statistics of poverty in Pakistan. The government officials are highly educated, enlightened, and concerned people. How can they ignore that you have nothing to eat and no place to sleep? They are very nice and generous. Have you not heard their speeches and statements? You are blaming them, again, without good reason due to class difference or prejudice. They are not only the servants of the state but also

of the people. Don't you know that they have even taken an oath to serve the people of Pakistan?

Boy: Sorry. I may be excused for my ignorance. In fact, I am unable to read newspapers. I also do not have any access to information through TV or social media. They might have made solemn statements about the welfare of the people. I am afraid they are largely failing to abide by their oath. They might also be highly educated but they seem to lack empathy and a national vision. Cannot they realize that the ordinary people are the strength of this country. How can a state be strong while major portion of its population is suffering from poverty, illiteracy, and disease? They might have wealth, as you said, but they still look greedy.

Me: You have talked too much. You must know again that you have all rights. Is it not enough that you have your rights under the law? Are you not a free citizen of Pakistan? Can you not move around freely and have enough food from the shrine and beg from anyone you like? You can also sleep at the place of your choice: on the footpath or in a public park. What else do you want, by the way? Are you not being thankless to God? Are you not expecting too much from the government? Are you not inciting others (around you) to claim their rights which they might not know or deserve? Should you not be put behind the prison for your free speech against the government? Should courts not start contempt proceedings against you?

Boy: I am sorry, Sir. God forbid if I say anything about the government or the courts ever. The rulers represent the will of God on the earth (I think it is also written in the constitution). Our courts are the fountain of justice. Perhaps, it is the will of God, or my fault, that I remain poor. I might have been deprived of my basic rights by the will of God. I think, a poor person like me, do not deserve any 'legal' right. The honorable courts may not provide me any relief as the court are bound by the law. Despite all hardships, I love my

country. I love my country. I love my country. If my ancestors sacrificed their lives for the creation of Pakistan; I have lost my 'identity' as a citizen of Pakistan. Poverty, corruption, violation of merit and rights, injustice, and severe form of discrimination and exclusion have shattered my confidence as a citizen. I do not exist anymore. I am a faceless person. But, I still feel proud that I have a name: Pakistani. Pakistan, Zinda bad!

Me: Oh, boy. You have educated me a lot. You have taught me what is not written in books. You have told me that one can remain satisfied in any situation with a strong belief in God and love for one's country. I walked towards Minar-i-Pakistan singing a lyric in the honour of that boy.

Ye Watan Tumhara Hai , Tum Hu Pasbaan is Kai…

INTERPRETING FUNDAMENTAL RIGHTS IN ISLAM

ABSTRACT

No constitution is expected to be without the provision of fundamental rights such as the right to life, liberty, and dignity of man as the protection of fundamental rights is a must for the meaningful living of humans. These fundamental or basic rights are endowed on humans by birth; therefore, they have been provided to the people in varied forms and degree under all legal systems, culture, and civilizations. However, some western scholars seem to deny this historical evidence. They argue that the concept of fundamental rights does not exist in Islam. They claim that fundamental rights or human rights have emerged in western societies only. To them, in Islam, there are only duties to God and independent human rights are not available to the Muslims. This argument is based on the assumption that there is no space for the notion of fundamental rights in Islam as the Quran and the Sunnah emphasizes the performance of religious duties or obligations. The present paper examines the validity of this argument in view of the opinion of a few Muslim scholars. Further, it explores the meaning and the application of fundamental rights in the context of the constitutional

practice and judicial interpretation in an Islamic state i.e.the Islamic Republic of Pakistan. It posits that the superior courts in Pakistan have creatively employed Islamic law and jurisprudence to expand and strengthen the meaning, concept and the provisions of fundamental rights within its constitutional dispensation.

INTRODUCTION

The concept of fundamental rights has attained unparalleled currency and salience in the constitutions of various countries in the recent past. This present surge of this idea is attributed to American constitutional jurisprudence along with other western countries. Though there is no denial of the fact that what is termed as fundamental rights in the constitutions of different countries has its origin in western-oriented constitutional jurisprudence, but this fact alone is not sufficient to establish that such notion was entirely absent from other religious discourses particularly Islam. This paper aims to demonstrate that Islam espouses a notion of fundamental rights in Pakistan, which is constitutionally declared as an Islamic republic, has employed it ingeniously to ensure and protect the rights of its citizens. With this object in mind, this article first explores the idea of fundamental rights and locates their basis in the constitution of Pakistan. Then, it discovers the genesis and concept of fundamental rights in both Islamic and Western civilizations. It assesses how Pakistan's judiciary has construed basic rights relying on the notion of justice in Islam. It concludes that fundamental rights not only exist in Pakistan's constitution and Islam but have been increasingly safeguarded, clarified, and expanded by the superior courts of Pakistan.

The paper is divided into three sections in addition to an introduction and the conclusion at the end. The first part discusses the constitutional jurisprudence of fundamental rights as it has been evolved in Pakistan. The second section

describes the origin and foundation of fundamental rights in Islam for dispelling the erroneous notion of the absence of fundamental rights in Islam. The last part is the lengthiest one and is dedicated to the analysis of how fundamental rights have been construed and expanded in their functional ambit by the superior judiciary of Pakistan.

CONSTITUTIONAL JURISPRUDENCE OF FUNDAMENTAL RIGHTS IN PAKISTAN

Pakistan's constitution labelled fundamental rights comprises an open declaration regarding the basic rights of the people. These constitutional rights are basic as not only they are written in the constitution but also protected by an effective constitutional mechanism from the transgression of the executive and the legislature. These rights are eternal and supreme and cannot be dismayed by the wish of the legislature or the executive. No branch of the government can violate the fundamental rights, and they can only be suspended or abridged by the mode lay down by the constitution; it can be done either by amending the constitution or by the declaration of emergency.

Constitutionally protected basic rights function as a double-edged sword; they abolish the law which contradicts with these rights and also, they run to make invalid any act of state which curtails the fundamental rights. If a law violates these fundamental rights, it would be null and void to the extent of its violation.

One of the main motives to include fundamental rights in the constitution is that religious minorities are living alongside the religious majority professing Islam. It was obligatory to provide some basic protections in the constitution so that the rule of the majority party may not prevail. There is no better protection against the rule of the majority than the incorporation of basic rights in the

constitution, specifically in a country where democratic norms are not fully established.

The fundamental rights mean those rights which have been provided under Pakistan's constitution. Fundamental rights are intrinsic to all persons, irrespective of sex, race, nationality, culture, language, religion etc. These are rights instead of honor which can be averted at somebody's wish; they are rights as one is permitted to be, to do or to have. They are global and they are the heritage of every individual of the society; nobody has to acquire the basic rights. These rights protect the people from individuals who might hurt them and they let the people live in a society with freedom, dignity, justice, equality and peace. Fundamental rights are necessary for the full progression of society.

Fundamental rights are immutable and inseparable: one cannot be deprived of a right as somebody held that it is insignificant. Moreover, one cannot lose these rights lest he dies. The basic rights fixed least possible criterion for in what manner government or private institutions must treat the individuals; they also allow the persons to claim and protect their rights as well as rights of the general public.The fundamental rights provided under the constitutions of modern democracies originate from the divine text and traditional scriptures such as the Quran and the Bible.

These rights are contemplated as basic as they are central and fundamental to the being of humans. Human beings have these rights merely on account of being a human. The humans are naturally eligible for the provision and security of these fundamental rights; without the provision and protection of the same, the existence of human society cannot be imagined. For instance, in the absence of adequate security of human life, there will be unending fight and bloodshed amongst humans that may ultimately destroy the human population.

The fundamental human rights are based on a philosophy that there are divine principles such as the right to life which cannot be dishonored by the government. These divine principles, values or rights occasionally named as natural law or universal law which is merged in the constitutions as the fundamental law of the land. The notion at the back of stipulating basic rights in the constitution is to safeguard basic human rights from the oppression of the government.

Pakistan's constitution also furnishes an inclusive way to safeguard basic human rights. On breach of any of such rights, an aggrieved person can approach a High Court to redress his grievance. High Courts would exercise its extraordinary jurisdiction where a person makes a complaint regarding the violation of his/her basic right by a government official. High Courts can order all types of writs and declare any action of the government to be unlawful by exercising its constitutional jurisdiction. The constitutional courts are guardian and custodian of the fundamental rights and possess the responsibility to safeguard the basic rights of the people against any incursion by the State. However, a High Court may refuse to exercise its extraordinary jurisdiction when the law affords an alternative, adequate, and efficacious remedy. The extraordinary situations which might warrant using constitutional power are those when the impugned act is clearly shorn of jurisdiction, malafide, Coram-non-judice or void.

Likewise, the SC has a mandate to protect fundamental rights under suo motu jurisdiction if it thinks that the question before it involves the fundamental rights of public importance. Thus, the SC has ample powers to safeguard the basic rights of the people.

FUNDAMENTAL RIGHTS AND ISLAM

Before Islam, there was severe defilement of rights of the people by influential ethnic groups and individuals of the

Arabs. It might be maintained that all messengers of God strived for the basic rights of the individuals. The Prophet Muhammad (PBUH) also struggled for the realization these fundamental rights. Muhammad (PBUH) came when the Arabian society was violating human rights such as female infanticide and the dignity of persons. Jaffar Tayyar, a companion of Muhammad (PBUH) while speaking to the King of Abyssinia, said that we were accustomed to killing the girls before the appearance of Muhammad (PBUH) and fight with one another and do all crimes. It is worth-mentioning that Muhammad (PBUH) stressed on protection of fundamental rights in his final sermon. Islam preaches for the parity among human beings, which is a central fundamental right. In Islam, the self-esteem of humanity is considered sanctified; and the religious freedom is acknowledged; the right to life, property, privacy, and free speech are protected. Therefore, it is evident that fundamental rights are provided and safeguarded in Islam.

Some Jurists like Donnelly contends that the fundamental rights have a western origin and such rights are unknown to other civilizations and societies. He contends that in Islam, nobody has any fundamental rights, but individuals and rulers have only duties. He argues that the right to justice in Islam is a responsibility of monarchs and the right to freedom is an obligation to do justice with the slaves; financial rights are a responsibility to support the poor. He further clinches that the basics of these sanctions are not human rights but divine commands which approach 'rights' not as human rights but in the context of 'what is right'. He reluctantly acknowledges that the welfare of humanity is the main objective of Islam; instead, he maintains that the appreciation and protection of fundamental rights in Islam is not equal to the status and protection of such rights in western civilization.

Muslim scholars like Baderin admire the contribution of western jurists for the recognition and protection of

fundamental rights globally; however, he contends that the appreciation, recognition and protection of fundamental rights are not exclusive to the western society. They are also found in other cultures and civilizations like Islam. Furthermore, Baderin claims that al-Mawardi debated the rights of human beings and said that rulers have to protect the basic right of the people under the concept of *Hisbah* (public order). He contends that the terminology 'human rights' may have a particular meaning in the west. However, the concept it infers is (almost) same all over the world and different societies may have different terminologies of it. Baderin maintains that basic rights must be perceived as a growing process that got its existing form passing through diverse phases of human society and it will remain evolving in future.

According to Baderin, the evolution of basic rights took place centuries before when human beings started an organized life. Human beings began searching basic rights long before the modern states started framing the international criterion of fundamental rights by transnational discussions. As per Baderin, through this advancement, the word *Huquq Al-Insan* (individuals rights) has substituted the term *Huquq Adimiyyain* (rights of a person) to signify the basic rights in current rapports. He ascertains human rights in the principle of *maslahah* (benefit). His faith on *maslahah* (benefit) as a classificatory code demands further deliberation for the growth and realization of human rights.

According to Baderin, there are two groups of scholars: evolutionists and traditionalists. Traditionalists are regressive and they do not want to review their views as per varying circumstances. On the other hand, the evolutionists while recognizing the past relate the legal doctrines profoundly with contemporary facts. The protection of fundamental rights is the main purpose of any democratic government. Thus, the evolutionary approach may be adopted to promote human rights in Pakistan. On the other hand, the regressive approach

of traditionalists appears outdated and rigid in the modern democratic framework of Islamic states.

Leonard Binder contends that one generation can override any judgement of another generation. It may be argued that the message of Islam is not fixed and static and it can be interpreted considering the needs of modern times and on the basis of knowledge and experiences gained by humans through the process of evolution. As the message of Islam is undying and for the whole world and not specific to Muslims, so this message of Islam may be interpreted and re-interpreted in the light of science and philosophy of modern times.

According to Baderin the connotation of *masalah* (benefit) is welfare, well-being or benefit of the human being. The concept of *masalah* (benefit) could be employed by an Islamic state to construe rights progressively. Baderin further gives cataloguing of the fundamental rights. There are basic rights such as the protection of life, intellect, religion, and property. Then, there are those rights which advance the general quality of human beings. Arguably, the fundamental rights of the first and the third level relate and can accommodate the basic human rights in the modern context of Islamic states.

Thus, the third level of fundamental rights can be construed creatively to accommodate more basic rights in this list such as socio-economic rights. The idea of *huquq al-ibad* (rights of the people) in Islam may be liberally interpreted to promote and protect fundamental rights as per the requisites of modern times. A head of state in Islam is responsible for the well-being of the people. With this background, it may be stated that fundamental rights exist in Islam and the same can be promoted and protected in modern Islamic democracies by employing the concept of *maslahah* (benefit).

It may be contended that standards of basic human rights are elaborated in Islam as the Quran emphasized on the

provision of basic rights. The democratic rights like equality among the people and the process of consultation in affairs of an Islamic state, that was the cause of civil rights movement and the outcome of the French revolution and also the movement of freedom in America, in fact, have roots in Islam. The basic rights were present in Islamic states before the renaissance in Europe. It is maybe conceded, however, that basic human rights are the shared inheritance of all cultures and it is the collective legacy of mankind. However, full agreement and concordance between the western and non-western concept of human rights are not desirable to keep this phenomenon as ever-evolving and flourishing. Different cultures and civilizations have different connotations of the idea of basic rights. They may be different in meaning and application due to different contexts.

Even in the west, the idea of basic rights is not limited to a particular time frame or civilization. The basic rights began developing since the birth of the first human being and it continues. For the collective welfare of mankind, all culture and states may agree on a broader definition and a scheme for implementing basic human rights. This objective may be achieved through constant dialogue and intellectual engagement amongst nation-states under the UN system.

JUDICIAL INTERPRETATION OF FUNDAMENTAL RIGHTS IN PAKISTAN

Interpretation plays a critical role in understanding and applicability of the law. There are two main theories of interpretation: Literal, purposive and progressive. To protect the basic rights in Pakistan the judiciary used the purposive and progressive theory of interpretation maybe by assuming the role of *Mujtahid* (a person who is duly competent to engage in legal reasoning in the appraisal of Islamic law). In Pakistan, the formal system of *Ijtihad* (Legal reasoning and

hermeneutics through which a jurist derives law from the Quran and Sunnah) does not exist. Fatwa of *Mujtahid* is not binding on the people as per the constitution. However, the parliament and the judiciary have the power to make and interpret the law. Therefore, it may be argued that the parliament and the judiciary have adopted the role of Mujtahid in present days. It is a basic duty of our courts to interpret the constitution, so by performing its duty, courts have interpreted the constitution creatively to protect basic rights.

The analysis of case law shows that our courts have appreciated socio-economic justice as enunciated in Islam. Syed Sajjad Ali Shah J. suggested that while construing the provisions of basic right the courts should construe them liberally, dynamically to give full benefit to the individuals. Nasim Hassan Shah J. emphasized that human rights provision must be interpreted while seeing the varying circumstance in a society. Thus, the courts of Pakistan preferred a liberal and dynamic approach to protect and promote the basic rights in Pakistan over a regressive and fixed approach of interpretation of fundamental rights. It is the outcome of this approach of the SC that it has over the years played an exemplary role in protecting women rights.

A constitution cannot be limited to its past. Thus , the judiciary interprets the constitution in evolving context to protect fundamental rights. Pakistan's constitution represents the political will of the people, which is incorporated in the preamble of the constitution. This will and aspiration contain socio-economic justice as enunciated in Islam. The constitutional courts of Pakistan have, therefore, given widest space to the will of the people by liberally interpreting the basic rights.

The courts ordained broader construction of rights to meet the varying needs of our society and the objective of an Islamic state. This approach of the courts can be seen in both

substantive and procedural law. For instance, the courts relaxed the filing requirements and strict necessities of evidence in basic human right cases. Second, the courts protected rights of the people on the basis of newspaper reports and letters. Through its directions the courts have broadened the meaning and scope of fundamental rights.

The courts have legal duty to protect basic rights of the people, and the courts have protected and promoted the same to a large extent recognizing the constitution as an organic instrument and basic rights as unlimited legal rights. The judiciary has exercised such a liberal approach in cases like safeguards against the arrest and detention the right to defend in case of arrest and detention, the freedom of business and profession, the prohibition of forced labour, the dignity of mankind, the right to consult a counsel, freedom of forming business unions, right to individual liberty, political freedoms, freedom of business and profession, the right to property, and the right to equality of citizens, inheritance, offshore company, judicial independence, the elimination of exploitation, the principles of policy, and Islamic rights. In these cases, the judiciary construed basic rights in a progressive manner and extended the connotation and meaning of basic rights to benefit the individuals.

For instance, in *Muhammad Akbar Azad versus Federation of Pakistan,* the court observed that the state has a duty to create an atmosphere where the Muslim community can regulate their lives as per the teachings of Islam. After the incorporation of Article 2-A, the Quran and Sunnah have gained the status of the supreme law; thus, the courts should adopt and enforce the existing laws as per Quran and Sunnah. Every law made by legislature ought to be confirmed with the Quran and Sunnah and the basic rights incorporated under the constitution are not expected to contravene the injunctions of Islam.

In *Abdul Khanan versus Government of Khyber Pakhtunkhwa*, the court held that the out of turn promotion is unlawful and against the injunctions of Islam as it offends the constitutional rights of equality before law and the equal protection of the law. The court emphasized that out of tern promotions are in contradiction of both the constitution and teachings of Islam. It creates annoyance and depression among government officers and ends the essence of civic service. The concept of award and reward to promote positive competition about public service is good; however, it must not be done by out of turn promotion.

Also, in Baz Muhammad Kakar's case the court observed that the constitution must be interpreted liberally to protect basic rights and particularly while interpreting the Article 184(3), the object and purpose of incorporating this article—that is protection of fundamental rights which are of public importance ought to be considered. The interpretation of the constitution must not be confined to formal rules of interpretation. In this regard, courts should contemplate on the objectives resolution, fundamental rights provisions, and the principles of policy. Moreover, the court observed that access and provision of justice is an internationally recognised fundamental right; a civilized and egalitarian society can only be created by providing this right to its citizens.

In *Ch. Muhammad Siddique versus Government of Pakistan*, the court stated in our country, frivolous customs practiced on the weddings and the communal problems stemming thereof have increased the sorrows of depressed and backward classes of the society. Dowries are boldly claimed now, thus the poor's have been crushed on the name of such wasteful spending. The court observed that Islam does not appreciate such frivolous matrimonial ceremonies. The Muslims have sacrificed create a state in which they could practice Islam; and under the constitution, the state is duty-bound to eradicate such bad customs evils and create an atmosphere where teachings of Islam can be fully observed.

The court, in *Asfand Yar Wali versus Federation of Pakistan*, emphasized on the objectives resolution to establish that Allah is sovereign of the entire universe. In Pakistan, Allah has delegated His authority to the people which is to be exercised through their representatives within the limits prescribed by Allah as a sacred trust. The court stressed that an Islamic state is responsible that the Muslims live according to the teachings of Islam. The court noted that protection of basic rights particularly the rights of underdeveloped classes and minorities and judicial independence is duty of the state.

The court in another landmark case titled *Sh. Liaquat Hussain versus Federation of Pakistan* held that imparting justice to the citizens is a basic right protected in the constitution. Right to get justice as enunciated in Islam connotes that all citizens must have equal opportunity and right to approach the courts to redress their grievance. All people have the right to approach an independent and competent court and fair trial as per law. The independence of the judiciary is necessary for the provision of fundamental rights, without judicial independence the protection of fundamental rights is uncertain. The court further noted that extremism and criminal acts refute the basics of democracy as well as social justice as set forth by Islam. The legislature can make the law to curb terrorism and restore law and order situation. However, such law cannot contravene the constitutional provisions such as fundamental rights.

In *Benazir Bhutto's* case the court observed that the dignity of man and the privacy of home are constitutionally protected fundamental rights and Islam has immensely emphasized in this regard. If an individual encroaches the privacy of any person, it hurts the dignity and privacy of man and in particular, it places the individual to the grave risk of being threatened. When the telephonic conversation of an individual is being recorded it violates constitutionally protected basic rights i.e. the freedom of expression and speech. It is supposed that when an individual speaks through

the phone just the speaker and his addressee hear the discussion as one cannot discuss his secrets in front of other persons; this protects freedom of expression, speech and privacy of any person. Thus, the recording of the phone violates liberties provided under the constitution.

In *Mian Muhammad Nawaz Sharif versus President of Pakistan*, the court held that the citizens have intended to make a system where the government shall use its power by the elected representatives; where they can practice and experiment democracy, equality, and freedom as articulated in Islam. The preamble of the constitution dictates that "the State shall exercise its powers and authority through the chosen representatives of the people". The constitution recommend that "sovereignty over the entire universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust" and state is commanded to "exercise its powers and authority through the chosen representatives of the people". A chosen representative who defects his declared conviction, mandate, party, constituency, abolishes his typical characteristic and cannot exercise the authority of the state.

In *Shehla Zia's* case, the meaning of 'life' was expanded by the court through an activist approach. The SC observed that although the constitution does not define the word 'life', yet it cannot be given restrictive meaning to equate human life with animal life. While liberally interpreting the meaning of life, the court observed that a human should be able to live a dignified life with all facilities and pleasures of life being born in a free society. The court, for the first time, departed from the traditional definition and jurisprudence of fundamental rights in Pakistan. Under the traditional conception of fundamental rights, the right to life could only be construed as a 'restraint on the powers of an individual or a government not to kill a citizen unlawfully such as

extrajudicial killing. However, in *Shehla Zia's* case, the court stretched fundamental rights jurisprudence.

The courts granted the right to accommodation to a civil servant while stretching the right to life. The right to life was extended even to drinking clean water. The court held that damage caused to property by the flood is a matter of fundamental right. Likewise, contract employees were confirmed as permanent employees considering the right to livelihood as a matter of fundamental right. Access to justice was also treated as an issue of the right to life. Such an interpretation of fundamental rights arguably disturbs the balance of power between different state organs. Arguably, it amounts to encroach upon the policy-making domain of other branches of the government, as, the courts have intervened in the government's domain of regulating environmental pollution.

On the contrary, it can be argued that when the executive fail to protect the people's rights , then the courts becomes the last resort to address the grievance of the people. Therefore, Pakistan's judiciary has followed a liberal, progressive, creative, and dynamic approach in interpreting fundamental rights to meet the objective of Islam—that is the welfare of the people. In this regard, our courts are inspired by the notions of socio-economic justice in Islam.

CONCLUSION

The provision of fundamental rights is integral for human life. Therefore, the protection of fundamental rights is envisaged in all constitutions. The fundamental rights owe its origin to religious text such as the Quran and the Bible. Thus, they were available to humans in one form or the other in all ages, cultures, and legal systems. Contrary to this historical fact, some western scholars argue that fundamental rights or human rights do not exist in Islam. Their argument assumes

that as Islam obliges the performance of religious duties, the fundamental rights are not granted as such to the citizens of an Islamic state. However, a brief survey of thoughts of Muslim scholars and the constitutional interpretation and practice of Islamic states like Pakistan refutes the western approach on human rights. It is established that fundamental rights exist in Islam and Pakistan's constitution. The Islamic principle of *maslahah* (benefit) can be utilized for the creation, elucidation and protection of fundamental human rights. Islam intends to advance well-being of the humans that requires the protection of fundamental rights. The argument that fundamental human rights originate in the western society only negates the historical evolution of these rights in different cultures and legal systems. In fact, the notion of human rights emerged, promoted, and protected in Islamic civilization even before the resurgence of these rights in so-called modern western societies. Further, the progressive interpretation of fundamental rights by Pakistan's judiciary rebuts the argument of western scholars. In doing so, the judiciary has employed the notion of socio-economic justice of Islam provided in the preamble of our constitution to expand and protect fundamental rights in Pakistan.

Part VII. Rule of Law

FRAGILE RULE OF LAW

IT has been pointed out that there are four universal principles that govern the concept of the rule of law. First, the governments and those representing it as well as individuals and private entities are accountable under the law. Second, the laws are clear, "stable and just, are applied evenly, and protect fundamental rights, including the security of persons and property". Third, laws are enacted and enforced in a manner that is "accessible, fair and efficient, and timely". And last, justice is delivered by unbiased representatives known to be ethical.

The World Justice Project (WJP) Rule of Law Index, 2020, while using the above definition, ranks Pakistan 120 out of 128 countries. This ranking is made against eight factors: "constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice". I invite the attention of justice-sector stakeholders to three

important themes: fundamental rights, civil justice, and criminal justice.

Fundamental rights are basic to human existence and individual development on the one hand, and on the other, they are essential for the growth of a society based on democratic and equitable principles. These rights are provided in Chapter 1 of the 1973 Constitution.

The WJP measures how far there is equal protection of law for citizens and the absence of discrimination. It reviews the extent to which the right to life and security is effectively guaranteed, due process of law, and protection of the accused's rights. It assesses how far the freedom of opinion and expression is guaranteed, the extent to which freedom of belief and religion is safeguarded, if freedom from arbitrary interference in private affairs is provided and freedom of assembly and association ensured, and how far fundamental labour rights are guaranteed. It confirms the fragile state of fundamental rights. Against this measure, it ranked Pakistan 115 out of 128 countries.

The delivery of justice in a timely, efficient manner is an integral pillar of the rule of law. Our Constitution promises inexpensive and expeditious justice to the people under Article 37. The WJP measures whether ordinary people can get their disputes resolved peacefully and grievances addressed effectively through our civil justice system.

The delivery of effective civil justice requires that citizens be able to access and afford the justice system, free of discrimination and corruption, and without government influence. Such justice necessitates that court proceedings are concluded within a reasonable time frame, and that decisions are enforced.

The accessibility, impartiality and efficiency of mediation, reconciliation and the arbitration system is another factor in the examination of the performance of the

institution of civil justice. The civil justice system is ranked 118 out of 128 countries.

An effective criminal justice system is key for the protection of life and maintenance of peace and order in society. In efficient criminal justice systems, investigation and adjudication of criminal cases take place in a timely, impartial, non-discriminatory manner.

Strong criminal justice systems process investigation and trial of offences without bias and influence, ensuring due process of law for both complainant and accused. The report also evaluates the overall performance of the stakeholders responsible for the delivery of criminal justice i.e. the police, lawyers, prosecutors, judges, and prison officers. Pakistan's criminal justice system ranking (98/128) indicates an urgent need for improvement.

The rule of law ensures the protection of fundamental rights and a strong civil and criminal justice system. Where it is weak, people suffer from injustice, poverty, violence, unaccountability, inequality and discrimination. Therefore, promoting it should be a major goal of the bench, bar, government and civil society organisations.

The Pakistan Bar Council and provincial bar councils should start special campaigns and crash courses on the rule of law. Students should be familiarised with the role of institutions through visits to courts and essay competitions. The government and civil society should launch awareness campaigns on the rule of law through social, print and electronic media.

The superior courts are custodians of our fundamental rights and also responsible for promoting the concept of the rule of law. Thus, those who violate fundamental rights and the rule of law must be held accountable before competent, ethical and independent judges.

The regulatory bodies of the judiciary (i.e. Supreme Judicial Council) need to play an effective role in ensuring the rule of law through an efficient judicial system. At the same time, the government must provide adequate resources to the judiciary for improving the civil and criminal justice system. The executive branch of the government and civil society should support the judiciary in upholding the universal principles of the rule of law.

LAWYERS AND RULE OF LAW

Law is a noble profession of learned people dedicated to the task of upholding the rule of law and defending, at all times, rights of people. Lawyers in Pakistan always stand for the rule of law. A section of lawyers, however, defame the legal profession by showing occasional disregard for the rule of law and legal institutions.

For instance, in an effort to establish circuit benches of the Lahore High Court, some lawyers harassed a public officer in Faisalabad. The Punjab Bar Council announced strikes to protest the creation of the benches. Notwithstanding the merit or demerit of this cause, one may ask from the members of the learned profession: can strikes not be called after court hours? Do unnecessary strikes suit respected members of the bar, even as they pursue a noble cause of justice? Finally, are strikes the only way to get the voice of the bar heard?

The demand for establishing high court benches at divisional level such as Faisalabad and Gujranwala is not illegal. It falls with the preview of the 1973 Constitution.

Article 37(6) of the Constitution provides for inexpensive and expeditious justice to the people. The establishment of high court benches in districts, which are some distance from Lahore, will provide easier access to justice. Article 198 (4) of the Constitution provides a mechanism for the creation of high court benches as "each of the high courts may have benches at such other places as the governor may determine on the advice of the Cabinet and in consultation with the Chief Justice of the High Court."

As such, high court benches may be created under the Constitution. The cause of access to justice may be promoted through discussion at the forum of the bar. The bar should present their case before the bench through a constitutional petition (as access to justice is a fundamental right of the people) or should have a dialogue with the chief justice of the Lahore High Court and or the governor. In any case, the lawyers should argue their case on the basis of the law. Strikes in courts and pressure beyond the domain of law will damage the cause and reputation of the legal profession. It may adversely affect the interest of the bar. Our justice system already ranks at 120/128 in World Justice Project Rule of Law Index 2020. In this Index, Pakistan has lost one point more in the global ranking. Boycott of the court proceedings may have a negative impact on this ranking, decreasing international trust in our legal system and the rule of law in Pakistan.

As per Rule 2(c) of the Supreme Court Bar Association of Pakistan Rules (1989), one of the objects of the Supreme Court Bar Association is to "to maintain high professional standards of probity and integrity amongst its members and to check and eradicate unprofessional practices." As per Section 3(d) of the Punjab Bar Council Memorandum of Association, one of the objects of the bar association is to "struggle for civil liberties, human rights, and the rule of law." Rule 134 of the Pakistan Legal Practitioners and Bar Councils Rules, 1976 (the Rules 1976) further provides that "it is the

duty of every advocate to uphold at all times the dignity and high standing of his profession, as well as his own dignity and high standing as a member thereof."

Bar councils are mandated to regulate and reform the legal profession. Under Sections 9(c) of the Legal Practitioners and Bar Councils Act (1973), "The Provincial Bar Council shall entertain and determine cases of misconduct against advocates on its rolls and order punishment in such cases." Section 13(d) provides that the Pakistan Bar Council shall "lay down standards of professional conduct and etiquette for advocates."

There is a perception that a segment of our lawyers considers itself above the law, and the bar councils have failed to rebut this perception. Legal action against members facing complaints of misconduct is ineffective. The actual number of these complaints and their outcome is hardly made public. Naturally, ineffective proceedings against lawyers weaken the bar and our justice system.

Deterioration of the legal profession may partly be attributed to the failure of the bar councils to implement the relevant laws. Poor entry and accountability procedures have allowed many who are not properly qualified in law and professional ethics to join and continue in the legal profession. Bar councils fail to provide regular and proper training to lawyers. Thus, lack of proper opportunities for professional training and growth, sometimes, lead young lawyers towards violence.

To promote professionalism, Sections 5-A (Qualifications for membership of a Provincial Bar Council), 5-B (Disqualifications for membership of a Provincial Bar Council), 5-C (Cessation of membership of Provincial Bar Council), 11-A (Qualifications for membership of Pakistan Bar Council), 11-B (Disqualifications for membership of Pakistan Bar Council), 11-C (Cessation of membership of Pakistan Bar Council) and 26 (Persons qualified for admission

as advocates) of the 1973 Act, and Rule 108-A (k) (Certificate of training from the senior) of the Rules 1976, should be implemented to regulate the legal profession more effectively. The Pakistan Bar Council Free Legal Aid Scheme (1988), which provides for pro-bono services to the poor, destitute, orphans, widows, indigent and other deserving litigants could be used to engage and compensate young lawyers.

The Pakistan Bar Council should constitute a commission comprising of senior members of the bar to get misconduct complaints investigated and adjudicated far more quickly. The commission should also recommend reforms to regulate entry into the legal profession as well as a bi-annual review of bar licenses. Capacity building of young lawyers should be especially focused. Training, opportunity, and regulation of the bar would promote access to justice than frequent strikes.

OUR RIGHT TO KNOW

The right to information is a valuable fundamental right. This right is recognised in all modern democracies. While acknowledging special procedures to ensure proper oversight for limited realms of state-secrecy, it provides citizens with access to a wide range of official documents and records ensuring good governance within the state. In Pakistan, however, citizens are generally kept unaware as to the functioning of public bodies. And, as a result, citizens often fail to hold the state accountable for bad governance and the protection of their fundamental rights. Article 19-A of the 1973 Constitution provides that "Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law". The Pakistan Right to Information Act 2013 and the Punjab Transparency and Right to Information Act 2013 further ensures that every citizen should be able to acquire required information and documents from public offices. Other provinces have also legislated similar law with some procedural variations.

Under the Punjab Act, all citizens are entitled to have information about official staff, proceedings, and the decisions of public bodies including court, tribunal, commission or board. Any person can apply for this information whether he is aggrieved or not. All public bodies constituted under any law or funded by the government are required to give information to citizens. State-run corporations like PIA, WAPDA, NADRA, and autonomous bodies like universities and chartered educational institutions are also bound to provide this service.

Every citizen has a legal right to access official documents and records except those pertaining to defence and security, the legitimate commercial interest of a public body, the prevention of crime or the administration of justice, and the private information of other citizens. All exclusion and classification must be accompanied by a record of reasons for such exclusion.

Under the Punjab Act, public bodies are required to nominate Public Information Officers. A citizen can file an application seeking information to such officers. One can also directly approach the head of a relevant public body. The application seeking information should be precise and concise. It can be written on a plain piece of paper. It should provide the applicant's contact details and postal address. It should also describe with accuracy which information is required. The applicant is not required to disclose his motive for getting the information. The application should normally receive a response within fourteen days. In any case, this period will not exceed twenty-eight days. In case of life or liberty of any person, the information should be provided within two days. There is no fee for seeking information under the Act except necessary expenses of copying, etc. The information cannot be refused without assigning reasons. It is suggested that the application should also be assigned a tracking number so that the applicant may monitor progress and fate of h/her application.

In case the requested information is not given by the Public Information Officer, the applicant has two options: First, he can approach the head of the public body for an Internal Review. On such an application, the head of the public body will be required to respond within fourteen days addressing all important issues including evaluation of reasons assigned for refusal and alleged negligence of Public Information Officer. Second, the applicant may apply to the Punjab Information Commission. The Commission is required to decide on such application within thirty days or sixty days if there are good reasons for the delay. If the Public Information Officer fails to provide information without any lawful excuse, he may be proceeded against in departmental proceedings and, secondly, the Commission may impose a financial penalty up to Rs50,000. In case of federal bodies, an applicant can also approach the Mothasib and Federal Tax Ombudsman. In any case, one can file complaint to the Superior Courts for redressal of grievance against provincial and federal public bodies.

Unfortunately, there is a huge gap between what the law says and what is actually happening in Pakistan. Particularly, the uneducated and poor segments of the society hesitate to peep through the doors of public bodies. It is, therefore, partly the duty of print and electronic media, civil society and professional organisations, including pro bono public interest litigation undertaken by lawyers, to speak for the right to information as a fundamental right of the people. It will promote accountability, strengthen democracy, reinforce the governance, reduce corruption and irregularities, improve development schemes and service delivery, and facilitate participation in decision making.

Knowledge will empower the citizens to speak against injustice of every kind. This knowledge will provide a check on the public bodies — the ultimate check of 'the people of Pakistan' on their representative institutions i.e., the

legislature, the executive, and the judiciary as per spirit of the Constitution.

RIGHT TO A FAIR TRIAL

The right to a fair trial is a norm of international human rights law designed to protect the right to life and liberty of the person. There is a perception that the judgement in the Junaid Hafeez case ignores the Supreme Court ruling in the Asia Bibi case and the principles of a fair trial.

Hafeez was alleged to have posted blasphemous comments on social media; he has been sentenced to death by a district and sessions court despite Pakistan's Supreme Court (SC) guidelines regarding proving the blasphemy charge in the Asia Bibi case. In that case, the SC has set a precedent that if a blasphemy charge is not proved beyond a reasonable doubt, lower courts must dismiss the charge. In the Asia Bibi case, the SC cautioned lower courts from awarding death sentence in blasphemy cases based on false or weak evidence.

Article 10 of the Universal Declaration of Human Rights, which represents customary international law, provides: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in

the determination of his rights and obligations and any criminal charge against him."

Article 14 of the International Covenant on Civil and Political Rights 1966 (ICCPR) states: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Pakistan ratified ICCPR in 2008 and added Article 10-A to its constitution in 2010 through the 18th amendment. Article 10-A states: "For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process."

A fair trial requires fairness of proceedings at a pre-trial and a trial stage. The pre-trial rights include the right to legal counsel, the right to a prompt appearance before a judge to challenge the lawfulness of arrest and detention, and the right to humane conditions during the pre-trial detention. The rights that are to be provided during a trial include equal access to and equality before the courts, the right to a fair hearing, the right to a competent, independent and impartial tribunal, the right to adequate time and facilities for the preparation of a defence, the right to a trial without undue delay, and the right to defend oneself through legal counsel.

UN Human Rights experts have termed the verdict against Hafeez "a travesty of justice" as it appears to violate the free trial criteria set out in the ICCPR and the fundamental rights provided under Pakistan's constitution. Hafeez was held in solitary confinement for six years; his trial was delayed unreasonably; his first lawyer, Rashid Rehman, was killed; and seven judges were transferred during the trial due to environment of fear. These circumstances suggest the denial of the right to a fair trial.

A brief historical account of the blasphemy law may be discussed to contextualise the Junaid Hafeez case. The British government promulgated the blasphemy law in the subcontinent as a result of Muslim protest against a publisher, Rajpal, who made derogatory remarks against Prophet Mohammad (pbuh). As there was no law preventing insult to religious feelings of Muslims, Rajpal was not convicted. Muslims then demanded a law criminalising blasphemous conduct and ban on blasphemous publications. The British government agreed to insert section 295-A-deliberateand malicious acts, intended to outrage religious feelings or any class by insulting its religion or religious beliefs-in the Indian Penal Code 1860.

The same law was inherited by Pakistan in 1947. In 1986, General Zia-ul-Haq made drastic changes in the law and added Section 295-C in the Pakistan Penal Code 1860 (PPC). Under section 295-C of the PPC, a blasphemous act targeting the prophet (pbuh) attracts both the punishment of death and fine.

Critics of Section 295-C argue that this law mostly targets the minorities and is misused for personal vendetta. The respect and love for Prophet Mohammad (pbuh) are integral to the belief of Muslims. However, as the SC noted in the Asia Bibi case, mixing truth with falsehood in the name of the Prophet (pbuh) is also not short of being blasphemous.

The Asia Bibi case demonstrates that securing conviction even on false or fabricated evidence is not unlikely in our criminal justice system. Thus, there is a dire need to reform Pakistan's criminal justice system.

In a nutshell, the Junaid Hafeez case should be decided by the appellate courts in light of the norms of international human rights law. The superior courts should also provide guidelines to lower courts for conducting a fair trial.

The legislature should provide punishment for those who file false cases or lie before the courts. No one should be

denied a fair trial. At the same time, it should be ensured that an act of blasphemy is punished in accordance with the law.

Part VIII. Law and Technology

COVID-19 AND VIRTUAL COURTS

The global spread of Coronavirus seems to be the most serious catastrophe of our times. The next few weeks may reshape the collective consciousness of mankind and usher in a transformation–not only in healthcare but also in our justice systems. This crisis has seriously affected courts working worldwide. Different approaches are emerging in the justice sector to handle this catastrophe and protect the rights of the people.

In the wake of Covid crisis, our Supreme Court (SC) decided to hear "essential cases;" adopting certain precautionary measures. For example, only lawyers would appear before the court; the public would avoid visiting courts unless their attendance is required; a screening system has been introduced at the entrance gates of the SC. On the contrary, the UK Supreme Court decided to go virtual and conduct all cases via web-based video conferences. Parties, their counsels and judges participated in proceedings from

different places. Proceedings were made available to the public through the court's website. Footage of the proceedings were also available to view on demand. Likewise, courts decided to move to virtual operations in New York City and Texas. The Indian Supreme Court also executed virtual courts plan.

Covid-19 is testing the capacity of all institutions. Justice systems like ours, which are already suffering from a lack of resources, strikes and delays face serious challenges. However, it presents the legal fraternity with an opportunity. There are two options. The first is to continue working conventionally and suffer the consequences in these times of crisis and thereafter. The second is to learn from the crisis and adopt technology to promote access to justice. I favour the second option.

We need to upgrade our justice system and drag our courts into the digital age with intensive education and training in legal information technology. We have to move as quickly as possible from paper-based to digital processes to save time and cost whilst maintaining access in the new context that we are facing. The court proceedings in Pakistan may also be conducted via teleconferences, Skype and video hearings.

Professor Richard Susskind from the University of Oxford said that online dispute resolution was no longer a matter of science fiction: it was the need of the modern age and, in many contexts, already a reality. For example, in the UK, digital systems like e-Judiciary (an email and document management system that allows judges to access information and advice from any device), Digital Case System (an online system of sharing and reading documents in criminal cases that can be accessed from any location on any device by relevant professionals) and Click Share (a system for displaying evidence on large television screens in courts

stored on or accessible from laptop computers of lawyers) have been experimented with successfully.

With the advancement of AI, working remotely and communicating through digital platforms could also be a normal phenomenon in Pakistan. In this regard, the two areas may be prioritised. First, all procedures and hearings can be digitised. Second, courts processes and procedures should be simplified; there should be a uniform procedural code for civil cases and a common procedural regime for criminal cases. The Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, should be amended to move towards digital justice. Subject-specific procedures may also be developed for special courts and tribunals such as family courts, commercial courts and tax tribunals, etc.

Other countries are modernising their court procedures rapidly. For example, the UK has launched a robust project to introduce online courts. Lord Justice Fulford (Investigatory Powers Commissioner, UK) has said: "In an era in which many people conduct a large part of their lives using some kind of an electronic device, … the judiciary has got to enable how we conduct cases to match the expectations of the public." It has been predicted that most civil disputes in the UK will be resolved through an online court by 2022. Worldwide improvements in e-dispute resolution provide examples for improvements in our justice sector.

With increasing access to technology and a higher level of literacy (as well as digital skills training), alongside adequate legal advice and support, Pakistan should move in the same direction. Our justice system should be accessible, convenient, inclusive, transparent, and non-discriminatory, especially for the marginalized sections of the society like women, children, and minorities. Improving both traditional and digital literacy goes hand-in-hand with improving e-justice.

The temporary measures advised by the SC in the wake of Covid-19 are appreciable. However, to introduce long-term reforms, the National Judicial (Policy Making) Committee – a body of all chief justices charged with bringing judicial reforms in the country – should establish an advisory board of leading experts in legal information technology and IT. This board should keep our justice system under constant review and advise on how it should be improved, particularly regarding online dispute resolution in civil and criminal cases. To facilitate buy-in from Pakistan's legal fraternity, Section 3 of the National Judicial (Policy Making) Committee Ordinance, 2002 should also be amended to provide representation to national and provincial bar councils.

A pilot internet-based court service ('Online Court') should also be established to encourage digital justice in each province. The lessons from this pilot project could be applied in other courts and tribunals such as civil courts, family courts and tax tribunals. The impact of such projects should, of course, be assessed, periodically, to upgrade our online processes and procedures. For example, the private data of citizens collected through online systems must be strongly protected.

In a nutshell, justice-sector reforms should provide increased access to e-justice, enabling citizens to get their disputes resolved more conveniently and quickly. Litigants should engage with online proceedings that ensure, first and foremost, procedural fairness. To do this, online procedures must integrate the role of judges and lawyers in a meaningful way. This will strengthen our justice sector and enhance the capacity of our country to meet any global crisis in future such as the Covid-19 virus.

EMBRACING LAWTECH

The Fourth Industrial Revolution is going to impact the legal sector. A rapid advance in artificial intelligence (AI) is changing the mode and structure of legal services.

International lawyers and law firms recognise the importance of technology. However, Pakistan's legal sector hasn't shown much interest in adapting to lawtech. Customers are increasingly using digital technology. Therefore, the legal profession needs to upgrade in order to satisfy the digital needs of customers.

Olive Communications, a managed cloud comms provider in the UK, recently conducted research on 500 law firms and 1,000 clients in the UK. It found that 34 percent of clients would like to receive digital services through video conferencing and instant messaging (IM) from their lawyers. Around 66 percent interviewees stated that they have not been provided such services.

Realising this gap between the digital needs of clients and the provision of such services by lawyers, the UK government has launched digital reforms that include the

automated filing of financial claims for disputes of up to $10,000, a digital divorce application service, and an online system for appealing tax bills.

The research carried out by Olive Communications further revealed that "seven out of 10 consumers would choose a 'law-bot'– a customer-facing, automated online system – to handle their legal affairs over a human lawyer because it's cheaper, faster and simpler". The study concluded that installing digital communication systems has significant benefits for law firms.

Digitalisation has obvious benefits, including greater opportunity, swiftness, convenience, and output. Collaborative cloud technology could help clients and law firms become paperless while improving efficiency and the security of information. The electronic filing of court proceedings could make the justice system more accessible and efficient. Lawyers can use lawtech, i.e. legal analytics, to conduct quick legal research and examine voluminous documents.

Richard Baldwin, a professor of international economics, states that: "Globalisation 4.0 is going to hit the service sector. Hundreds of millions of service-sector and professional workers in advanced economies will be exposed to the challenges and opportunities of globalisation for the first time. Worryingly…AI-driven automation will displace many workers".

Such studies show that the Fourth Industrial Revolution will impact the service sector, including the legal profession. Clients would prefer communication with speed, efficiency, and security through automated responses or multiple channel web-based communication systems to wasting time visiting a lawyer's office or waiting for legal advice to come through the post or email. Therefore, Pakistan's legal sector has to be upgraded in terms of technology to sustain in a globally-changing legal landscape.

At the same time, legal professionals need to be equipped to handle cybersecurity threats through awareness and the promulgation of cybersecurity regulations in Pakistan. Lawyers and law firms hold valuable personal and commercial information about their clients. For example, the nature of information is very sensitive in the merger and acquisition of corporate entities. Threats for a cyber-attack in such cases are real.

While recognising these threats, the International Bar Association Presidential Task Force on Cybersecurity conducted a study and issued a report in 2018 that provides robust cybersecurity guidelines for lawyers.

These guidelines keep the system software updated; implement endpoint protection; use reliable internet connections; secure web browsing and email; implement data-keeping and loss-recovery capacity; encrypt data and devices; authorise remote deletion; make certain that the cloud computing provider is secure; supervise access control; and create strong network segmentation.

They are also required to apply audit logs; secure mobile devices; secure devices that store data; implement strong username and password management with multi-factor authentication; spot sensitive data and implement protection protocols; and conduct regular cybersecurity risk assessment and system testing.

In addition, these guidelines will implement a cybersecurity policy aligned with identified risks and minimum standards; ensure vendor and third-party service provider risk management; prepare business continuity plans; establish and test a comprehensive incident-response plan; assess legal and regulatory obligations; conduct employee training and testing; consider cyber liability insurance; and participate in cybersecurity information-sharing with other organisations.

Pakistan's legal fraternity may benefit from these guidelines till cybersecurity regulations that focus on protecting the confidentiality, integrity, and availability of sensitive data that belongs to law firms and clients are introduced. The adaptation of lawtech cannot be suspended due to the absence of adequate regulations. Innovation and regulation must go side-by-side.

Due to the backlog of cases in our courts, the new generation of lawyers and judges need to enhance the quality, reach, and impact of their services by utilising lawtech. The electronic filing of court documents and digitalised modes of communication would meet the rising digital demands of the legal sector's customers.

The founder of World Economic Forum, Klaus Schwab, says: "…we should understand that the Fourth Industrial Revolution will affect not just our industries but also society and the lives of people everywhere. Businesses [including the legal sector] need to make sure society benefits from technological innovations". Let's hope the legal fraternity in Pakistan appreciates the importance of lawtech.

FUTURE FIRMS

The legal profession is rapidly changing — but not in Pakistan. From structural changes in the procedures required to establish a law firm, to technological changes in research and development, the profession is undergoing massive transformations. To meet the challenge, Pakistan's legal industry needs to embrace technology and fundamentally alter its service structures.

Many lawyers are now moving beyond the traditional business model (i.e. solo practice) to join professional referral networks or organise law firm networks. Member firms coordinate effectively across borders through close collaboration, information sharing and training, posing a challenge to those who only offer local services. Lawyers working in domestic jurisdictions need to appreciate the value of law firm networks to improve the quality, impact, reach and even the scope of their legal services. Legal technology companies, for example, are increasingly occupying the space of small firms and solo lawyers, and are set to reshape traditional models of legal services.

New technologies are revolutionising the legal system: data security, big data, Bitcoin, computable contract, legal help web, digital technology, document automation, outcome prediction, machine learning, automation of legal work, legal

analytics, mobile computing, data mining, legal app, electronic document-management systems, virtual law firms, online dispute resolution, electronic courts and e-filing of court documents, cloud computing, social media, block-chain money transfers and even robot lawyers are transforming the way legal work has traditionally been done. Who will prosper and who will be left behind will depend on who adapts best to these revolutionary changes?

Artificial intelligence, for example, is having an impact on every sector, including in the legal sector. This technology is already being used to scan and predict documents relevant to a particular case. Some firms are using AI to review contracts, conduct due diligence and undertake legal research. Now e-discovery software can analyse millions of documents in a very short space of time for very little cost. An e-discovery provider in Silicon Valley, for example, can help analyse 1.5 million documents for less than $100,000.

Some programmes have the ability to extract relevant concepts at computer speed. In one competition, an AI programme developed to measure aptitude and legal intelligence had an accuracy rate of 86.6 per cent, compared with 66.3pc for human lawyers. E-courtrooms, meanwhile, are already operational in some countries. For example, the Federal Court of Australia uses e-courtrooms to assist in matters such as ex-parte applications for substituted service in bankruptcy proceedings. Access to, and management of, court documents is easier, saving time and money while increasing accuracy and reliability.

Social media platforms can be used to generate business and establish professional networks as well as improve education, career development, and rights-awareness for the general public. In Australia, a justice of the Supreme Court of Victoria notified claimants of a class action case about the registration requirements via

Facebook. In Pakistan, where court proceedings get delayed for non-service of notice, Facebook may be used as a substitute mode of service for those who avoid the court process. Such usage needs to be balanced to ensure privacy rights are protected.

The International Bar Association Presidential Task Force on the Future of Legal Services report of 2017 lists several drivers of change. These include (a) increased complexity of the legal environment and the need for fast and efficient answers, (b) client demands and increased client sophistication in demanding less expensive legal services, including an expansion of online legal aid, (c) a focus on process improvement within law firms, including virtual working and electronic access to both case law and research materials, (d) increased demand for cross-border legal advice and alternative forms of dispute resolution, (e) increased need for regulatory and global compliance advice, (f) emergence of innovators to provide solutions and increased role of non-lawyers in solving consumers legal problems, (g) customers widespread access to legal information, (h) growth of unmet legal needs, (i) shrinkage of lawyers' knowledge monopoly, (j) increased transparency of lawyers' work, (k) increasing segmentation of legal solution providers, (l) multidisciplinary service firms, and (m) increased expectation for lawyers to be available 24/7.

Studies like this show that domestic legal institutions have to respond to global trends. The sooner Pakistan's legal system adapts the better. A new generation of lawyers and judges must be prepared to meet the challenges posed by technology. In this regard, law schools, bar councils and judicial academies should provide special courses on 'law and technology'. The legal rights of the people will be even further compromised if the legal profession is not immediately upgraded.

Part IX. Criminal Law

DEFINING TERRORISM

M. Cherif Bassiouni, an eminent professor of criminal law, said that "to define terrorism in a way that is both all-inclusive and unambiguous is very difficult, if not impossible. One of the principle difficulties lies in the fundamental values at stake in the acceptance or rejection of terror-inspiring violence as a means of accomplishing a given goal. That is why the search for an internationally agreed-upon definition of terrorism may well be a futile and unnecessary effort."

Criminal law experts could not agree on a single legally binding definition of terrorism. Governments and UN agencies are reluctant to formulate an all-encompassing definition as the term 'terrorism' is emotive and politically charged. However, the international community has criminalised terrorist activities under sector-specific conventions.

The sectoral approach avoids the need to define terrorism. It focuses on the 'nature of activities' rather than its 'intent.' These treaties include the 1997 International Convention for the Suppression of Terrorist Bombings, the 1999 International Convention for the Suppression of the Financing of Terrorism, and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism. At the same time, the UN has attempted to provide a standard description of terrorism: "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them."

The political, ideological, moral, social, and emotional connotation of 'terrorism' makes its definition challenging in any legal system. Our legislature is also confronted with this difficulty. The legislature provided different definitions of terrorism under different laws such as Suppression of Terrorist Activities (Special Courts) Act, 1974, the Suppression of Terrorist Activities (Special Courts) Act, 1975, Special Courts for Speedy Trials Ordinance, 1987, Terrorist Affected Areas (Special Courts) Ordinance, 1990, Special Courts for Speedy Trials Ordinance, 1991, Special Courts for Speedy Trials Act, 1992, the Anti-Terrorism Act, 1997, Anti-Terrorism (Second Amendment) Ordinance, 1999, and the Anti-Terrorism (Amendment) Ordinance, 2001. The definitions of terrorism under these laws either focused on the magnitude of an offence or its terrorising effect on the society or the nature of the weapon used while committing an offence. These shifting definitions resulted in conflicting judgments by our courts. The cases of terrorism kept on shuttling from one court to another due to the imprecise definition of terrorism.

Justice (R) Asif Saeed Khosa took this challenge and constituted a larger bench of the SC to define 'terrorism.' The SC has examined all relevant cases decided so far and noted that, in some cases, only those actions constitute the offence of terrorism which are accompanied by the 'design' or 'purpose' specified in Section 6(1) (b) (c) of the Anti-Terrorism Act, 1997 (Act). In another category of cases, the SC observed, "fallout, consequences or effect" of an action weighed upon the courts to decide whether an action was terrorism or not.

After a thorough analysis of the anti-terrorism laws and judgments, the SC has concluded in a criminal appeal No.95 of 2009 titled Ghulam Hussain v. The State (decided on 30.10.2019) that only those actions fall in the definition of terrorism where the 'use or threat' of such action is designed to achieve the objectives specified in Section 6 (1) (b) (c) of the Act. Clause 6(1) (b) envisages those actions which are designed to "coerce and intimidate or overawe the government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society." Clause 6 (1) (c) stipulates the purpose advancing "a religious, sectarian or ethnic cause or intimidating and terrorising the public, social sectors, media persons, business community or attacking the civilians, including damaging property by ransacking, looting, arson, or by any other means, government officials, installations, security forces or law enforcement agencies."

The SC clarifies that effect of an action howsoever "grave, shocking, brutal, gruesome or horrifying" maybe, cannot be made the basis to label an action as terrorism, if such action is not carried out to achieve the objectives mentioned in Section 6(1)(b) (c) of the Act. In other words, SC explained that the crimes committed in the context and background of personal or private enmity or revenge do not fall in the definition of terrorism. For further clarity, the SC has recommended that the parliament should provide a

succinct definition of 'terrorism' focusing on 'violent actions' aimed at achieving "political, ideological or religious objectives."

Given the challenging nature of terrorism, the UN should eliminate or minimise the sectoral treaties and proactively negotiate a comprehensive convention on international terrorism. It would help states to legislate in line with the international perspective of terrorism enabling national law enforcement agencies to handle the terrorism cases effectively. A clear definition of terrorism would reduce unnecessary burden of cases allowing our courts to focus on actual cases of terrorism. It would help to fight the menace of terrorism making Pakistan a peaceful and prosperous state.

CRIMINAL TRIALS

Our criminal justice system is failing to deliver. Those with resources and connections manage to escape from the process of law due to flawed investigation, forced compromises and procedural loopholes. As per Section 497 of the Criminal Procedure Code (the Code), even the accused of murder case gets entitled to the grant of bail if the trial is not concluded within two years after the arrest of the accused. More often than not criminal trials take more time than two years. Thus, delay in trial helps accused in securing concession of bail. As a result, there is deteriorating law and order situation and the alarming rise of crime in Pakistan.

The first information report (FIR) is lodged after lots of effort by the complainant. When the FIR is registered, the substance of the complaint is often twisted to involve as many people as possible in a criminal case. Further, the procedure for collecting evidence is outdated. Modern investigation techniques are yet to be opted in Pakistan. Many times, parties are supposed to provide or plant the evidence to strengthen their case. The commission of a crime is often proved not through evidence but by taking oath in the mosque. The police consider oath yet the most convenient and effective method of conducting an investigation. It is also an established practice that both the parties are required to

bring community members along to support their version. Thus, local influence of the parties plays an important role in determining their role in the commission of crime. Heads are counted to determine guilt of the parties. So, it is the quantity and not the quality of evidence that weighs in the investigation.

The statements of witnesses under Section 161 of the Code are recorded by the investigation officer in his own style. These statements are rarely recorded in the question and answer form. Thus, it becomes hard to determine what was said by a person in response to a particular question. These statements are then used as a foundation of the story of both the parties. The evidence solicited through oath and manured by false statements then forms basis of a criminal case.

The next phase of a criminal trial starts when the evidence collected by the police is placed before the court under Section 173 of the Code. The trial proceeds at the discretion and mutual convenience of judges and lawyers. The lawyers tune their clients keeping in view the evidence recorded by the police. The courts also form the first impression about the role of the parties from the material available on record. So, the record prepared by the police effectively determines the outcome of criminal trials.

The courts usually dictate when answers are supposed to be given by the accused. For example, answers to charge framed against the accused and statement of the accused under Section 342 of the Code are largely dictated by courts. Moreover, the accused are informed as to the charge in an unfamiliar language. The lawyers rarely agitate such drafting and dictation of questions and answers by the courts.

In addition, the environment of our courtrooms is not conducive. The litigants look harassed and confused in courts. The parties and their witnesses get first opportunity to speak during recording of the evidence before the courts. However, before this occasion arises, lots of record gets prepared by the

police. At this stage, the witness is confronted with the record which is prepared by the police without full knowledge and comprehension of the witnesses. Thus, confrontation with the record creates confusion and contradictions in the evidence.

The decision in criminal cases depends on the contradictions in evidence. It is an established principle of criminal jurisprudence that the prosecution is to prove his case beyond any shadow of a doubt. There is another principle that the benefit of the doubt is always granted to the accused. In the criminal justice system like ours, anyone can create some contradictions in evidence. Thus, accused get benefit of such contradictions and often acquitted after a mock trial.

Therefore, the Criminal Procedure Code, 1898, should be reviewed considering developments in theory and practice in other jurisdictions. The investigation must be conducted employing modern scientific tools. The investigation officers and the courts should ensure that statements of the witnesses are recorded in their own words without undue harassment, coaching, and dictation. All stakeholders of the criminal justice system i.e., police, courts, and lawyers need to ensure that offenders are punished reducing crime in the country.

DEBATING LIFE SENTENCE

Amidst considerable confusion in the public about the duration of a life sentence, Justice (R)Asif Saeed Khosa raised an important question of law at the end of his judicial career: why does life sentence correspond to maximum imprisonment of 25 years when the Pakistan Penal Code (PPC) does not specify any term of imprisonment in case of a life sentence? Hearing a review petition of a murder case, the Justice Khosa said: "We will interpret the law correctly at an appropriate time. Once it happens, convicts will ask for a death sentence instead of life imprisonment." These observations are extremely important and require engagement of the learned legal fraternity.

Answering the above question, the advocate general of the Punjab (AGP) submitted before a seven-member bench of the SC that a life sentence is imprisonment for the natural life of a convict. The AGP stated that the misconception as to the duration of life sentence is the outcome of a misunderstanding of Section 57 of the PPC, which provides that, "In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to

imprisonment for 25 years." The AGP stressed that Section 57 of the PPC has no bearing on the "meaning [duration] of life imprisonment" and it is only concerned with "calculation of fractions of terms of punishment" in other offences. He essentially argued that life sentence is "reckoned as equivalent to 25 years" and not deemed as 25 years.

The AGP further stated that although Section 401 of the Code of Criminal Procedure (CrPC) empowers the government to remit the life sentence of a convict, yet the convict cannot claim remission in the sentence as a matter of right. The AGP reiterated that the government can keep life convicts in jail for the remainder of their lives. With due respect, the learned AGP's argument does not seem to sustain as per the existing terms of the law.

A brief reading of Section 57 of the PPC shows that life imprisonment is calculated as equivalent to 25 years. Section 55 of the PPC allows the executive even to commute the life sentence to 14 years. Section 401 of the CrPC also authorizes the provincial government to remit the life sentence. In view of these provisions, a life sentence may not be also necessarily deemed as more than 25 years.

The principals of statutory interpretation dictate that a statute must be construed as a whole and that words that are reasonably capable of only one meaning must be given that meaning (the literal rule); that ordinary words must be given their ordinary meanings unless absurdity would result (the golden rule). The AGP's arguments appear to challenge the existing law as well as the principles of interpretation. If the above provisions of the PPC and the CrPC are construed as per the given rules of interpretation, a life sentence can extend from 14 to 25 years only.

Justice Khosa has been one of the best criminal lawyers and a fine jurist in Pakistan. Therefore, the lordship's question as to the duration of a life sentence is extremely important; any answer to this question would have a far-

reaching impact on our criminal jurisprudence. An ordinary citizen, however, may wonder how this important legal proposition escaped the attention of the legal fraternity so far. Even if it is assumed (for the sake of legal argument), that the PPC is silent as to the duration of a life sentence, the SC, I submit, can neither specify duration of life sentence nor can amend any provisions of the PPC and the CrPC as our constitution has defined mandate of the legislature and the judiciary.

It may be appreciated that the similar issue of life sentence arose in India. The Criminal Law Amendment Acts of 2013 and 2018 made several offences in the Indian Penal Code (IPC) punishable by imprisonment for life, extending to the remainder of convict's natural life. In Union of India versus Sriharan (2016), the SC further ruled that courts could place a sentence beyond the scope of remission for a fixed period. The IPC amendments and the SC judgment seems to have made the issue of life sentence more complicated in India. It has added confusion as to the exact term of a life sentence and has multiplied criminal litigation as well.

In our criminal justice system, increased reliance on life imprisonment, either by the courts or the parliament, may also exacerbate the problems of the existing criminal justice system. Pakistan's criminal justice system is ranked at 98 (out of 128) as per the World Justice Project Rule of Law Index (2020). In this system, witnesses may make false statements, the police may conduct a faulty investigation, prosecutors may handle the cases inefficiently, and judges may ignore the evidence. For example, in Asia Bibi's case, she was awarded death penalty based on a false FIR as well as concocted evidence compelling the then-CJP to observe that the courts below failed to advert to contradictions and some "downright falsehood" in the evidence.

In another case, the SC acquitted Wajih-ul-Hassan after he spent about 19 years in prison. The honorable judge noted

that, "There cannot be a fair trial, which is itself the primary purpose of criminal jurisprudence if the judges have not been able to elucidate the rudimentary concept of the standard of proof that prosecution must meet to obtain a conviction." It simply means that Hassan was convicted in the absence of any solid proof.

These two cases reflect on the functioning of our criminal justice system. Are Asia Bibi and Wajih-ul-Hassan not victims of our justice system? Can there be adequate compensation for Asia and Hassan? If so, who should be made to pay that compensation? Should the SC not fix some responsibility on those who have contributed to weakening our justice system?

Life and liberty are the most valuable human rights that cannot be taken away at the convenience of any justice system. Therefore, while considering the question of a life sentence, the SC may consider two important legal questions: Can a life sentence be construed more than 25 years given the existing law? Can a life sentence for the remaining period of convicts be justified considering the flaws of our criminal justice system?

In Pakistan, life sentence has become a complex patchwork of judicial and executive orders. Lack of consistent judicial and executive approach has only increased miseries of convicts and their families. An interpretation of life sentence endorsing its duration beyond 25 years would strengthen the perception that we believe more in retribution than the reformation of the convicts. Thus, the SC should provide jurisprudential guidance as to the duration of life sentence. The legal fraternity should provide proper assistance to the SC to help the public. Otherwise, innocent people will continue to suffer.

CRIMINAL JUSTICE

Justice Asif Saeed Khosa was one of the best criminal law judges in Pakistan. He confronted a poor performance record within Pakistan's criminal justice system.

When Justice Khosa elevated as a Chief Justice of Pakistan, Pakistan's global ranking in the criminal justice was poor. It ranked in the 81st position out of 113 countries as per the World Justice Project (WJP) Rule of Law Index 2017-18. The non-disclosure of the details of missing persons before the Supreme Court and the trial of civilians allegedly involved in terrorism by military courts made the challenge to strengthen our criminal justice system hard.

The WJP measures whether perpetrators of crimes are effectively apprehended, prosecuted, and punished. It also reviews whether the police, prosecutors, and judges are competent and free from corruption and influence. In addition, the project examines whether the police and judges are impartial and whether they discriminate on the basis of gender, socio-economic status, religion, ethnicity, and place of origin. The WJP assesses whether the basic rights of the accused (presumption of innocence, freedom from arbitrary arrest and detention, and due process of law) are respected.

Our criminal justice system is plagued with corruption, incompetence of lower-court judges, and the delay in the delivery of justice. In Aasia Bibi's case, Justice Khosa specifically noted that the courts below conveniently failed to advert to contradictions and some "downright falsehood" in the evidence.

Such is the state of Pakistan's criminal justice that even those acquitted by the courts have died in prison. Our system allows bail in murder cases when a trial is not concluded within two years after the arrest of the accused (Section 497 of the Criminal Procedure Code). The inefficiency of the system is recognised as a 'statutory ground' for setting accused persons free on bail.

It is widely known that FIRs (registered under Section 154 of the Criminal Procedure Code) are often used to involve innocent people in criminal cases. For example, both the sessions court and the Lahore High Court relied on a false FIR in Aasia Bibi's case as well as concocted evidence to award a death sentence.

Our procedures for collecting evidence are outdated and criminal investigations essentially bank on oral witness statements, even though it is common for witnesses to make false statements due to blood relations, enmity, and prejudice. The outcomes of police investigations are sometimes influenced by corruption and political interference. The police lack the resources and skills needed to collect and analyse evidence on a scientific basis.

Further, the police record the statements of witnesses in paragraphs – not in question-and-answer form (Section 161 of the Criminal Procedure Code). The stance of witnesses is neither duly recorded nor truly reflected in these statements. The evidence recorded by the police without full consent, knowledge, and understanding of witnesses is then used to confront them with their statements made in examination-in-

chief and cross-examination before the court. This adds further confusion and contradictions in the evidence.

The norms of justice oblige the courts to decide cases on the basis of evidence that is on the record. As a result, evidence collected and recorded in a flawed manner determines the fate of bail or criminal trial. After the evidence collected by the police is brought before the court (Section 173 of the Criminal Procedure Code), trials are delayed by adjournment after another due to various reasons, such as lawyers' strikes, a judge's leave, and the absence of witnesses.

Justice is delayed at the convenience of lawyers, judges, and witnesses without any concern for the accused or the complainant. These inefficiencies can be exploited to achieve bail or to procure an out-of-court settlement or a forced compromise.

Lawyers or judges often dictate statements ostensibly given by the accused. For example, judges or lawyers dictate answers to the charges and statements of the accused (Section 342 of the Criminal Procedure Code) and record them in a language that most of the accused are unfamiliar with: English. Women, children and minorities are more vulnerable during police investigations and in the courtrooms.

Our criminal cases are decided on the basis of two established principles of criminal law and the law of evidence: "everyone is presumed innocent unless proved guilty" and that "the prosecution has to prove its cases beyond any reasonable doubt". Under our criminal justice system, the accused often succeed in creating contradictions within the evidence, entitling them to the benefit of the doubt and then an acquittal. This fails to deter crime, including terrorism.

The solution lies in reforming our criminal justice system, not establishing military courts. It was hoped that Justice Khosa will focus on speedy reforms in the judiciary

before he seeks to reform other institutions. He did his best in a short span of time. He established special courts for the speedy trial of criminal cases. He was able to decide most of the pending criminal appeals before the SC.

However, he could not propose specific amendments in criminal procedure to ensure the speedy disposal and scientific investigation of criminal cases. He could not provide any mechanism for the performance review and accountability of criminal court judges. He failed to recommend punishment for filing false criminal cases and providing false evidence in courts. He did not decide the most important question he raised: the 'duration of life sentence'.

It is hoped that the project of justice system reforms moves further. It is expected that the SC shall decide all important questions of law including the duration of life sentence on which there exists a sharp difference of opinion in the legal fraternity. Precisely, the SC should resolve all questions of law (including criminal law) on which there are conflicting judgments. It would help to reduce multiplicity of the proceedings and save precious time of the courts and the public.

Part X. Constitutional Law

SUPREMACY OF THE CONSTITUTION

Following the statement of the prime minister calling for a parliamentary debate on the role of institutions — specifically, the supremacy of parliament — and an observation by the chief justice about the supremacy of the Constitution, a confrontation of institutions seems inevitable.

Three specific court decisions, first, a Supreme Court decision regarding the period of Nawaz Sharif's disqualification from contesting elections, second, a Supreme Court decision on changes to the electoral laws allowing Sharif to act as president of a political party and, third, an accountability court verdict regarding corruption cases against Nawaz and his family are likely to heighten institutional clash between the government and the judiciary. So, what is the role of each institution in the 1973 Constitution?

The legislative function involves the enactment of laws of both a constitutional and a sub-constitutional nature.

Article 141 provides that "subject to the Constitution, parliament may make laws for the whole or any part of Pakistan". Article 142 provides that "parliament shall have exclusive power to make laws with respect to any matter in the Federal Legislative List". Article 238 provides that "subject to this part, the Constitution may be amended by [an] act of parliament". Article 239 provides that a bill to amend the Constitution may be passed by the votes of not less than two-thirds of the total membership of each house of parliament.

The executive function relates to the enforcement of laws. Article 90 provides that "the executive authority of the federation shall be exercised in the name of the president by the federal government, consisting of the prime minister and the federal ministers, which shall act through the prime minister, who shall be the chief executive of the federation". Article 97 provides that "the executive authority of the federation shall extend to the matters with respect to which parliament has the power to make laws". In a parliamentary form of government like that of Pakistan, the executive participates actively, and often decisively, in the process of legislation. When the government has a working majority in the National Assembly, no new legislation can be enacted by parliament that is not approved by the federal government.

Part VII of the Constitution deals with the judicature. Article 184 provides that "the Supreme Court shall if it considers that a question of public importance with reference to the enforcement of any of the fundamental rights conferred by Chapter 1 of Part II is involved, have the power to make an order of the nature mentioned in the said article". Article 189 provides that "any decision of the Supreme Court shall, to the extent it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan". Article 190 provides that "all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court".

Even a brief reading of the above provisions reveals a separation and a balance of powers between the legislature (making law), the executive (enforcing law), and the judiciary (addressing disputes by interpreting the law). In light of this, I shall proceed to examine the current debate between parliament and the judiciary.

Parliament itself (more specifically, the government led by the PML-N) states that parliament is the supreme institution in the dichotomy of powers and has a final say in both constitutional amendments and ordinary legislation. Chief Justice Mian Saqib Nisar says that "judges cannot ask parliament to make a particular [ordinary] law, but they can examine it". The chief justice observed that the authority of the Supreme Court has been defined in the Constitution and as such the court never transgressed from its authority because doing so would amount to violating the duty and oath that judges take under the Constitution.

An extract from the relevant judicial oath (Third Schedule of the Constitution) says "that, as judge of the Supreme Court of Pakistan … I will discharge my duties and perform my functions honestly, to the best of my ability and faithfully in accordance with the Constitution of the Islamic Republic of Pakistan and the law". I further reiterate Article 141 of the Constitution, which provides that, "subject to the Constitution, Parliament may make laws for the whole or any part of Pakistan". Article 189 also provides "Any decision of the Supreme Court shall, to the extent it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan". In addition, Article 8 provides that, subject to the interpretation of the courts, laws inconsistent with or in derogation of fundamental rights shall be void.

In view of the above, I argue that the Constitution is higher than parliament, although parliament is empowered to amend the Constitution. No doubt, dialogue and debate

within parliament strengthen democracy. There is also no cavil to the proposition that parliament has a constitutional authority to make laws or constitutional amendments. This authority, however, has to be exercised "subject to the Constitution" (Article 141). The Supreme Court, being the custodian of the fundamental rights of the people, is obliged to perform its duty in accordance with the Constitution — that is, to examine, interpret, and decide questions of law within the parameters of the Constitution.

The electoral law (the subject of the current debate) or any other piece of ordinary legislation remains subject to judicial review as per the dictum of the Constitution. At the same time, the Supreme Court should encourage public and parliamentary debate on matters of national importance, including efforts to reform the justice system. Parliament also needs to demonstrate its commitment to the substance of democracy through sustained high-quality dialogue on the constitutional role of institutions as well as issues of public importance, including health, education, poverty, and public accountability. Above all, constitutionalism should prevail over a person-specific or institution-specific approach in the supreme interest of the state and the people of Pakistan.

LIMITS OF SUO MOTU POWERS

Judicial activism is once again trending in Pakistan. The Supreme Court (SC) has increasingly been using its suo motu powers to enforce an exceptionally broad understanding of "fundamental rights" in areas that might ordinarily be seen as the purview of government policy. This has produced significant tension between the judiciary and the executive. In this context, the Pakistan Bar Council (PBC) has urged the SC to restrain or regulate its suo motu powers. The limits of the SC and the power of the judiciary are now a critical topic of debate in Pakistan.

The PBC has proposed that, "The SC should suitably amend the Supreme Court Rules (1980) to regulate and structure the parameters of the exercise of suo motu powers, and a special bench of the court should be constituted to hear suo motu cases."

To strengthen the constitutional balance of power in Pakistan, the PBC believes that the top court should exercise its authority under Article 184 (3) of the Constitution sparingly, in order to "maintain the principle of trichotomy of

powers." There are concerns that because of the top court's active use of suo motu powers, this balance has begun to tilt too far in the direction of the judiciary. What some see as a proudly independent judiciary, others see as an increasingly unaccountable court.

Article 184 (3) of the Constitution says that, "Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights … is involved, have the power to make an order of the nature mentioned in the said Article". Even a brief reading of this article establishes the SC's mandate to enforce fundamental rights. However, in a recent editorial, Babar Sattar asks, "Isn't it time that a bench comprising all SC judges decided … the scope of 184(3), [that is], the test for matters of public importance in relation to enforcement of fundamental rights that will be taken up by the SC … and the nature of orders to be passed?" According to Sattar, "This will inject certainty into [the] law and ensure that the scope of 184(3) does not depend on the personal sensibilities of a chief justice." While supporting his argument, he submits, "Article 176 states that the SC comprises the chief justice and judges of the SC. Article 184(3) powers are powers of the SC and not those of the CJ [acting alone]".

When exactly can an appeal to fundamental rights be invoked via suo motu powers in relation to flaws or gaps in existing policies?

Babar Sattar has raised a valid question, but his argument as to the composition of the SC for exercising suo motu powers is partially misconceived. Sattar relies on Article 176, which states that, "The Supreme Court shall consist of a Chief Justice to be known as the Chief Justice of Pakistan and so many other Judges as may be determined by Act of Parliament […]". However, it is not correct that a suo motu decision by the CJ (or any other Judge of the SC) shall not be

binding on other courts or executive officers unless it is made by 'a SC defined as more-than-one-SC-justice acting together.' In my view, it is not the number of SC judges but the designation of any judge as a judge of the Supreme Court that makes a suo motu judgment binding on other courts and executive officers. Thus, Sattar's argument that the CJP (or any other SC Judge) should not be enabled to act alone under Article 184(3) is not correct.

I agree with Sattar, however, that while maintaining its appreciation for the enforcement of fundamental rights, the SC must also appreciate the separation of powers vis-à-vis the other institutions. It would, therefore, be helpful if the SC could draw the legal line between the domain of fundamental rights and government policy more clearly. When exactly can an appeal to fundamental rights be invoked via suo motu powers in relation to flaws or gaps in existing policies? Currently, there is a sense that the judiciary's vastly expanded use of suo motu power has traded short-term popularity with the public for a long-term constitutional imbalance.

The SC should ensure the protection of fundamental rights without interfering in the law-making powers of the executive. There should, for instance, be a clear link between the explicit text of Articles 8 – 28 and a suo motu order of the SC. One might ask, for instance, which constitutional article allows suo motu powers via-a-vis healthcare standards? After all, Article 9 simply says, "no person shall be deprived of life or liberty save in accordance with [the Government's] law". The explicit text of the constitution seems to suggest that, even if "life" is a fundamental right, specific hospital standards are matters of government policy.

What we need from our SC is a clear definition of fundamental rights. If the SC continues to enforce its vastly expanded understanding of fundamental rights, that will disturb the balance of powers envisaged by our Constitution. The government is responsible for matters of public policy,

the SC is responsible for ensuring that our constitutional provisions are met. These provisions include fundamental rights clauses that appreciate the role of government policy.

BLURRING THE BOUNDARIES

The Supreme Court, in its judgment on the constitutionality of 18th and 21st amendment, seems to blur the boundaries between the executive, the legislature, and the judiciary. In other words, the court appears to relinquish its judicial power to some extent before the executive and the legislature allowing the executive to conduct trials of civilians and the legislature to enact a law offending fundamental rights i.e., right to fair trial and due process of law. This decision seems to ignore the old-age wisdom enshrined in the constitutional doctrine of separation of powers guaranteeing the fundamental rights to the citizens against tyranny of a state.

Historically, the doctrine traces back to Plato's laws where he argues for the division of governmental powers to avoid tyranny and guarantee political stability. John Lock developed this concept further. He argued for the separated legislative power to make the established law, the authorised judges to decide the rights of the subjects according to the standing laws, and the executive powers to see the execution of the laws. The modern constitutional theory of separation

of powers is commonly ascribed to the French philosopher Montesquieu, who analysed the doctrine in the context of the British constitution of the early eighteenth century. Montesquieu's theory provided the basis for discussion in James Madison's discourse on the separation of powers in The Federalist Papers. Alexander Hamilton disagreed with Madison and argued for an independent judiciary with limited powers. However, Madison stressed an independent judiciary with powers to strike down unconstitutional acts of the legislature.

Since 1947, the separation of power between the three organs of the state has been a key question in Pakistan. The legislature, the executive, and the judiciary have been struggling to secure their due role in the exercise of the state power. This ongoing struggle between these branches actually promotes a constitutional orientation (that this doctrine highlights a focus on the constitution in ways that promote the rule of law, balance of power, and the fundamental rights). In the more recent past, the issue of the separation of powers came into focus when President Musharraf removed Chief Justice Iftikhar Chaudhary in 2007 and sacked sixty other judges from their position. This onslaught against the judiciary initiated 'the lawyers' movement' resulting in the restoration of the judges in 2009. Thereafter, we see a constant contest for power between the three branches of the government.

The debate on the separation of powers in Pakistan started from Moulvi Tamizudin Khan's case (PLD 1955 Sind High Court 96) when the executive dissolved the constitutional assembly and thus interfered in the domain of the legislature. This case raised a question about the independence of the judiciary and the supremacy of the legislature. The superior court decisions in the Baz Muhammad Kakar's case (PLD 2012 SC 923), the Mubashar Hassan's case (PLD 2012 SC 265), the Nadeem Ahmad's case (PLD 2010 SC 1165), suo-moto case No.10 of 2007 (PLD

2008 SC 673) and Suo-moto Case No.23 of 2012 (Anita Turab Case) fuelled this debate further.

The judgment of SC declaring the military courts constitutional, once again, brought the issue of separation of powers in a public and constitutional domain. This time, however, the SC seems to allow the legislature and the executive to interfere into its constitutional domain (temporarily — till 2017). The SC appears to keep security of the State above other considerations like the rule of law, independence of the judiciary, separation of powers, obligations of the State under international law, and fundamental rights, etc. The Court has further acknowledged failure of the civil justice system in awarding punishment to terrorists.

Some argue that this decision brings the three branches of the government on the same page helping to combat terrorism in Pakistan. Some contend that this judgment is like a win-win situation for all — as the executive is happy to get the military courts, the legislature is happy that the amendments founds its way into the constitution without interruption by the judiciary, the judiciary is satisfied that it retains its ultimate authority to review acts of the executive and the legislature, and the people are happy that the terrorist will face the music of quick justice.

It may be argued that a broken civil justice system cannot be a valid ground for further breaking the civil justice system. Ultimate solution lies in reformation of each institution including the judiciary. Thus, terrorism can be effectively tackled without blurring the boundaries and thus violation of state obligations towards its citizens and international community. Long term peace and stability comes through elimination of corruption, injustice, and discrimination in the society and the protection of basic rights of the people.

ESTABLISHING MILITARY COURTS

Pakistan's march towards constitutionalism and rule of law is challenged by a chequered history of abridging the constitution, martial law, and a violation of fundamental rights. In 2009, a collective struggle of civil society, media, and the legal fraternity restored hope, but within a short span of time we are again prepared to violate the constitution under the new pretext of 'combating terrorism'.

There is no denial of fact that we face a serious challenge of terrorism. We also have confidence in our military in terms of its defence capability. Indeed, it is a disciplined institution and merits appreciation by the nation. However, this does not necessarily mean that we should replace judges with military officers. As the judges cannot perform military's tasks, so too are the military officers not qualified to conduct a fair trial. If military officers have to be made part of the legal and judicial process in terrorism related cases, then they may be appointed *only* to assist the judges. The army is professionally trained for war, not to conduct judicial trials.

My opinion is based on these reasons:

First, the Constitution of Pakistan 1973 (the Constitution) provides for the separation of powers between the executive, the legislature, and the judiciary. This formula for the division of power is based on the ancient wisdom that: concentration of power in any of these institutions amounts to violation of the fundamental rights of the people. Thus, appointing executive i.e., military officers as judges in the courts violates the basic structure of the Constitution and, in doing so, infringes on the fundamental rights of the people. Moreover, establishing military courts will negate preamble of the Constitution (wherein the independence of judiciary shall be fully secured) as well as Article 175 which provides that 'the judiciary shall be separated from the executive'.

Second, the objectives intended to be achieved by establishing military courts could be better attained through the existing courts. The terrorism laws should be applied in letter and spirit. In the past, acquittal of offenders was due to lack of strong evidence and those convicted were not prosecuted due to lack of political will. If required, amendments can be made to further empower and equip the criminal courts and law enforcement agencies. For example, new timelines for concluding trials can be inserted in the law. The witnesses can be provided additional security and judges can be provided with additional information and assistance by intelligence agencies. The investigating agencies can be trained to collect evidence through scientific means i.e., telecommunications, cyber and forensic technology. Terrorism can thus be effectively combated by improving our criminal justice system.

Thirdly, appointing military officers as judges would damage independence of the judiciary. The short-term benefit, if any, will cause a long-term loss to our civil judicial system. As a matter of fact, no nation can be sustained without a strong judicial system. It is further argued that

establishing the military courts goes against our military — repudiating its institutional integrity because military is not entitled to prosecute terrorists. Even otherwise, instead of being a solution, military courts have been a part of the problem in Pakistan during General Zia-ul-Haq's regime as well as in Indian-held Kashmir, Egypt, and Israel.

Fourth, creating military courts is against the Constitution and constitutional norms prevailing in every civilised society. Pakistan is an 'Islamic' country and a 'republic'. So, in order to meet its declared constitutional objectives i.e., wherein the State shall exercise its powers and authority through the chosen representatives of the people; wherein shall be guaranteed fundamental rights, it has to ensure provision of justice as per the minimum standards given under the Constitution of 1973. Giving responsibility of conducting criminal trials to military courts, in fact, violates fundamental right of a fair trial and due process of law.

Finally, establishing military courts gives a bad name at the international level. Article 14.1 of the International Covenant on Civil and Political Rights provides that 'in determination of criminal charge, everyone shall be entitled to a fair and public hearing by competent, independent and impartial tribunal established by law'. By any stretch of imagination, it may be argued, the military courts are neither 'independent' of the prosecution nor 'competent in law'. In fact, we may not expect 'justice in accordance with law' from the courts 'established in violation of the law'.

BJP AND INDIAN FEDERALISM

India is widely seen as a federal democracy. However, the BJP's recent move to scratch the 'special status' of Jammu and Kashmir (State) by removing Article 370 from the Indian constitution whilst simultaneously changing Jammu and Kashmir from a 'state' into two 'union territories' (Ladakh, without a legislative body, and Jammu and Kashmir, with a Legislative Assembly), call this familiar claim into question.

The BJP's move has been criticized by the International Commission of Jurists (ICJ); indeed, India's own constitution and the judgments of its Supreme Court raise several important questions about the constitutionality of the government's recent move.

After the partition of the Subcontinent, the former princely states had an option of either joining Pakistan or India or remaining independent. The ruler of the State of Jammu and Kashmir, Maharaja Hari Singh, joined India through the Instrument of Accession on October 27, 1947 under the Indian Independence Act 1947. The Dominion

Legislature of India was authorized to make laws as to defence, external affairs and communication with the consultation of the state. However, the Maharaja retained his sovereignty and discretion as to the acceptance of any future constitution of India. This arrangement was incorporated in Article 370 of India's constitution and reflected in the constitution (Application to Jammu and Kashmir) Order(s) of 1950 and 1954 passed with the approval of the State's Constituent Assembly. The BJP government, however, has abrogated this arrangement through the Constitution (Application to Jammu and Kashmir) Order 2019.

By the presidential order, all the privileges previously available to the state under Article 370 – the state constitution, laws, flag, and mandate to define who counts as a 'permanent resident' of the state (particularly for the purpose of buying land as per Article 35-A) – have been removed. Kashmir's new constitutional scheme is expected to encourage an influx of property owners from outside the region, greatly altering the demographic shape of what had been a Muslim-majority state.

Sub clause (1)(d) of Article 370 stated that the president may specify by order which provisions of the India's constitution shall apply to the state. A proviso to Article 370 states that such order which relates to the matters specified in the Instrument of Accession of the State (Instrument) shall be issued with the 'consultation of the state'. The proviso further states that such order relating to the matters not specified in the Instrument shall be issued with the 'concurrence of the state'. At the same time, however, Article 370 (3) and its proviso authorize the president to declare this article inoperative 'with' the recommendation of 'the constituent assembly of the state'.

The president, therefore, "on the recommendation of parliament" (clearly bypassing the mandatory requirement of the recommendation of the constituent assembly of the state)

declared that as from August 6, 2019, Article 370 shall cease to be operative. Thus, the president has applied India's constitution 'without any exception' to the state. It has deprived the people of Jammu and Kashmir of their right to self-determination, constitution, state's special status and sovereignty.

The procedure for amending the text and substance of India's constitution is clearly spelled out in the constitution itself: Article 368. The Indian Supreme Court has also described Indian 'federalism' as the "basic structure" of the constitution, the substance of which cannot be abrogated even by parliament following the procedures laid out in Article 368 [the Kesavananda Bharati case (1973)].

The text of Article 370 would appear to state that the BJP cannot remove Article 370 before "consultation" with, and indeed without the "concurrence" of, the state's constituent assembly. In the absence of the erstwhile Maharaja of the state and his government – indeed, following the dissolution of the state's constituent assembly in 1957 and, indeed, after the outright dissolution of the state's legislative assembly following the imposition of governor's rule in 2018 – a number of questions have emerged regarding the meaning of terms like "consultation" or "concurrence" in the context of Jammu and Kashmir.

The state's constituent assembly ceased functioning in 1957 without providing whether Article 370 would continue to operate. However, the State's Constituent Assembly did not abolish Article 370, and since then the Indian Supreme Court has appeared to endorse the view that Article 370 has remained an active part of the Indian constitution [State Bank of India versus Santosh Gupta (2017)].

It may be that, bypassing the constituent assembly (or the legislative assembly) of the state, the BJP's recent move challenges the procedures required to amend, abrogate, or remove Article 370. It may be that the BJP's recent move

challenges the procedures required to amend India's constitution itself (as per Article 368). Indeed, even if those procedures could be said to have been followed, it may be that the BJP's unilateral removal of Article 370 and, more importantly, its unilateral redefinition of the state as a 'union territory,' challenge both the definition and the practice of Indian federalism, effectively abrogating something the Indian Supreme Court has long described as an essential feature of that country's constitution.

The BJP, however, in its recent move, appears to have manoeuvred around the first set of concerns by replacing – again by presidential order (circumventing the normal procedure for amending the Indian constitution (Article 368) – the term "constituent assembly" with the term "legislative assembly" adding Clause 4 to Article 367 of the Indian constitution.

This is an important change. It could mean that, even if the Supreme Court of India holds that India's president cannot unilaterally change the territorial boundaries of India's federating units without the "concurrence" of the affected unit (and, in most cases, the legislative assembly of that unit), then the BJP government will be forced to allow the election of a new legislative assembly.

But, if this happens, the BJP will attempt to change the electoral arithmetic of the state (partisan gerrymandering) to ensure a majority in the state's legislative assembly for the Hindu-nationalist BJP. In other words, even if the Supreme Court challenges the BJP's recent move, the goal would be to pave the way for a dramatically refashioned Jammu and Kashmir "legislative assembly" that would provide the "concurrence" needed to approve the BJP's removal of Article 370.

In the absence of states' constituent assembly – and, since the summer of 2018, in the absence of a legislative assembly – the president of India acting as the current

"government" of the state seems to have used his powers in a colourful manner, effectively concurring with himself to play havoc with India's constitution and, for that matter, previous judgments of India's Supreme Court. The ICJ termed the BJP's alleged constitutional move as "a blow to the rule of law…in India".

It may be argued that unilaterally removing the 'special status' of the state and unilaterally downgrading its status from that of a 'state' to a 'union territory' – even while the state was placed under governor's rule a– mounts to abrogating the basic structure of Indian federalism. The BJP's recent move is not a simple modification of the state's status; it is a radical transformation. It defies India's own constitutional logic to believe that the president alone might be allowed, in India's federal polity, to amend (constitutionally) the 'territorial limits' of its federating states.

The redefinition of the State of Jammu and Kashmir without the full and active "concurrence" of the state's constituent assembly (or even its legislative assembly) amounts to assaulting the terms of Indian federalism – a basic feature of India's constitution. Any Supreme Court decision upholding this move would shatter the existing terms of Indian federalism, destroy the esteem of the court, and foreshadow considerable anxiety in India's other federating units.

A CHALLENGE FOR THE INDIAN SUPREME COURT

Removing the 'special status' of Indian-held Kashmir through a rushed presidential order is likely to create a constitutional challenge for the Indian Supreme Court in the face of pressure from India's BJP government, which has hailed the move as a 'historic moment' to be 'written with golden words in Indian history'.

Presidential Order CO 272 scrapes Article 370 from the Indian constitution, bifurcating the state into two union territories, namely Jammu and Kashmir (with a legislature) and Ladakh (without a legislature), whilst allowing a new wave of Hindu settlers to alter the demographic shape of Muslim-majority Kashmir. Consequently, all the privileges available under Article 35-A regarding the state's own constitution, laws, a separate flag, and mandate to define status of 'permanent residents' stand removed.

Article 370 was enacted so that, whenever necessary, the president could apply the Indian constitution to the State of

Jammu and Kashmir with the consultation [Article 370(1)(b)(i)] or concurrence [Article 370(1)(b)(ii)] of the state. Essentially, Article 370 granted a special autonomous status to Jammu and Kashmir and envisaged a distribution of power between the union and the State of Jammu and Kashmir.

Under this constitutional arrangement, matters of national importance (foreign affairs, defence, and communications) remained with the union while all other matters were left to the state. Consequently, the president could bring the provisions of the Indian constitution to bear on Jammu and Kashmir only with the 'concurrence' of the state.

Article 370 (3) authorizes the president to pass an order removing or modifying parts of Article 370. A proviso to Clause 3, however, states that the recommendation of 'the Constituent Assembly of the State' … shall be necessary before the president issues such a notification (order). The Constituent Assembly of the State of Jammu and Kashmir ceased functioning in 1957. In fact, the elected legislative assembly of the state was dissolved in November 2018, after the BJP withdrew from its state-level ruling coalition with a Kashmiri party known as the People's Democratic Party or PDP (led by Mehbooba Mufti) in June 2018, and president's rule was imposed in December 2018.

As such, we are left to understand that India's president simply consulted with himself (acting as governor of the state) to issue the disputed presidential order. This might suggest that the dissolution of Jammu and Kashmir's elected legislative assembly by a BJP-controlled central government and, then, the imposition of president's rule, was colored by mala fide intentions.

President's rule may be imposed in a state when the constitutional machinery of that state breaks down. President's rule continues until the elected government is restored. Decisions of a permanent character, such as

changing the 'special status' of a state itself, without the 'concurrence' of the state's elected legislative assembly, is inherently flawed and unconstitutional. With respect to fundamental constitutional changes requiring the 'concurrence' of the state, a governor acting for the central government cannot substitute for an elected state-level government.

The Indian constitution does not allow variations in the territory of a state without the 'concurrence' of the elected state assembly. In effect, the president's order amounts to a scam on democracy, a fraud on the Indian constitution, and an affront to the people of Jammu and Kashmir. It also makes a mockery of the UN Security Council Resolution of 1948, which mandates a plebiscite in Jammu and Kashmir to decide the contested status of the State.

The International Commission of Jurists (ICJ) says: "The Indian government's revocation of the autonomy and special status of Jammu and Kashmir violates the rights of representation and participation guaranteed to the people under the Indian constitution and in international law", calling the president's order "a blow to the rule of law and human rights in the state and in India".

Under the present circumstances of state-level government-by-the-centre in Indian-held Kashmir, the Indian Supreme Court is likely to be confronted with a question of profound importance for democracy in India and around the world: can a head of state 'consult' [Article 370(1)(b)(i)] and 'concur' [Article370(1)(b)(ii)] with himself to amend a country's constitution?

According to ICJ Secretary-General Sam Zarifi, "the legality of the Indian government's measures to eviscerate Article 370 [and 35-A] will certainly be tested before the Indian judiciary…". Hopefully, the Indian Supreme Court will set aside the presidential order saying that state elections are necessary before 'consultation' and 'concurrence' with an

(elected) state government can be said to have taken place. But, even if the Supreme Court says this, the BJP may simply turn to a fresh delimitation of constituencies (partisan gerrymandering) or an increase in the number of state-level legislative assembly seats to alter the state's electoral arithmetic. The U.S Supreme Court recently upheld the constitutionality of partisan gerrymandering in the United States, indicating that, rather than constitutional litigation, citizens should mobilize politically to promote independent non-partisan mechanisms for delineating State-level electoral constituencies (Rucho versus Common Cause, No. 18-422). How will the people of Kashmir, and the Indian Supreme Court, respond to similar concerns?

The Indian Supreme Court is likely to play a critical role in the unfolding constitutional crisis presented by the Indian president's act of removing the 'special status' of Jammu and Kashmir. Will the court uphold constitutionalism and protect the 'special status' of Kashmir against the might of the BJP government? The president's revocation of the state's 'special status' seems incompatible with a 2017 judgment of the Court [2 Supreme Court Cases 538] in which 'concurrence' of the State of Jammu and Kashmir was said to be required for the president to make any status changes. All eyes are now focused on the wisdom of India's respected court.

In the given circumstances, however, Pakistan should also raise this issue before the relevant international forums as it is not merely a constitutional catastrophe in India but also a sheer violation of UN Security Council Resolutions on Kashmir and international law. It must be taken as an immediate concern of regional peace and international security.

SUPREMACY OF PARLIAMENT IN PAKISTAN

The Standing Committee on Law and Justice of the Pakistan Senate unanimously approved an amendment on 19 October 2017 to Article 63 A of the Constitution of the Islamic Republic of Pakistan, 1973 (the Constitution) in the form of Constitution (Amendment) Bill, 2017. The proposed amendment aims to omit para- graph (iii) of clause (1) in sub-clause (b) of Article 63 A, thereby seeking to curtail powers of a party leader over party members in parliamentary votes regarding constitutional amendments.

Previously, Article 63 A (1) (b) (iii) provided that: "if a member of a Parliamentary party com- posed of a single political party [...] votes or abstains from voting in the House contrary to any direction issued by the Parliamentary party to which he belongs, in relation to a Constitution (Amendment) Bill, he may be declared in writing by the Party Head to have defected from the political party". It further provides that if the Election

Commission of Pakistan confirms the declaration; the member shall lose his/her seat in the House.

The political context in which Article 63 A was added to the Constitution is relevant to discuss here. In fact, the Constitution was never implemented in Pakistan in its letter and spirit. The democracy was derailed at different times. The parliamentary form of government was converted into the semi-presidential form of government. The parliament was weakened with frequent horse-trading and floor crossing. Pakistan was ruled for more than half of its existence under martial law regimes. The first President of Pakistan, Major-General Iskander Mirza, abrogated the 1956 Constitution, dissolved the national and provincial legislatures and imposed Martial Law in October, 1958, appointing General Ayub Khan as the Chief Martial Law Administrator.

The Martial Law was, however, lifted and a new Constitution was promulgated in 1962. The second martial law was imposed on 26 March 1969, when President Ayub Khan abrogated the 1962 Constitution and handed over power to General Yahya Khan. The political turbulence and war with India forced General Yahya to hand over power to Zulfiqar Ali Bhutto as a civilian administrator. In 1973, Pakistan adopted the present constitution creating a parliamentary democracy. In 1977, the political government was again taken over by General Zia ul Haq on the allegation of rigging in the general elections held in 1977. Zia increased his powers via the 8th Constitutional Amendment introducing Article 58 (2)(b), which empowered the President (then military dictator) to dis- miss the Parliament at his discretion. Non- democratic forces used this Article to dissolve elected governments several times. Article 63 A was incorporated first into the Constitution through the Constitution (Fourteenth Amendment) Act,1997 by the then Nawaz Sharif government to prevent instability in relation to the formation and functioning of the government.

In 1999, General Pervez Musharraf proclaimed an emergency in the country and took over the government. Making changes to the Constitution, General Musharraf suspended Article 63 A. Due to mounting political pressure, however, general elections were held in 2008, and the military dictator was forced to resign. Against this background, the 18th Amendment was passed in 2010, removing the power of the President of Pakistan to dissolve Parliament unilaterally, turning Pakistan from a semi-presidential to a parliamentary form of government. Article 63 A was added to the Constitution to confer powers on political parties (read the Party Head) to control the common practice of floor crossing. Article 63 A thus bound members of the Assemblies to the decisions of Party Head in terms of using their discretion of voting power in amending the Constitution.

In practice, however, Article 63 A seems to have been used by the Party Heads to silence elected members of the political parties. Thus, necessitating the proposed Amendment to the Constitution. The proposed Amendment effectively curtails powers of the Party Head over members of his party concerning their voting on constitutional amendments. Thus, it has created a debate in Pakistan regarding the powers of a Party Head with reference to constitutional amendments.

Those who support the proposed Amendment claim that the existing provision of Article 63 A does not allow members to vote ac- cording to their conscience on a constitutional amendment. They claim that an arbitrary restriction on the members of Assemblies is against the very essence of parliamentary democracy. The proponents of the Amendment further argue that the existing provisions of Article 63 A (1) (b) (iii) negate the supremacy of parliament as they restrict lawmakers from exercising their independent right to vote for amendments to the constitution. According to Senator Babar "The existing provision negates the spirit of

the Constitution and the supremacy of the parliament". Moreover, "[l]awmakers should be allowed to vote according to their conscience to uphold the supremacy of the Constitution," Said Senator Farooq Naek. On the contrary, the supporters of the existing provision of Article 63 A claim that the pro- posed Amendment weakens the parliamentary form of government as it promotes violations of party discipline.

I argue that the Amendment, in fact, strengthens parliamentary democracy and constitutionalism as it encourages elected members to exercise their personal liberty and freedom of expression. It may be noted that the word 'defection' appearing in Article 63 A is not de- fined in the constitution. This vagueness pro- vides space to the Party Head, under the auspices of 'party discipline', to interpret the law in ways that suit his/her personal whims and wishes. In fact, the vagueness in the defection clause indicates that it may be used to oust elected members merely on the pretext of violating the constitution, manifesto, code of conduct, or policy priorities of the political party.

The Supreme Court of Pakistan declared that Article 63 A of the Constitution does not violate any of the basic structures of the Constitution, namely, a representative form of Government, an Islamic concept of democracy, fundamental rights, or the independence of the judiciary. At the same time, the Supreme Court has generally adopted a rule of interpretation that if there is a conflict between the two provisions of the Constitution which is not reconcilable, the provision which contains lesser right must yield in favour of a provision which provides higher rights. On this premise, it may be argued that the fundamental right of freedom of speech contained in Article 19 of the Constitution should prevail over the restriction placed on the legislators to exercise such rights in the context of an amendment in the constitution. However, many of the Court's decisions have been more nuanced than this.

In one petition before the Supreme Court (under Article 184 (3) of the Constitution), it was argued that Article 63 A of the Constitution was capable of being misused or exploited by the Party Head. The Court, however, rejected this contention and held that if an individual case was brought before the Court, it would be examined, but the Court could not *assume* that the leader of a political party would exploit the said clause. The Court further explained that no conflict exists between the provisions of Article 63 A and Article19 (freedom of speech, etc.). The Court said that these provisions are to be read in conjunction with each other and effort has to be made to preserve the right to freedom of speech on the floor of the house subject *to reasonable restrictions as contemplated by Article* 19.

This approach appears contradictory. On the one hand, the Supreme Court states that Article 63 A is compatible with the basic structures of the Constitution, which include protection of fundamental rights of the people (Article 19). On the other hand, the Court has said that a Party Head can proceed against the members of the Assemblies on the basis of alleged defection from the discipline of the party (even when that member has exercised h/her fundamental right of freedom of speech).

I would further contend that unfettered powers of the Party Head cannot be perceived in government under the rule of law. Montesquieu discusses the concept of political liberty and moderate government. He claims that all constitutional governments protect political liberty. To him, political liberty is not doing anything one wants as to his fancy and de- sires. Rather, Montesquieu notes, liberty un- folds under the limits of the law. He further condemns tyranny of any kind by the political government. So, Montesquieu lends support to the argument that political liberty is tied to limitations on governmental power. In this conception of political government – there is no space for tyranny. It may be argued that the existing provision of Article 63 A (1) (b) (iii) gives

unrestricted powers to the Party Head which tends to promote the tyranny of the Party Head of the ruling political party in governance through coerced law making. This unbridled power of the Party Head, thus, weakens parliamentary democracy as the Head of the majority party in government can mis- use h/her authority in promoting a tyrant government. In a parliamentary form of government, a parliamentarian should be able to vote for enacting laws as to his/her own free- dom.

Aristotle wrote that it was better for the laws to rule than for any one of the citizens to rule. Arbitrary powers of the Party Head un- der the existing provision of Article 63 would only establish the rule of men (read Party Head) and not the rule of law—that is the basis of any democracy and a constitutional government. By any stretch of imagination, a Par- ty Head may not be allowed to suppress individual freedom to express one's opinion as to any amendment to the constitution under the disguise of party policy. Moreover, it is a positive feature of constitutionalism and democratic government that legislation should pre- sent a dignified mode of governance and a respectable source of law. The existing powers of the Party Head compromise dignity and respect of parliament as an independent institution of law making.

Furthermore, the freedom of speech of parliamentarians is a basis of democracy. Alexander Meiklejohn, a notable proponent of democracy, contends that the idea of democracy is that of self-government by the people. Therefore, there ought to be no restriction on the opinions of the people in democracy. The proposed Amendment by allowing the parliamentarians to vote on a constitutional amendment as to their conscience, in fact promotes freedom of speech. It also enhances the dignity of the constitutional law-making process in Pakistan. The Amendment makes the Parliament strong, free, and a respected institution.

Part XI. International law

THE KASHMIR'S CASE

On 5 August 2019, the Government of India withdrew the special status of the State of Jammu and Kashmir (the state) conferred under Article 370 of the Indian Constitution. By the presidential order, all the privileges earlier offered to the state – the state constitution, laws, flag have been eradicated. When in 1947, the state joined India, it did so with requirements that it would keep a degree of independence. This independence was safeguarded by Article 370 of the Indian Constitution. India revoked this special status of the state in brazen infringement of the United Nations Security Council (UNSC) resolutions and international law.

The UNSC resolution of 1948 acknowledged the state as a contested territory and repeated that the permanent status of the state would be determined by a referendum. The UNSC resolutions of 1951 and 1957 further reprimanded Indian unilateral attempts to modify the special status of the

state. The United Nations also announced the territory under the control of India and Pakistan as the ceasefire line following the Simla Agreement (the Agreement) of 1972.

The Agreement prohibits unilateral action to alter the status of the state. Clause 1(ii) of the Agreement precisely declares that neither side shall unilaterally alter the situation. Clause 6 further underlined that both the states should discuss modalities for a conclusive resolution of the state via peaceful ways. Therefore, India's claim that the withdrawal of the special status of the state is its domestic matter refutes its pledge under the Agreement.

With this background, Pakistan can pursue the Kashmir's case before the United Nations Security Council (UNSC), the UN Human Rights Council (UNHRC), the International Court of Justice (ICJ) and the International Criminal Court (ICC).

Under the UN Charter, the maintenance of international peace and security is the primary responsibility of the UNSC. Due to gross and systematic violations of human rights in Indian Occupied Jammu and Kashmir (IOJ&K), Pakistan should stress on the UNSC to play its role to enforce its *own* resolutions regarding the right to self-determination of the Kashmiri people Otherwise, peace and security in South Asia would be endangered.

Article 33 (2) of the UN Charter further authorizes the UNSC to call upon the parties to settle their dispute by the means outlined in Article 33(1): negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. Thus, Pakistan can pursue the UNSC to direct the parties that the Kashmir dispute is decided through judicial settlement by the International Court of Justice (ICJ).

Pakistan can also seek an advisory opinion on IOJ&K from the ICJ. Under Article 65 of the UN Charter, the ICJ has the power to issue an advisory opinion on any legal

question. Article 96 authorizes the Security Council or the General Assembly to request the ICJ for an advisory opinion on any legal question. Pakistan may entreat the Security Council or the General Assembly to ask the ICJ for an advisory opinion on IOJ&K.

In view of the worsening human rights situation in IOJ&K, Pakistan should launch an aggressive diplomatic campaign to hold a special session of the UN Human Rights Council (UNHRC) to address increasing human rights violations and emergencies in Kashmir. It must be highlighted that India is committing serious crimes against the people of IOJ&K with brutalities such as extra-judicial killings, rape, unlawful detentions and incarcerations, disenfranchisement of Kashmiri people by systematic changes in demographic, use of ammunition against peaceful protestors, and burning and looting of houses. Continuance of such violations would undermine the reputation of the UN making mockery of international law. To start with, the UN should ensure that findings of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on Kashmir released on 14 June 2018 and 8 July 2019 are enforced; an international inquiry be established so that the world could see India's real face.

Further, offences of genocide, crimes against humanity, war crimes and the crime of aggression fall under Article 5 of the Rome Statute of the International Criminal Court (ICC). As Pakistan is not a party to the Rome Statute, it cannot directly invoke the jurisdiction of ICC. However, under Article 13(b) of ICC, the UNSC is empowered to refer a crime to the prosecutor of the ICC. Article 13(b) states : "The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations." Moreover, under Article 15,

the Prosecutor may initiate investigations in the situation in IOJ&K on the information received from any intergovernmental or non-governmental organization. Thus, Pakistan may approach the UNSC to refer to the offences of genocide, crimes against humanity, and the crime of aggression in IOJ & K to the ICC. An intergovernmental organization may also provide concrete information to the Prosecutor regarding the crime of genocide and the crimes against humanity occurring in IOJ & K.

Gross human rights violations are recognized as matters of international concern that warrant multilateral intervention by states. The international community is obliged under the UN Charter to ensure the protection of human rights as norms of customary international law. Thus, considering situation in IOJ & K as "the existence of threat to the peace, breach of the peace, or act of aggression", the UNSC may also call upon the member states to apply measures such as the closure of economic relations or the severance of diplomatic relations, or [even] may call for the use of armed forces which is "necessary to maintain or restore international peace and security.

In short, India's gross violations of human rights in IOJ&K has internationalized the Kashmir issue. The UNSC consultation on Pakistan's request, again, reaffirms that IOJ&K is a disputed territory. The UNSC, however, needs to 'recognize' that the Kashmir issue is an 'immediate' and 'grave' threat to regional and international peace. It is UNSC's 'obligation' to 'enforce' its resolutions regarding plebiscite in IOJ&K. The UNSC can refer the Kashmir dispute to the ICJ (for judicial settlement) and to the ICC (for the investigation, trial, and punishment for India's crimes in IOJ&K). Finally, UNSC can enforce 'economic sanctions' against India and also "call for the use of armed forces" to "restore international peace and security" and to 'stop' India's 'state terrorism' in IOJ&K.

APPLYING INTERNATIONAL LAW IN KASHMIR

India's annexation and illegal occupation of the State of Jammu and Kashmir has highlighted, once again, the seven-decades-old issue of the State of Jammu and Kashmir. The state has had a special status with a separate constitution, flag, population and a clearly defined territory under international law. The BJP government has attempted to diminish this status in blatant violation of the established principles of international law.

Article 7-2 of Independence of India Act 1947 declared the lapse of suzerainty of "His Majesty's Government" over the Indian States. Under Article 2-4, the princely states were allowed to join "either of the new Dominions." While it was a straightforward decision for other princely states due to their geographical proximity, territorial contiguity or political and religious affiliation of the ruler and subjects, issues were surrounding the accession of the state of Jammu and Kashmir.

The ruler of the state, Maharaja Hari Singh, flirted with the idea of remaining independent. However, Indian machinations spearheaded by Congress leaders including Nehru and Patel went into a full drive to seek alleged accession from Hari Singh on October 26, 1947. On October 27, 1947, the Governor General of India approved the accession with the condition that as soon as law and order were restored in Kashmir, the question of the state's accession should be settled by a reference to the people.

The purported Instrument of Accession (which India has failed to produce so far) denies the authority of any unilateral action by India. The terms of the Instrument could not have been varied even by amending the Indian Independence Act, 1947 without acceptance of the ruler of the state (clause V). Furthermore, nothing in the Instrument would have been deemed to be a commitment as to the acceptance of any future constitution of India and nothing could have affected the sovereignty of Maharaja over the state (clause VII and VIII).

Due to the conflict between Pakistan and India over the accession of the state, the United Nations declared the military control territory under both the countries as the ceasefire line which was re-designated as the "Line of Control" following the Shimla Agreement of 1972. The UNSC resolution 1948 recognized the state as a disputed territory and reaffirmed that the permanent status of the state shall be decided by a plebiscite. The UNSC resolutions of 1951 and 1957 further condemned India's unilateral attempts to alter 'special status' of the state.

The Shimla Agreement forbids unilateral action to change the status of the State. Clause I of the Agreement specifically states that neither India nor Pakistan shall unilaterally alter the status and situation of the state. Clause VI further emphasised that both the countries should discuss modalities for a final settlement of the state through

diplomatic means. Thus, India's claim that the revocation of state's 'special status' is its internal issue negates its obligation under the Shimla Agreement. By the revoking the state's special status, India has, in fact, violated the Shimla Agreement.

Essentially, India has unlawfully annexed and illegally occupied the state. From the international legal opinion on the issue of self-determination, as developed in the aftermath of Second World War and the process of decolonization, the fate of millions of people of Jammu and Kashmir cannot be left to the whims of India. Given the UN General Assembly resolution of 1960 concerning Declaration on the Granting of Independence to Colonial Countries and Peoples, the people of Jammu and Kashmir have every right to self-determination.

Under Article 42 of The Hague Regulations 1907, a territory is considered occupied when it is placed under the authority of a hostile army. The International Court of Justice (ICJ) in an advisory opinion (2004) regarding legal consequences of the construction of a Wall in the Occupied Palestinian Territory stated again that territory under the authority of a hostile army is considered occupied.

India has no title on the state under international law. India's illegal occupation since 1947; denial of the right to self-determination of the people; application of India's constitution by removing state's special status makes it an occupying power and its military a hostile army. The BJP's recent attempt to include the territory of the state within the union's territory of India is clearly an act of occupation and illegal annexation.

Jean Simon Pictet, a prominent jurist, while explaining Article 47 of Geneva Convention, stated that the occupying power is the administrator of the territory and is under various positive obligations towards the occupied population (that is, the occupying power cannot annex the occupied

territory or change its political status). Jean Pictet elaborates that occupying power must respect and maintain the political and other institutions of the occupied territory. In occupation of Iraq, the UNSC confirmed Jean's view and confirmed the obligation of occupying power to leave the occupied territory's position intact [resolution 1483 (2003)]. Therefore, India being an occupying power cannot annex the state's territory and is bound to keep the state's institutions and territorial boundaries intact.

The ICJ also stated that the revocation of the autonomy and special status of Jammu and Kashmir by India violates the rights of representation and participation available to the people of Jammu and Kashmir under international law

Considering the violation of the UNSC resolutions and international law regulations and conventions, the international community should act to save two nuclear-armed neighbours from the havoc of war. The UN must implement its own resolutions and use its mandate to enforce international law in the case of Jammu and Kashmir. Otherwise the sanctity of international law will weaken.

International Law and Myanmar

The treatment of Muslims in Myanmar is a flagrant violation of international law. The UN high commissioner for human rights has described the ongoing atrocities in Myanmar as a 'textbook example of ethnic cleansing.' Myanmar has ratified various international conventions on international human rights law, international humanitarian law, and international criminal law. But now it appears to be in violation of its international obligations.

Myanmar (then Burma) voted for the adoption of the Universal Declaration of Human Rights in 1948 (UDHR), which sets out the basic principles of international human rights. In addition, the Convention on the Prevention and Punishment of the Crimes of Genocide, 1948 (ratified in 1956), the Geneva Conventions, 1949 (ratified in 1992), the Convention on the Rights of Children, 1989 (ratified in 1991), Charter of the United Nations and Statute of the International Court of Justice, 1945 (ratified in 1948) are some of the instruments that oblige Myanmar to comply with international law.

Article 5 of the UDHR states, "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Article 2 of the Convention on the Prevention and Punishment of the Crimes of Genocide states, "killing members of a group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life which are calculated to bring about its physical destruction in whole or in part" qualifies as genocide.

Myanmar voted for the adoption of the Universal Declaration of Human Rights in 1948, which sets out the basic principles of international human rights. In addition, the Convention on the Prevention and Punishment of the Crimes of Genocide, the Geneva Conventions, the Convention on the Rights of Children, Charter of the United Nations and Statute of the International Court of Justice oblige Myanmar to comply with international law

The International Court of Justice further observes that the principles underlying the Convention being recognised by civilised nations are binding on UN member States, notwithstanding the signing of a specific treaty to that effect. Successive Burmese governments having carried out the genocide of the Muslim population and are thus liable under the Convention and the UDHR.

Moreover, large-scale military actions which include killings, rape, torture, and arson against the population violates international law. International law becomes more significant in the context of Myanmar, since it has signed relatively fewer international treaties.

For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatments or the Additional Protocols to the Geneva Conventions is not ratified by Burma, it is yet obliged to comply with those provisions of the convention that have acquired the status of customary international law. These norms include prohibitions on

torture, apartheid, and genocide. States are not allowed to violate those norms in any case. The atrocious acts being inflicted on the Rohingya Muslims, apparently at the behest of the Myanmar government are thus liable to be prevented and punished under the customary international law.

Furthermore, the torture and humiliation of those taking no active part in hostilities is prohibited under the Geneva Conventions. Those who are found to be in violation of these prohibitions are liable to be held responsible as war criminals by the International Criminal Court (ICC).

The Rome Statute of the International Criminal Court came into force in 2002.It acts as an evaluation tool for international criminal law violations. Under Article 5 of the Rome Statute, the ICC can investigate and prosecute genocide, crimes against humanity, war crimes, and crimes of aggression. The statute can also be used in situations where state parties are unable or unwilling to take action themselves. However, as Myanmar is not a state party to the Rome Statute, the ICC can investigate and conduct a trial of the above crimes when the UN Security Council (UNSC) refers investigation of these crimes to the Prosecutor under Chapter VII of the UN Charter or the Prosecutor initiates investigation on receiving information from intergovernmental or non-governmental organization.

So far, the UN and some other states have condemned the persecution of the Rohingya, but mere condemnation is not enough. Will condemnation (without effective action) make the lives of the Rohingya community better? In my opinion, the situation in Myanmar requires immediate action from the international community.

The UN should intervene more actively and impose target sanctions and arms embargos. The UNSC should refer the investigation of the crimes being committed in Rohingya to the ICC. Under Article 41 and 42 of the UN Charter, economic and diplomatic relations should be cut immediately.

The UNSC should launch necessary military action to halt the ongoing violence in Myanmar's Rakhine state. Slow action from the UNSC will only fortify the apprehension of critics who argue that the Rohingya issue may go unattended, as it went in the Rwandan genocide.

The ongoing war crimes in Myanmar cannot be allowed to go unchecked. The people are being subject to murder and rape on the basis of their ethnicity and religion. It is the responsibility of the international community and international legal institutions to halt the massacre of the Myanmar's Muslim population immediately.

THE INTERNATIONAL CRIMINAL COURT

The threat by some African states (i.e. South Africa, Gambia and Burundi) to withdraw their memberships from the International Criminal Court sparked uncertainty about the future of the ICC, and shaked the foundation of the global criminal justice system, which was designed to eliminate impunity in war crimes.

The UN high commissioner for human rights thus urged "the international community to remember there is not yet any alternative in place to ensure the implementation of the (Rome) Statute or protect citizens from war crimes" and called for them to demonstrate resolve and strength.

Experts predict that Kenya, Namibia and Uganda may follow suit — leading to the disintegration of the ICC. Russia's withdrawal from the statute adds to concerns of the court's future. A rising trend of withdrawals could signal that the ICC has failed to live up to the hopes of certain members.

It is imperative, therefore, that this trend is reversed in order to restore the ICC's legitimacy.

The ICC was established for the enforcement of international justice under the Statute in 2002. Under Article 5 of the statute, the ICC has the jurisdiction to prosecute individuals for four types of crime: genocide (i.e. killing members of a national, ethnic, racial or religious group); crimes against humanity (i.e. widespread murder, apartheid, torture directed against a civilian population); war crimes (i.e. directing attacks against a civilian population or individual not taking direct part in hostilities under the Geneva Conventions); and crimes of aggression.

The ICC provides an international forum to conduct trials of those who are generally not amenable to the jurisdiction of national courts, due to their stature or the magnitude and nature of their crimes. It thus supplements existing national judicial systems. Under Article 13 of the statute, when individual states fail to prosecute offenders, the investigations are referred to the ICC by a state or the Security Council, or are independently initiated by the Office of the Prosecutor.

There is a perception that the ICC is biased against African countries, that it tries African leaders disproportionately and brushes aside atrocities committed elsewhere. It is stated that the court does not treat member states equally. Specifically, it is pointed out that the ICC ignores the 'war crimes' of Western nations, seeking only to prosecute Africans, that the ICC, despite being called the International Criminal Court, is in fact an 'international Caucasian court' for the persecution and humiliation of people of colour.

On the contrary, others contend that the ICC is acting as a neutral arbitrator; that existence of the court is essential for safeguarding peace, security and the wellbeing of the world; that South Africa's withdrawal would reverse its role as

a leader of promoting victims' rights and its values in the post-Apartheid era; that such withdrawal would be a serious setback in the fight against immunity and the statute would lose its universality; and that it would also increase the likelihood of genocide, crimes against humanity and war crimes in the future.

While appreciating both the positions, the UN high commissioner stated: "It may not be perfect, in design nor operation — like any other institution, or state for that matter. But altogether it is the best we have."

The commissioner, in fact, emphasised the need to stand with the ICC at a time of uncertainty. He said: "To keep this international system intact becomes even more pressing in the face of enormous pressures being heaped on it today — not least for small states who, for their security, need the companionship and protections provided by international law and by this court." However, the commissioner's statement fails to persuade those who feel dissatisfied with the ICC's role. While the statement hints an urgent need for reforms, it fails to provide a solution.

The solution lies in bringing the international community on board. An independent commission of jurists may be constituted to determine and redress state grievances.

At the same time, African states must strengthen their national judicial systems to prosecute offenders of war crimes. They have to use their strength as a region to reform the ICC from within, ensuring the principle of impunity applies equally to all states.

All other members of the ICC need to play a proactive role to protect victims of atrocities. The UN high commissioner must urge member states to provide solutions. If the ICC loses its integrity, it may amount to the failure of the international criminal justice system to protect the world's most vulnerable victims of war crimes, genocide, crimes against humanity, and crimes of aggression. As it is a court of

last resort for victims disappointed by the courts of national jurisdiction, the ICC must be impartial.

THE PARIS AGREEMENT

Pakistan is the 104th country to ratify the Paris Agreement. The agreement requires the state to keep global warming below 2° centigrade, which experts describe as the threshold for our safety

Pakistan is among the countries most vulnerable to climate change. It lacks the technical and financial capacity to meet the challenge, but our ratification of the Paris agreement shows our strong will to fulfill the objectives of the United Nations Framework Convention on Climate Change.

The agreement requires the state to keep global warming below 2° centigrade, which experts describe as the threshold for our safety. It sets out an era of global cooperation to solve the issue of climate change, and requires all countries to ensure environmental protection, and envisages a legally binding accountability regime requiring all countries to report their progress, every two years, towards reducing greenhouse gas emissions. These reports are subject to expert review. The agreement further recognises "the need for an effective and progressive response to the urgent threat of climate change

on the basis of the best available scientific knowledge". It appreciates the specific needs and special circumstances of developing countries as to funding and the transfer of technology.

The Paris agreement is a significant achievement in the history of international environmental law. The United Nations Framework Convention on Climate Change was constituted in 1992. It acknowledged "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their respective capabilities and their social and economic conditions". The Kyoto Protocol 1992 extended the UNFCCC. Further progress was made in Copenhagen, Cancun, and Durban, where state parties committed themselves to a new agreement by the end of 2015. This commitment is, thus, fulfilled in form of the Paris agreement.

The agreement demonstrates the ambition of the international community to protect the common heritage of mankind. The president of the natural sources defense council stated that "it sends a clear message to our children: we will not abandon you to pay the price for reckless habits that ruin our planet and lives. A crisis that took centuries to get here won't go away overnight, but climate change has met its match in the collective will of a united world". He said: "our challenge now is to transform the action we have pledged into the progress we need".

The Paris Agreement enables developing countries to avail international support for the scientific knowledge and technology that can help us ensure our basic rights (i.e., clean water, fresh air, and pure food)

Developed countries are obliged to provide scientific knowledge, finance, and technology to developing countries. Article 9 of the Paris agreement states that developed countries will mobilise and provide funds to developing

countries through a transparent and efficient financial mechanism. Article 10 requires all countries to cooperate in the development of technology and its transfer from developed to developing countries. Article 11 states that developed countries will support the capacity building of developing countries on the basis of their needs and priorities. It says that enhanced capacity building should enable the developing countries "to take effective climate change action to implement adaptation and mitigation actions". At the same time, it requires that developing countries will take action "to facilitate technology development, dissemination, and deployment, access to climate finance as well as education, training, and public awareness".

Pakistan faces serious climate change issues including increasingly intense weather (e.g. floods and, thus, siltation of dams; heat waves and, thus, water shortages) as well as deforestation. Water security, food security and energy security are now critical issues for policy makers due to our fast-growing population.

The issue of water security is particularly acute. It may lead to 'water wars' as India threatened to revoke the Indus Water Treaty. Afghanistan and China are also potential stakeholders in the distribution of cross-boundary rivers water in the region. Escalation of tension among water-stressed countries in South Asia would have disastrous consequences for poverty-stricken nuclear states.

While fulfilling obligations under the agreement, Pakistan must now resolve to address the looming challenge of climate change on an urgent basis. The developed countries must also reduce greenhouse gas emissions as per set targets and meet the promise made in Paris supporting developing countries in scientific knowledge, finance, and technology. The subject of the environment must be taught at schools. The government and civil society should launch an

aggressive media campaign to educate the people as to climate change and their role in keeping the environment clean.

THE INTERNATIONAL COURT OF JUSTICE

Article 2(3) of the United Nations Charter (UN Charter) provides that: "[a]ll members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered". An 'international dispute' is defined as a disagreement over a point of law or fact, a conflict of legal views or of interests between two states. The international disputes are resolved through non-binding and binding methods: Non-binding methods comprise of diplomatic procedures such as negotiations, good offices and mediation, conciliation, and enquiry. Binding methods of dispute resolution require the determination of factual or legal disputes between the state parties through adjudication by the judicial forum such as the International Court of Justice (ICJ). This article focuses on a binding method of dispute resolution. It explores the organization, functions and the jurisdiction of the ICJ.

The Hague Conferences of 1897 and 1907 promoted debate as to the creation of a world court. In order to restore international peace and security after the First World War, the League of Nations established the Permanent Court of International Justice (PCIJ) in 1920. After the Second World War, the United Nations replaced the PCIJ with a new court, named the ICJ.

The Court comprises fifteen members which are elected by the General Assembly and Security Council through separate voting with absolute majority in both the bodies, regardless of their nationality, from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults of recognized competence in international law. The duration of these members is nine years; however, a member may also be re-elected. The president and vice-president of the ICJ are elected for three years. To maintain independence of this judicial organ of the UN, the election procedure aims to ensure the selection of the men of ability and integrity.

It decides international legal disputes as per the rules and norms of international law. In order to invoke jurisdiction of the ICJ, state parties have to establish that the dispute qualifies as an 'international dispute'. In the *Interpretation of Peace Treaties* case, the ICJ observed that in a dispute 'the two sides [should] hold clearly opposite views concerning the question of the performance or the non-performance of certain treaty obligations.' In another case, the Court held that 'in order for a matter to constitute a legal dispute, it is sufficient for the respondent to file an application before the Court merely to deny the allegations made even if the jurisdiction of the Court is challenged.' Where there is an international legal dispute, the states can either avail diplomatic means for dispute resolution, or can approach the Court. It is not necessary that diplomatic methods should be exhausted before coming to the Court.

The ICJ has two kinds of jurisdiction: contentious jurisdiction and advisory jurisdiction. The question of jurisdiction is determined by the Court as a question of law in light of the relevant facts in each case. Once the Court has taken cognizance of a dispute, its jurisdiction shall continue notwithstanding the occurrence of subsequent events. Only states can invoke the Court's jurisdiction and not the non-state organizations or entities. As the Statue of the ICJ is an annex to the UN Charter, therefore, the UN member states are *ipso facto* parties to the Statute of the ICJ and can avail its jurisdiction; however, non-member states can also become a party to the Statute on conditions determined by the General Assembly and upon the recommendation of the Security Council. The states are entitled to get a question of jurisdiction decided at the preliminary stage of the proceedings.

Under Article 36 (1) of the ICJ Statute, the consent of the state parties is a precondition to invoke 'compulsory jurisdiction' of the Court. A state party cannot be impleaded in pending proceedings without its consent. In case of any dispute as to the jurisdiction of the Court, it can decide upon its own jurisdiction. In *Corfu Channel* case, the UK argued that Albania was obliged to accept the Court's jurisdiction irrespective of its consent on the recommendation of the Security Council under Article 25 of the Charter, but the Court rejected this argument and observed that it is an attempt by the UK to introduce a new meaning of compulsory jurisdiction. The jurisdiction of the ICJ can be invoked in all cases brought by parties, and the matters which are provided under the UN Charter or the existing treaties or conventions.

Under Article 36 (2), the state parties can invoke 'optional jurisdiction' of the Court, as it allows the state parties to accept the jurisdiction through filing a declaration. While filing a declaration, a state can make reservations with respect to certain matters that a state does not want to be

under the Court's jurisdiction. These matters are of vital interest of the states such as national security or defense. A declaration can also be withdrawn or modified by a state. As India has recently modified its earlier declaration of 18 September 1974 to oust the jurisdiction of the Court in matters of national security. Article36 (2) provides that: "The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; and (d) the nature or extent of the reparation to be made for the breach of an international obligation". While deciding a matter, the Court applies treaties, customary law, and general principles of law. It can further consider the principles of justice and equity.

In addition to contentious jurisdiction that is available for the state parties, the Court may deliver an 'advisory opinion' to the UN agencies that want to facilitate the resolution of inter-state disputes by soliciting an opinion from the Court. The Statute of the Court provides that, "the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request". In addition, the UN Charter states that the General Assembly, Security Council, and other organs and specialized agencies of the UN may request advisory opinion of the Court. As to the exercise of its advisory jurisdiction, the Court observed in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* that "the specialized agency in question must be duly authorised by the General Assembly to request opinions from the Court; that the opinion requested was to be on a legal question; that the question must be one

arising within the scope of activities of the requesting agency."

The Rules of the Court governing the procedure of the Court were first adopted in 1946; however, they have been revised in 1972 and 1978. In addition, the Court has adopted twelve Practice Directions to ensure that the parties follow the Rules strictly regarding pleadings and the filing of cases. The Court regulates its procedure with reference to the pleadings i.e., the number, order and timing of filings of pleadings. Articles 44 to 53 of the Rules of Court specifically govern written pleadings. Articles 49(1) and (2) state that pleadings or memorial must provide a statement of relevant facts, a statement of law and the submissions of the party. The counter-memorial contains an admission or denial of the facts stated in the memorial, any additional facts, if necessary, observations upon the statement of law in the memorial and a statement of law in answer thereto and the submissions. Article 49(3) deals with the reply and rejoinder.

As a remedy, the ICJ can make a declaration as to the violation of international law by a state party. It may grant compensation of loss caused by unlawful conduct of a state and award damages. The Court ordered dismantling of disputed works carried out by a state party, and, in another case, canceled arrest warrants. In the *Gabcikovo–Nagymaros Project* case, the Court also directed the future conduct of the states.

After the judgment is made by the Court, it becomes final and not subject to any appeal. The judgment is binding between the state parties. If a state fails in compliance, the other party may approach the Security Council for appropriate action. In case of any dispute as to the meaning and scope of a judgement, the parties to the case can file an application for interpretation of the judgment. However, if a new fact is discovered which was unknown to the Court or the parties, revision of a judgment can also be sought.

The states have frequently referred their disputes to the ICJ. Pakistan has also been a party in the proceedings before the ICJ in these five cases: The jurisdiction of the council of the international civil aviation organization case (1971), the trial of Pakistani prisoners of war case (1973), the aerial incident case (1999), the obligations concerning negotiations relating to the nuclear arms race and to nuclear disarmament case (2015), and the Kalbhushan case (2018). The ICJ's website provides facts and judgments of the cases. The increasing use of the ICJ in the recent decades shows the significance of international law has increased. However, a few questions need attention of the international community: do small states and developing countries have a fair chance of getting justice through international courts and tribunals?; do the reservations in declarations of the states make the ICJ an ineffective court?; does the ICJ lacks genuine force or effectiveness for the enforcement of its decisions? These challenges notwithstanding, developing countries like Pakistan should promote the compliance of international law and develop their capacity to protect their interest in international forums.

THE CAUSE OF PALESTINE

Palestine has been under the control of various powers, including the Assyrians, Babylonians, Persians, Greeks, Romans, Arabs, Fatimids, Seljuk Turks, Crusaders, Egyptians, Mamelukes and Islamists. The Ottoman Empire governed the region from about 1517 to 1917. The geographical area situated between the Mediterranean Sea and the Jordan River was signified as Palestine until 1948, however, at present much of this area has been occupied by Israel. Now, hypothetically Palestine contains the West Bank and the Gaza Strip, though, the boundaries are not officially fixed.

After World War I the British took control of Palestine in 1918. The UN in 1947 suggested a design to divide Palestine into two parts: a sovereign Jewish state and a sovereign Arab state, with Jerusalem as internationalized territory. Jewish heads acceded the plan, however many Palestinian leaders fervently rejected it. In May 1948, Britain retracted from Palestine and Israel became a sovereign state and about between 700,000 and 900,000 Palestinians were compelled to depart their homes.

Instantly, in 1948 war began between Israel and Arabs. In 1964, the Palestine Liberation Organization was established to make a platform for creating an independent Palestinian state. Between, June 5 and June 10 Israel attacked Egypt, Jordan and Syria, and during this 'The Six-Day War' Israel occupied major area. In 1987, the First Intifada broke out. This fight was broken out due to Israel's occupation of Gaza and the West Bank. Two peace processes Oslo Accords (I & II), were signed in 1993 and 1995 respectively for peace in Palestine but the dream of peace did not come true. The Second Palestinian Intifada broke out in September 2000. In May 2017, the leaders of Hamas consented for the creation of a Palestinian state as per the 1967 defined borders, with Jerusalem as its capital, however, this proposal was rejected by Israel. Till date, Palestinians are combatting for an independent state. Over 135 UN member states accept Palestine as a sovereign country, however, Israel, the United States as well as some other states do not recognize Palestine as an independent state.

On August 13, 2020, the governments of Israel and the United Arab Emirates (UAE) declared that they had reached on an agreement to 'full normalization of relations' on Israel's postponement of the unlawful occupation of the West Bank. President Trump, Israeli prime minister and the Emirati crown prince jointly publicized the declaration and depicts that the agreement is an important strategic step for the Middle East to enlarge diplomatic, security and trade support. As per Abraham Accord (the Accord) in coming days Israeli-UAE missions will meet 'to sign bilateral agreements regarding investment, tourism, direct flights, security, telecommunications, technology, energy, healthcare, culture, the environment, the establishment of reciprocal embassies, and other areas of mutual benefit.'

The Trump administration has been endeavoring to enhance Israel's relationships with the Arab world chiefly to counteract Iran since, 2017. These efforts ensue silently

maturing relationship between Israel and Arab states and efforts of preceding US governments in this regard. The Trump administration's January 2020 "Peace to Prosperity Vision to Improve the Lives of the Palestinian and Israeli People" draws parts of the West Bank to be yielded to Israel. Primarily, the US administration looked willing to let Israel to singly seize those territories, however, the Accord provides that Israel will put off such occupation. But what would be the Accord's time limit and the meaning of annexation, all are unclear.

The collaboration between Israel and the Arab world was long considered unpleasant for the Gulf states. The 1967 Arab League Summit coincided to no peace with Israel, no recognition of Israel, no negotiations with Israel till the Palestinian issue is settled. Israel has been in a peace treaty with Egypt and Jordan since 1979 and 1994 respectively however, their people have not accepted it warmly. The Accord has been appreciated by Germany, United Kingdom, China, India, France, Spain, Egypt, Jordan, Bahrain and Oman, for prospects of peace in the region, however, Palestinian leadership, Turkey, Iran and Pakistan have rejected the Accord as a setback to the cause of Palestine.

How the Accord will develop Israel's relationships with the Arab states is yet uncertain. Palestinian President Mahmoud Abbas has condemned the accord, 'The Palestinian leadership rejects and denounces the UAE, Israeli and US trilateral, surprising announcement,' and declared that the Accord was a 'betrayal of Jerusalem, Al-Aqsa and the Palestinian cause'. The Accord may further divide the Middle East, with Arab world led by Saudi Arabia and UAE on one side and Turkey and Iran on the other. Both Saudi Arab and Emiratis seem to perceive Turkey and Iran's regional domination, with opposition.

Nevertheless, Pakistan's historical friendship with Saudi Arabia, China, Turkey, UAE, and its earthly immediacy and

neighbouring relationship with Iran, make it necessary that Pakistan evades choosing sides. Pakistan should keep a balanced relationship with all Islamic countries and play an effective role to promote Muslim unity. In short, while supporting the unity of nations, Pakistan should pursue Palestinian's right to self-determination.

Part XII. Miscellaneous

AN INTELLECTUAL CRISIS

Pakistan suffers from an intellectual crisis. Occasional exceptions notwithstanding, mediocrity holds the field. One reason for such a crisis is that only a few are holding the reigns while keeping the less privileged out of the learning and decision-making process. Our intellectual spaces are exclusionary and discriminatory. The potential of our youth remains untapped owing to a lack of quality education, merit, transparency and opportunity. Our education system does not focus on developing critical and intellectual skills. Due to such an education system, a huge proportion of our population has become practically irrelevant and its voice is not heard in policymaking circles.

Policies are generally made and implemented by a very thin class of our society. There are a few families and their successors who dominate every field due to the violation of merit and monopoly. Unfortunately, instead of developing an inclusive ideology and a desire for collective welfare, we have

developed an unedifying thirst for power and materialism. The shadow of fear, uncertainty and unemployment looms over the poor (which is now the majority of our population). Resultantly, we rarely find self-improving, optimistic, rational and confident individuals. In such circumstances, it is not surprising that Pakistan fails to make good progress.

Our intellectual crisis is visible in almost every profession. In our justice sector, for instance, we find a few exceptional lawyers and judges. In general, we fail to find elevated debate in the legal profession and media talk shows. Open discussion and constructive critique are hardly appreciated even in academic circles. Our schools and universities fail to impart quality education. These places seem to be graveyards of intellect. Purposeless politics, meaningless talk and the race for positions have captured our places of learning. The use of reason is considered a challenge to settled standards (although settled standards do not represent absolute truth). So, we suffer from dogmatism and stagnation in every field.

In the developed world, institutions focus on creativity and original research. Students are exposed to a variety of ideas and encouraged to appreciate these ideas in different contexts. They are required to assess and analyse concepts. This exercise enables them to weigh evidence, examine claims and check the validity of information before making opinions. Intellectuals from around the world present their ideas, engaging professors and students in ongoing research. This makes intellectuals aware of the latest developments around the world. The people in developed countries believe that ideas are never frozen; they can be improved over time with cutting-edge philosophical, scientific, theological and psychological knowledge. Such a perception of knowledge is necessary to reverse the intellectual crisis in Pakistan.

What keeps developed countries ahead is not raw intellect but a commitment to reason and debate. Constant

engagement with new ideas and challenges keeps them informed. Scientific and rational thinking have increased the confidence of students and researchers. In fact, inventions thrive where everyone can challenge conventional wisdom with scientific evidence. In modern democracies, governance is based on consultation supported by think tanks and research institutes. Our policies, however, are formulated without meaningful consultation and discussion with experts. The men in power direct state policy without parliamentary debate or access to civil society input. Our policies totally fail to reflect the voice of the masses.

To meet our intellectual deficit, we need to encourage open discussion and challenge conventional narratives on security, development, religion, the welfare of the state and so on. Our national narratives and policies must be constantly updated on the basis of research and evidence to better protect our national interests. We have to adapt our worldview to a rapidly globalising environment. We should develop our distinctive consciousness while appreciating the values of others. We should inform and reinterpret our notions of history, culture, truth and authenticity in light of present knowledge. We should reconstruct our religious thought in view of challenges facing Muslim communities.

We need to embrace the still-muted voices of a larger section of our society. We need to provide equal opportunity to all citizens for the optimal use of their capacity. Indeed, this will foster socio-economic development in Pakistan. To repair the trust deficit that holds us back, we should initiate a dialogue between the secular and the religious, liberal and conservative-minded people, and our rich and poor citizens. We must improve our education system so that professors produce fresh knowledge and students can actively evaluate knowledge. We need to develop scientific attitudes in our youth so that they could get rid of superstitions and the blind following of others. We must include topics like scientific

enquiry, critical skills, reasoning, pluralism, civic life, basic rights and the ethics of debate in our syllabi. Researchers, technocrats and academics should be provided more space on media and governance to address fundamental issues like health, education, justice and security. We must discourage learning by heart and encourage learning to think and solve problems.

SAGES HAVE SPOKEN

At the opening ceremony of the new judicial year, Justice Asif Saeed Khosa observed that the bar has repeatedly voiced its concerns "over receding political space in the governance of the state and such concerns must not be ignored." He stated that we feel "the growing perception that the process of accountability being pursued in the country at present is lopsided." He pointed out that "voices being raised about the muzzling of the print and electronic media and suppression of dissent are also disturbing."

While expressing little disappointment, Justice Khosa emphasised on three issues: first, restructuring of the judicial system by introducing a three-tier system, doing away with special courts and repealing or amending some unnecessary and problematic laws; second, holding of an inter-institutional dialogue for sorting out irritants within the organs and institutions of the state; third, the issue of missing persons. He hoped that these issues would receive proper attention from the executive and the legislature.

Justice Faez Isa has highlighted the duty of the judiciary within a democratic system. He said the judiciary has the authority "to stop an individual or institution in the event they transgress fundamental rights." He explained that the

parliament is responsible for legislation; the executive enacts the legislation and the judiciary interprets the constitution and law and ensures that every individual and institution operates within its constitutional domain. He cautioned that history stands witness to the fact that "whenever institutions have crossed the bounds of their authority, not only are the fundamental rights of people violated, the country is weakened and can break apart as well."

Justice Isa stressed that "institutions and countries are strengthened only when they learn from their mistakes." While hearing a case about the cutting down of forests in Khyber Pakhtunkhwa, he regretted that "things had come to a pretty pass in the country and the atmosphere was such that one could not freely talk about anything."

Justice Gulzar, while hearing a case regarding the regularization of sanitation workers, remarked, "All the institutions in the country have become spoiled. The system of the entire country is running on ad-hocism."

Thus, there should be no surprise if Prime Minister Imran Khan expressed disappointment with the international community for failing to pressure India in the matter of Jammu and Kashmir. It may not be taken as unexpected if Islamic countries have not shown desired support and enthusiasm for Kashmir. It appears to be the right time for national introspection.

We must appreciate the fast-changing global context and revisit our national and international policies. We should listen to Justice Isa when he brings our attention to a lesson of history that institutions and countries are strengthened only when they learn from their mistakes. We should adhere to the proposal of Justice Asif Saeed Khosa regarding inter-institutional dialogue for sorting out issues within the state institutions. We should appreciate observations of Justice Gulzar to avoid expediency and ad-hocism in the country. We must learn from the experience of our prime minister with

the international community first for seeking financial support and now for a principled stand on Kashmir.

The question remains: Where to start? The sages have spoken loudly. Let us begin with inter-institutional dialogue culminating into the formation of a national commission for introspection and reforms. The commission should probe into our past mistakes and be able to speak truth to all concerned. It should help for chalking out a future national plan for institutional corrections. In the first phase, the commission must focus on economic, national security, and foreign policy. Then, it should concentrate on our education, justice, and political systems.

Without putting our national house in order, we should neither expect any miracles from any individual or institution nor any support from the international community. National success depends on collective performance of state institutions. The institutional output is determined by merit, transparency, and accountability within the state institutions. Moreover, all the institutions work in a larger inter-connected policy framework and socio-economic context of the country. Reforms in one sector help in improving the performance of other sectors as well. For example, improving the national economy helps in our securing national security. Likewise, reforming our education system would strengthen our economy. Nothing may work effectively if we fail to address the flaws of our political institutions. Finally, without making our judiciary independent and efficient, we cannot reap the fruits of justice, economic prosperity and democracy. We cannot establish an egalitarian society without protecting fundamental rights and upholding the rule of law and supremacy of the constitution.

Let us realise our huge national potential building a knowledge-based economy. Let us invest in our youth producing a capable human resource without which no nation can compete and progress in international market. We must

capitalise the hundred per cent potential of our population to make our institutions stronger. All stakeholders now appreciate that without consistently following an independent, clear, and informed foreign policy, we cannot convince others as to the moral and legal strength of our national stance. We must realise that no state can sustain in the long run without protecting citizens' basic rights such as right to a dignified life and freedom of expression. Finally, all the institutions must support constitutionalism, rule of law, and democracy to make the country stronger.

PROFESSIONALISM

Who can deny the importance of professionalism and professional training in the modern age? Professional training enables a person to perform well in the profession and fully participate into the socio-economic life of a country. It flames hidden potential and sharpens raw intellect. The best output of a human body and brain can be associated with physical and mental training of an individual. The 21st century's miracles have been possible only due to the investment in human resource development. The technological advancement in Japan, the computer software invention in the United States, mastery in the social sciences in the United Kingdom, the medical research in Germany, and the industry revolution in China depends on mega investment in professional training. The spirit of professionalism from sports to arts and business to literature has produced healthy competition amongst countries. In this regard, our country has also shown progress in some fields and lagging behind in others.

Some professionals (naming a few) have made significant contribution in their fields. For example, Muhammad Ali Jinnah set high standards of personal and professional integrity in the legal profession. AK. Brohi, Khalid M Ishaq , Justice Aamer Raza A. Khan, Justice Qazi

Faiz Isa, and Justice Ayesha A. Malik are eminent jurists. Dr Muhammad Munir, Prof. Hamyoun Ihsan, and Dr Shahbaz Ahmad Cheema are dedicated professors of law.

Iqbal, Faiz, Mian Muhammad Baksh, and Sharif Kunjahi are great poets. Ashfaq Ahmad and Wasif Ali Wasif are wise sufi saints. Fatima Jinnah, Benazir Bhutto, Parveen Shakir, and Noor Jehan, will be remembered for their struggle, humanity, and melodious voice. Who can forget Nusrat Fateh Ali Khan, a great musician? Dr Safdar Mahmood and Eqbal Ahmad are acknowledged historians, political scientists, and writers. Major Aziz Bhatti and Shabbir Sharif (nishan e haider) set a history of sacrifice and courage. Hameed Nizami, Arif Nizami, and Mir Khalil ur Rehman are stalwarts of journalism in Pakistan. Dr Abdul Qadeer Khan is a great scientist. Abdul Sattar Edhi was a prominent philanthropist, social activist, ascetic, and humanitarian. Azhar Hassan Nadeem, Tariq Khosa and Zulfiqar Cheema are known for their integrity in the police service of Pakistan.

At the same time, we are facing dearth of professionals in our country. Pakistan is still an underdeveloped country. It is facing unprecedented challenges of poverty, illiteracy, corruption, nepotism, political and administrative chaos, etc. This is also a lack in coordinated, coherent, and consistent national policies. We seem to rely on persons than on institutions. Our institutions need a structural overhauling to meet the above challenges.

When I compare my experience with the professional training institutions in Pakistan with the institutions abroad, I feel that our institutions are working in traditional ways--without learning from the advanced training institutions in other parts of the world. We have good infrastructure but lack in institutional management and training capacity. We emphasise more on lecturing and less on discussion. Our lectures mostly rely on outdated knowledge missing the latest research in the field. The course participants are hardly

compelled to read and encouraged to question. Our institutions lack access to on-line data bases which are available in the institutions of training and renowned seats of learning. Our libraries lack in subscribing cutting-edge research journals and books on the subject.

So, we need to focus on creativity and discussion. We need to encourage the participants to apply similar concepts in different contexts and see how the same concept produces a different result while interacting with different set of facts. The students should be allowed to challenge ideas of the teacher. We need to be open and frank in our discussions while maintaining appreciation and respect for the opinion of each other. The trainees must be encouraged to challenge the existing theories, norms, codes, and to review their ideas in the light of latest philosophical, political, historical, technological, scientific, theological, and psychological knowledge.

Indeed, it will help them thinking beyond the boundaries to find viable solutions for the issues facing Pakistan. The fresh stream of knowledge will thus provide required motivation for action in the right direction. We will have to confront authoritarian and extremist narratives promoting intellectual pluralism in our society while maintaining an appreciation for order in collaboration with the institutions of the state.

Let our youth think outside the box to change the world!

POLICY AND THE LAW

The Global Climate Risk Index (2019) released by the public policy group Germanwatch places Pakistan among the top ten countries that are experiencing the impact of climate change. Air pollution, being a top-killer, has been recognized as a key theme for the 2019 World Environment Day.

The World Health Organization reveals that 98 percent children are exposed to unsafe levels of air pollution in developing countries. The 'climate march' in Pakistan (in the run up to the UN Climate Action Summit) expressing solidarity with the Global Youth Strike 4 Climate was a well-timed move. This global strike aimed at pressing our political leaders to take urgent measures to curb climate degradation.

The magnitude of the environment crisis is colossal. However, the protection of the environment is not provided as a fundamental right in any specific provision of our constitution. The environment is dealt with under sub-constitutional laws. Item 24 of the concurrent legislative list (fourth schedule of the constitution) empowers the federal

and provincial legislatures to legislate on the environment. After the 18th Amendment, however, this list was abolished. In view of Article 142(c) of the constitution, the environment falls in the legislative domain of the provinces.

Notwithstanding the absence of fundamental rights provision about the environment, our courts have attempted to protect the environment while interpreting Article 9 (right to life) of the constitution. In the Shehla Zia case (1994), for example, the court expanded the meaning of word 'life' through an activist interpretation. The court stated that the word 'life' has not been defined in the constitution but it does not mean nor can it be restricted only to vegetative or animal life. The court held that a person is entitled to the protection of the law from being exposed to hazards of the environment such as an electromagnetic field.

Following the Shehla Zia case, parliament passed the Pakistan Environmental Protection Act 1997. This act and other provincial environmental protection laws envisage a mechanism of filing a complaint about environment protection. The complainant can first approach the provincial environmental protection agency and then the environmental protection tribunal in appeal. However, this mechanism failed to provide substantial relief.

After ratifying the Paris Agreement (2016), parliament again passed the Pakistan Climate Change Act, 2017. This act establishes three institutions: the Pakistan Climate Change Council, Pakistan Climate Change Authority, and the Pakistan Climate Change Fund. The Council is empowered to supervise the enforcement of the act, to give guidelines for the protection of ecology and to consider national climate change reports. The Authority is mandated to formulate mitigation policies and programmes to curb the climate change crisis, to ensure compliance with the Paris Agreement, and to carry out research and awareness campaign for the public. The Fund is responsible for providing financial

support and thereby enabling the Authority to perform its functions. Despite this robust statutory framework, our environment continues to deteriorate.

Arguably, due to the failure of the executive to make and enforce policies regulating the environment, our courts have taken up numerous cases for the protection of the environment [i.e. The Lahore Clean Air Case (2003), Karachi Oil Spill Case (2003), Islamabad Environmental Commission Case (2015)].

Recently, the Lahore High Court has issued a fresh set of directions to various government departments to plant trees and protect forests and make the existing laws more stringent to deal with the non-compliance and violations of environmental laws. However, despite repeated judicial directions and constitution of judicial commissions, our environment is being polluted increasingly. Cleaning the environment through judicial activism seems to have produced little results.

While interpreting and enforcing the fundamental right to life, our courts have tried to make the environment clean and healthy. In doing so, however, the courts appear to have interfered into the policymaking domain of the government. The analysis of environmental law cases shows that superior courts have issued broad policy directions to the executive without due appreciation of the constitutional distribution of powers between the executive and the judiciary.

It may be argued that judicial activism cannot be a substitute for proper policymaking and its enforcement by the executive. The judiciary is obliged to uphold the constitution including the separation of powers between the executive and the judiciary. It is the job of the executive to handle the environment crisis ensuring the actualization of fundamental rights. The degradation of the environment, despite frequent directions by the courts, shows that policy matters such as

protection of the environment may be left to the executive branch of the government.

The overstretch of fundamental right provisions in policy areas like the environment appears to challenge the constitutional separation of powers between the institutions and impede the progress of democracy. Allowing the people to hold the political government accountable for the provision of basic rights such as a clean environment would promote the democratic process in the long run. This Friday's 'climate march' may not herald any revolution, but the politicization of our youth about climate change provides great hope for ushering an era of governmental accountability through a political process.

In my view, 'active judicialism' is a parallel of 'constitutionalism'. To strengthen rule of law and protect fundamental rights of the citizens, our courts need to support constitutionalism more enthusiastically, and the government should take effective measures to protect the environment and save the lives of our future generations.

CHILD CUSTODY

A full-bench of the Supreme Court has issued a detailed plan for custody of minor children. While, the plan has been drawn with the agreement of both the parents in the peculiar circumstances of the case, family courts can consider its terms and conditions to derive guiding principles for deciding custody cases. The reconciliatory approach adopted in the order has been widely praised in legal circles.

The judgment provides that the children will stay with their mother (till they attain the age of puberty) and that the father shall be responsible for "education, uniform(s), books, and pick-and-drop from school". The father shall also provide Rs 5,000 every month for the miscellaneous needs of the children. The children will be able to visit the father on every holiday. During summer vacation, the father will be able to keep the children at his home from the first Sunday to the fourth Sunday; thereafter, the children will be dropped back at the mother's house. The children will also stay with the father during the first week of winter vacations and will then be returned to their mother. The children will stay with their father from the night before Eidul Fitr till 8pm on the following day. The father will pick the children at 11am on the day following the Eidul Adha and drop them back at 10pm the next day. On unscheduled holidays, the children

will stay with the father from 10am till 8pm. If the father wants the children to participate in a function such as a marriage in the family, the mother will hand over custody of the children to their father. None of the parents will incite the children against the other parent.

Pakistan's Family Law jurisprudence dictates that "welfare of the children" is the paramount consideration in deciding custody cases. Section 17 of the Guardian and Wards Act 1890, provides that the "welfare of the minor" principle is to be applied in deciding all custody cases. For deciding the welfare of the minor under this section, the age, sex, and religion of the minor and the preference of the minor – if (s)he can form an intelligent preference – and the character, capacity, and relationship of the guardian to the minor is to be considered.

It was held in 2004 SCMR 1839 that the welfare of a child supersedes a private settlement between the parents. Further, in 1994 SCMR 339 the SC held that where a mother and a father are not suitable for the custody of a child, a third person (the grandmother in that case) can be given custody of the child. In 1983 SCMR 606, the SC attached a broad meaning to the term "welfare of the children". The SC observed that material or financial well-being of the children may not be the only factors for weighing matters of "welfare". The family courts should also give importance to the moral, spiritual, and intellectual upbringing of the children in custody cases.

So, comprehensive terms of the plan notwithstanding, the family courts should continue to decide custody cases on the touchstone of "welfare of the children". The plan may not be suited in family cases where facts and circumstances are different. For example, the custody of a child may not be handed over to a father or a mother of odd character. More specifically, the family courts cannot grant the custody of a

child to a parent involved in a crime even when the other parent does not object to it.

Further, the plan issued by the SC appears to go against the Islamic tradition to the extent that "minor children will stay with their mother." Under classical Islamic law, a mother loses her preferential right to the custody of a child on contracting marriage to a man who is not related to the child within the prohibited degree of marriage. If the plan is followed without appreciating the "welfare of the children" in the peculiar circumstances of a case, it could violate the principles of classical Islamic law.

There seems to be some confusion in the legal fraternity regarding whether the so-called comprehensive plan is binding on family courts. It appears that the plan may not be construed as binding in cases where the facts and circumstances are different. The family courts can still decide custody cases keeping their chief concern, the "welfare of the children" in the particular circumstances of the relevant case. Article 189 of the Constitution provides that "[a]ny decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan." The terms of the plan neither appear to decide a specific "question of law" nor enunciate a "principle of law". It is merely a settlement between the parents. Thus, it may not be taken as a binding judgment in other custody cases.

In view of conflicting jurisprudence on child custody, the SC should examine the principles of classical Islamic law in the present-day context to provide a clearer policy and consistent legal principles to be followed by courts in deciding child custody cases. The jurisprudence on the validity of divorce also needs to be fixed for the legal fraternity and the public.

DIGITAL BANKING

THE dawn of Financial Technology (FinTech) brings with it many opportunities and challenges for the traditional banking sector in Pakistan. FinTech i.e. digital banking is likely to skyrocket if adequate awareness and security of data are provided to customers. The latest players in the financial market including TPL Rupya, Monet and FonePay are set out to disrupt traditional modes of banking.

The Payment Systems Reviews, issued by the State Bank of Pakistan (SBP), confirm the rapid growth of digital banking in the country. According to these reviews "digital channels have been rapidly replacing paper-based transactions as payments through Pakistan Real-Time Interbank Settlement Mechanism in the third quarter of FY18 stood at Rs 90.1 trillion against Rs 38.8tr in paper-based". It further provides that" there are 14,850 banks branches reported by 45 Banks/Microfinance Banks, out of which 117 are overseas branches. All branches in the country, except 23 are proving online banking services to their customers. There are 13,835 ATMs and 53,509 POS machines in country. In addition to these, banks offer Internet, mobile phone and call centers/IVR banking facilities".

The National Financial Inclusion Strategy aims to encourage people to have an account at a formal financial institution. This will help to document the economy and make it more inclusive via branchless banking (BB). It is claimed that BB will provide a cheaper and more efficient model than conventional branch-based banking, allowing customers to avail financial services with their mobile phone. BB can also be used to provide financial services to unbanked communities where physical branches do not exist.

In order to capitalise on these opportunities, the SBP will have to provide an enabling environment to banks and their customers based on international best practices. So far, there appears to be no consolidated legal framework or comprehensive guidelines for establishing and regulating independent 'digital banks' in Pakistan. The SBP should introduce a separate category of banking services through the promulgation of a Digital Banking Framework (DBF).

In view of the fast-growing use of digital banking, banks/FIs should make their customers aware of the use of digital services and the security of digitally processed financial transactions. Gaining the trust of customers who are reluctant to use technology in financial matters is challenging. To facilitate them, the Branchless Banking Regulations, 2016, may be translated into all languages spoken in Pakistan. Further, certain regulations need to be refined for the Banks and elaborated for the customers. For example, Regulation No.7 relating to Risk Management Programmes may be elaborated as to how 'technology-related risks' can be avoided by providing 'IT security measures'. What exactly are those 'risks and measures'? Customers should also understand Regulation No.8 providing for Customer Protection, Awareness, and Complaint Handling. Considering the rate of illiteracy, the frequency of fraud, and the probability and history of financial scams in Pakistan, as well as the hesitation of our old-age population to use technology, banks should be

required to launch an active media campaign to educate the people as to the advantages (and risks) of digital banking.

To prevent money laundering and terror financing, special attention should be paid to banking through digital channels. The Financial Action Task Force (FATF) has placed Pakistan on its grey list. FATF has stressed Pakistan's "structural deficiencies" in anti-money laundering (AML) and combating the financing of terrorism (CFT). Any misuse of digital banking services will affect the integrity and reputation of Pakistan's financial markets; foreign investors and banks are generally reluctant to do business with countries that allegedly finance terror or lack strong mechanisms to prevent such financing.

As per the FATF plan, certain targets have to be met by Pakistan in order to avoid slipping from the grey list to the black list. Financial institutions will have to comply with these targets while, at the same time, offering digital banking services to the customers. The SBP should instruct banks to check their links regularly and financial institutions should prohibit keeping business connections where Know Your Customer (KYC) requirements are not fulfilled. The SBP must strictly implement a legal and regulatory framework to counter the money/value transfer services (MVTS) threat. Pakistan should have an updated list of how many illegal money remitters exist in Pakistan and enlarge enforcement against all proscribed groups and individuals.

In the absence of strong security measures (i.e. firewalls, software, data protection laws) customers' data will remain exposed to be misused by cybercriminals. Banks should provide awareness and adequate protection to the customers. The SBP should strengthen monitoring mechanisms and conduct a regular review of its regulations.

In a nutshell, the SBP should introduce a comprehensive legal framework ensuring security of digital financial transactions. The rules regarding technology-related

risks and security measures may be elaborated. This legal framework should be reviewed regularly to improve the overall efficiency, protection, and effectiveness of financial transactions (including transfer of funds through digital channels) helping Pakistan to meet the FATF evolving targets and ensure an efficient economy.

WEAKENING CIVIL SERVANTS

The recent promulgation of the Civil Servants (Directory Retirement from Service) Rules, 2020 (the rules) amounts to weaken bureaucracy as it hits the old age principle of 'security of tenure' of the civil servants. The intention of the government to ensure efficiency in civil service notwithstanding, the operation of these rules would be problematic considering the politicization of civil service in Pakistan.

The rules authorize the government to retire the civil servants anytime. Section 2(1) (c) defines 'conduct unbecoming' of a civil servant broadly: "conduct unbecoming" means the conduct on the part of a civil servant that is contrary to public interests or which harms his standing or the standing of the civil service in the eyes of the public or is contrary to any prescribed law, rules, procedures, instructions and includes inefficiency on his part necessitating his directory retirement under these rules", without defining public interest.

Section 5 stipulates grounds for the retirement of a civil servant. It provides that a civil servant shall be recommended for 'directory retirement' under the rules, who (a) has earned average performance evaluation reports (PERs) or adverse remarks have been recorded in three or more PERs from three different officers, for a period not less than six months and have attained-finality after appeal there against, if any, (b) has been twice recommended for supersession by the Central Selection Board (CSB), Departmental Selection Board (DSB) or Departmental Promotion Committee (DPC), as the case may be, or twice not recommended for promotion by the High Powered Selection Board and such recommendations have been approved by the appointing authority and the matter has attained finality, (c) has been found guilty of corruption or has entered into plea bargain or voluntary return with National Accountability Bureau or any other investigating agency, (d) has been on more than one occasion placed in category 'C' by the CSB, DSB or, as the case may be, DPC under the Civil Servants Promotion (BPS-18 to BPS-21) Rules, 2019; or (e) has conduct unbecoming. I will explain how these grounds are sweeping and subjective.

Based on these grounds, a retirement board constituted under Section 3 is empowered to recommend early retirement of a civil servant in BPS 20 and above. Likewise, a retirement committee formed under Section 4 is mandated to propose premature retirement of a civil servant in BPS 19 and below.

The government claims that these rules would enhance the performance of the civil servants. However, the critical analysis of the rules shows otherwise. The terms like 'public interest', 'harms standing of the civil service', 'inefficiency', and 'average performance' are vague and interpretable. In an environment when NAB is allegedly making false cases for political victimization, the excessive use of imprecise terms in the rules can be exploited, misused or misinterpreted to victimize those officers who refuse to fall in the line. Hence,

these rules are inherently flawed and fatal for the independence of civil servants.

The civil service in Pakistan lacks expected neutrality and independence. S. M. Zafar, a senior lawyer, in his recently published book: 'History of Pakistan reinterpreted' states: "Unfortunately, by the political interference and later due to bureaucracy abdicating its neutrality…the image of bureaucracy in the public mind is unfavorable. They are looked upon as…servants of the rulers. The image of the office as the servant of the people is not yet well developed". Quoting from another book 'Ultimate Crime', he states, "once the work ethics of neutrality of police…is undermined…it soon turned into a tool of oppression and tyranny".

Given the compromised position and politicization of our civil service, the rules would further dilute the institution of civil service. It would make the bureaucracy vulnerable to political exploitation and revenge. The 'security of the tenure' is the only shield that protects civil servants from political onslaught and interference. It enables them to say no to those who want to use civil service as machinery for victimization. The security of tenure allows them to uphold the rule of law. The removal of the security of the tenure would, thus, make the survival of the civil servants' dependent on the pleasure of politicians. It would shake the entire edifice of governance in Pakistan.

The performance of civil servants can be effectively regulated under the existing rules such as the Government Servants (Efficiency and Discipline) Rules, 1973. The lacuna in the civil service laws could have been removed by amending those laws through a proper procedure involving consultation in the parliament. In any case, the performance of civil servants can be improved within the existing legal framework provided it is enforced without subjective considerations. Making new rules, without promoting merit and neutrality in the civil service and objective application of

the existing rules, creates a sense of insecurity amongst the civil servants and weakens the civil service.

The promulgation of indefinite and arbitrary rules in a politically charged environment provide unfettered power to rulers or their cronies resulting in the damaging of the civil institutions. The subject rules provide an unbridled power to the government and offend the due process of the law envisaged under Article 10-A of the constitution. How can it be ensured that these rules shall not be misused and the due process of law not avoided to punish 'selected' civil servants? More specifically, how can it be made sure that a ground of 'plea bargaining' under section 5 (c) of the rules shall not be created to retire non-compliant civil servants?

Any effort to enhance the efficiency of civil servants should be appreciated; however, an attempt to control civil servants must be resisted. The rules appear to tame the civil servants in the guise of regulation and improvement of civil service. Thus, these rules need to be revised to save the institution of civil service and promote good governance in Pakistan.

USING LAW TO CONTAIN A PANDEMIC

The subject of law deals with social realities; it applies in a context; interpreted and understood in a specific situation. Criminal law regulates human conduct by defining offences and prescribing its punishment. Lawmakers promulgate new laws with a careful appreciation of social realities. Those who enforce the law must reasonably understand the law and rules they are called upon to enforce. Flawed legislation or its arbitrary enforcement limits the rights and liberties of the people.

To combat Covid-19, the government of the Punjab, for instance, promulgated the Punjab Infectious Diseases (Prevention and Control) Ordinance 2020. Handling an epidemic with a legislative instrument is a necessary and appreciable step. However, such legislation must meet two requirements: first, it should strike a balance between the right to livelihood and the right to protection of the health of the people; second, it should ensure that fundamental rights

of the people are not undermined seriously. The ordinance fails to meet both the requirements.

First, the ordinance ignores our social realities such as poverty and unemployment. Under Section 5 of the ordinance, a person may be required to abstain from working or trade and his right to movement can also be restricted. In other words, the poverty-stricken persons can be compelled to stay home – without adequate financial support by the government. The government's initiative to help the poor through the Ehsaas Emergency Cash Programme promises a nominal amount that hardily meets the needs of any family. Whereas, a person can be detained through coercive measures which may lead to a conviction up to three months and a fine up to Rs50,000. Upon repeated violation, with imprisonment for a term up to one year (up to 18 months for running away from the place of detention) or a fine up to Rs100,000, or both (in case of a body corporate a fine up to Rs300,000). These stringent penalties, absent adequate financial security, may frustrate the poor and unemployed people and create anomalous behavior in the society.

Second, the ordinance empowers the government to require doctors and government servants to perform their duties without providing protective equipment. Section 4 of the Ordinance envisages the imposition of a duty upon all registered medical practitioners and health facilities to treat cases of infection or contamination. Section 5 requires government servants such as police officials to monitor and control public health risk with a simple precaution that a person may be required to wear specified protective clothing. The violation of these obligations attracts above-mentioned punishment. The strict performance of these obligations, without the provision of essential personal protection equipment, may expose doctors and police to serious health risk.

Section 14 of the ordinance obliges every person to inform to a notified medical officer as to the infectious disease of any person under one's care, supervision or control. Considering uncertain symptoms of the epidemic it may not be necessarily possible for a non-medical person to ascertain the symptoms and report the occurrence of disease to the relevant officer.

The ordinance imposes excessive obligations upon the people, the police officers and the doctors without the provision of adequate financial assistance and personal protection equipment. It provides unreasonable punishments. The conduct of the people can be regulated and improved combining minor penalties with awareness and educational tools.

The ordinance seems unnecessary when federal laws such as the Pakistan Penal Code, 1860 (PPC), and the Code of Criminal Procedure, 1898 (CrPC), already provide effective substantive law and procedural mechanism to handle human conduct in an emergency. Section 269 of the PPC provides a penalty up to six months or fine or both for a negligent act likely to spread the infection of any disease. Section 144 of the CrPC empowers district administration to issue orders in the public interest that may place a ban on an activity for a specific period of time. So, specifying or enhancing fine through ordinance, when people are suffering from economic constraints does not provide a good gesture and solution.

The ordinance seriously affects the right to life and liberty of the people that are protected under our constitution. Section 26 of the ordinance bars any civil or criminal remedies before any court of law against the action taken by government servants such. There is no denial of the proposition that restrictions can be imposed on fundamental rights in times of crisis and to protect public health. But it has to be done under a valid law. In any case, the content of the law which governs the life or liberty of the people must meet

the requirements of the constitution. The ordinance fails to meet this requirement as it fails to ensure the means of subsistence (right to life) and protection from misuse of the state powers (right to dignity of man).

The ordinance further undermines the rights of the people while conferring extensive powers on police without proper training. When the content and scope of any law is imprecise the risk of its abuse is undeniable. In principle, the authority of government servants is not unlimited. They must know the limits provided under the constitution—ignorance of what a person is supposed to know is not an excuse. If a public officer disregards or ignores such limits he commits a fault, which cannot be protected under the bar provided in the ordinance.

Briefly, the ordinance should be substantively revised to provide enhanced measures for the protection of fundamental rights of the people. Besides, if so required, the federal legislature should promulgate a federal law aiming to combat the pandemic in the country in a coordinated and effective manner. It should make the obligations of public officers such as police and doctors clear and realistic. It should define a 'negligent act' with precision and distinguish between a 'safety precautio" and a 'legal obligation' facilitating the government servants in the execution of the law. In short, in case of any calamity, federal law must protect both the right to livelihood and the right to protection of individual and public health in a balanced manner.

REFORMING EDUCATION SYSTEM

Education is the bedrock for the development of any country. Strong education systems produce men of vision, men of character, and men of letters, not merely 'men of degrees. Unfortunately, our education system is producing worthless 'paper degrees'. Thus, we are falling behind other nations in knowledge and research. We witness invention of every kind in the developed countries. We seem to have no other option except to borrow or beg technology and even medicines from others. Notwithstanding the Axact fake degree scam, many institutions in Pakistan are a awarding 'procedurally genuine' but actually 'fake degrees' as the majority of such degree holders are blind followers of dead letters. They have memorised text without critically analysing the concepts. The race for mere degrees is like a rat race; one who wins the rat race remains a rat. So, we have acute shortage of genuine social and natural science scholars in Pakistan. Some scholars that we have prefer serving abroad due to lack of academic culture and political victimisation in our institutions.

We continue to fail to learn from the developments in other parts of the world and seem to ignore teachings of our ancestors. We have failed to comprehend Iqbal's philosophy of 'self' as well as Sayyed's passion for education and intellectual pluralism. Iqbal's 'self' demands a recurrent evolution in knowledge and morality to strengthen society. Sayyed sees a wide-open quest for knowledge as a virtue. Instead of developing this 'self' and 'quest' for the progress of human thought, we have developed a certain anxiety about free ideas and a thirst for materialism. In fact, we lack in the values envisioned by Iqbal, Sayyed, and Jinnah and thus rarely find a restless, self-advancing, self-improving, optimistic, rational, confident, and idealistic individual – a person who believes in constant evolution, progress, and change in oneself and one's society.

On the other hand, one can see a high level of debate and intellectual engagement in universities like Oxford, Cambridge and Harvard. Universities in developed countries focus on creativity and original research. They introduce students to a variety of views and encourage them to apply and appreciate these ideas in different contexts. The students can challenge these ideas and differ with their teachers. They can challenge conventional wisdom in every discipline i.e., religion, culture, health, history, politics, business, music, nanotechnology, crime, fashion, etc. The people consider that ideas cannot freeze and events are contextualised in time and space so they can be revised and/or better understood employing philosophical, scientific, theological, and psychological knowledge of the present time. This perception of knowledge, in my view, can be helpful for producing fresh thinking in our educational institutions.

Moreover, what makes the West advance is not raw intellect but their commitment to reason, research, duty, discipline, and open debate. Constant engagement makes them informed and better than others in research, technology, development, and policy making. In the West, academia

informs the policy making process through press coverage and consultation. In our country, however, the academia is rarely consulted by policymakers. Our policies (including educational policies) are generally motivated by short-term political objectives.

At the same time, some people think that the present in the West may be the future of the non-West. In my opinion, ideas like 'secularism', 'enlightenment', and 'liberalism' cannot simply be transplanted in a different soil. These concepts require space for evolution and the recognition of different religious, social, economic, and cultural realities in true spirit of democracy. Every ethnicity, religion and community (national or even post-national) can maintain, evolve, and present its 'distinctive consciousness' while appreciating the values of the others. So, we may learn and accommodate others' views. One does not necessarily need fixed attachment to the unshakeable beliefs, ideas, ideologies, or ideocracy presented by others. The notions of history, origins, culture, values, customs, norms, beliefs, normality, truth, nature, authenticity, development, stability, and consensus evolve; these notions can be challenged in the light of knowledge acquired over the process of human civilisation. I do not mean that every notion and narrative is totally false; rather, I think there should always be kept a space for evolution as humans cannot claim finality in their efforts or ideas. So, we need to construct and reconstruct our worldview with reading, reflection, and constant critique. That construction seems impossible without reconstruction of our education system.

Finally, a true education system teaches tolerance. It develops an 'ethics of engagement' and appreciation of historical, religious, and cultural differences to develop an 'overlapping world view' providing peace and prosperity for mankind. With this optimism, the following specific suggestions may be offered for Pakistan:

First, we must improve our education system from the primary school to the university level. Syllabi should be revised to include topics like pluralism, civic life, ethics, basic health, legal rights, etc. The students should be involved in leaning activity. Traditional lecture system should be replaced with open discussion and advance reading. Excessive photocopying from books and notes should be discouraged. Exams should test the basic skills of reading, writing, analysis, thinking, and not mere memory.

Second, we need to promote intellectual dialogue on important issues (e.g., extremism, electoral reforms, law and order, development, etc.) in our educational institutions. These debates should be publicised through media. Keeping in view the resources and security, tele-conferences should be arranged amongst scholars from around the world and findings of these debates should be circulated at every level in national and local languages.

Third, our media should present intellectually rich, coherent, and clear discussions regarding educational reforms and other matters of national interest. Researchers, technocrats, and academia should be provided more space on electronic and print media to address long-term national issues i.e., reconstruction of our education system.

COLONIAL LAWS IN A POST-COLONIAL STATE

In 1947, the sub-continent got freedom from the British government creating the dominion of Pakistan and India. Both the countries inherited the legacy of colonial laws promulgated in the nineteenth or early twentieth century to rule on the colonies. However, even after the lapse of more than seventy years, Pakistan is largely run under the colonial legal framework. The colonial laws were created in a specific political context and for a specific purpose to regulate the subjects of the Empire. Most of these laws have lost their relevance (hence, outdated). But no serious effort is made by our legislature to repeal or revise these laws considering that the people of Pakistan are now free citizens of an independent State.

A quick survey of civil and criminal laws reveals the impact of colonial rules in our legal system. The colonial edifice of laws that are applicable in Pakistan includes the Code of Civil Procedure, 1908 (CPC), the Contract Act, 1872, the Court Fees Act, 1870, the Land Acquisition Act, 1894, the

Specific Relief Act, 1877, the Transfer of Property Act, 1882, the Canal and Drainage Act, 1873, the Arbitration Act, 1940, the Guardians and Wards Act, 1890, the Oath Act, 1873, the Electricity Act, 1910, the Banker's Books Evidence Act, 1891, the Code of Criminal Procedure, 1898 (CrPC), the Pakistan Penal Code, 1860 (PPC), Explosives Act, 1884, Fatal Accidents Act, 1855, Forest Act, 1927, and Ancient Monuments Prevention Act, 1904.

The bulk of these laws carry the date of its commencement from the 19th or early 20th century. Obviously, the colonial masters created laws to regulate (read tame) the subjects of a colony. So, the very intent of the ruler and the objective of such laws make them unsuitable for a free State. How can citizens of an independent State enjoy fruits of freedom within the legal framework conceived and crafted by a colonizer? How can institutional structures designed by a master foster the dignity, freedom and liberty of slaves? How can modern democracy be promoted under the legacy of colonial laws?

The premises and genesis of procedures and our substantive laws are colonial. For example, Sections 46, 54, 55, and 56 of PPC, Sections 61, 340 of CrPC, and Rules 26.1 and 26.2 of the Police Rules, 1934 describe the powers of the police to arrest a person and rights of the arrested person. However, these laws do not envisage any effective control and accountability over the police officers that how should they exercise their power to arrest. Similarly, Ch.4 of the Police Rules, 1934 provides for clothing/uniform and badges of police; however, it does not require the arresting officers to bear a clear identification of their name to facilitate easy identification. Under the existing criminal laws, the arresting officers are neither required to inform the person arrested that he has a right to have a relative or friend informed or the arrest nor to use any standardized language when arresting a suspect. The police officers are also not obliged to explain to the person arrested their right to bail in a non-bailable case.

Thus, criminal laws should be amended to specify as to how, when, where, and in what circumstances the arrest can be made. The practice of arrest can be improved by increased vigilance over the police though monitoring by civil society (e.g. a citizen's committee), supervision within the hierarchy of police (e.g. review of arrest by officer-in-charge), and by providing penal consequences for the police for non-compliance with the guidelines and mandate of the law. Effective control and accountability of arresting officers need to be established, so that arrest is made only when it is necessary--to avoid harassment and unlawful detention of the citizens of a free State. The law must provide clear and consistent guidance for making an arrest, as it deprives a person of the precious fundamental right to 'life and liberty'.

The criminal laws need to provide for displaying posters at conspicuous places at the police station in a local language. These posters should provide information as to the legal rights of the arrested person while in prison and also his/her rights of bail. Information leaflets should be provided in the language of the arrested person so that he could understand his legal rights and seek their protection. There must be a mandatory review of the arrest by the officer-in-charge to minimize arbitrary detention and protect the dignity of the citizens. The officer-in-charge of a police station must be made responsible for health and welfare of the arrested person and to monitor the arrested persons regularly to ensure they are not mistreated or tortured for the extraction of evidence or for any other reason. The law must ensure that the right to consult a lawyer is provided to the arrested person before being questioned by the police. The officer-in-charge must be held responsible if this right is denied to the arrested person. Complete information must be provided to the accused and his lawyer to provide him with the right to a fair trial and due process under Art.10A of the Constitution. The vulnerable person like sick, women, and children must be provided additional support at the police station for the

protection of their dignity. There should be an effective mechanism for the redressal of complaints against the police, so that arrested person could make a complaint without any fear. A time period may be fixed for the disposal of complaints and the decision of police authorities should be made subject to judicial review.

There should be step-by-step guidance for the police on how to make an arrest as it is a matter of liberty of the citizens. The arresting officer must satisfy a 'specified criteria' before causing an arrest and must be made to explain the arrest to officer-in-charge and the lawyer of the arrested person. There should be a strong monitoring and accountability mechanism in place to ensure that fundamental rights of the arrested person are protected (subject to reasonable restrictions imposed by laws i.e., prison regulations).

The laws promulgated in the 19th century also have lost their relevance and efficacy. The Code of Civil Procedure, 1908, provides a procedural mechanism for the trial and adjudication of the matters of civil nature. A civil trial begins with the filing of a civil suit before a civil court of competent jurisdiction. Under Order 5 of the CPC, the court then issues summons to the party against whom the suit is filed. Sometimes, it takes months before the service of notice is affected. The mode of summoning has obviously become outdated as it requires service of notice through conventional means such as the staff of the court and courier etc. It is to be appreciated that we have entered into a digital age when a more efficient mode of service of notice through social media channels is available. In Punjab, some amendments have been made (Section 27 A) in the CPC allowing service of summons through an electronic device; however, service through social media channels is not specifically provided. Some amendments provide timelines for filing pleadings, producing evidence and written arguments, which are appreciable. But these amendments appear to be a patchwork considering the

overall scheme and span of the CPC. In fact, a thorough review of the CPC is needed with the consultation of civil procedure experts like Justice (R) Aamer Raza A. Khan from Pakistan and renowned juristic from other countries. Despite recent amendments, Order 9 of the CPC requires physical attendance of both the parties and their counsels on each date of hearing with consequences for non-appearance such as the dismissal of the suit or ex-parte proceedings. The conclusion of a trial generally takes years. Thus, the stringent requirement of physical appearance on each date causes inconvenience to the parties or their counsels. The electronic filing of pleadings and the conduct the proceedings through video link etc. can be adopted by amending inefficient court procedures.

Similarly, laws pertaining to powers of civil servants such as the Police Rules, 1934 and the architecture of civil service were constructed by colonial masters to subjugate the population of a colony. The very foundation of civil service is erected on the premise of 'master and servant'. The civil service of the Britsih India was meant to stifle the basic rights of the 'colonized' people. Unfortunately, we carry on with such a legal framework and institutional structures that are colonial (hence, oppressive) in nature. The civil servants in Pakistan largely enjoy impunity for their actions taken in 'good faith'. The term 'good faith' is essentially vague and grey. It provides protection from the consequences of unlawful and unfettered actions. Therefore, the civil service needs to be effectively regulated and reformed for the protection of the fundamental rights of the people.

A large number of outdated revenue and property laws are retained: The Central Board of Revenue Act, 1924, The Land Improvement Loans Act, 1883, The Partition Act, 1893, The Transfer of Property Act, 1882, and The Registration Act, 1908. Needless to mention that the British Empire formulated such laws to extract the maximum revenue from the subjects of a colony. Even after the lapse of more than a century most of the revenue laws are kept intact. The

designations of the revenue staff remain unchanged. The unfettered powers of the revenue continue as it is.

We are essentially continuing the laws and policies of 1947 when the Government of India Act, 1935, was adopted by Pakistan as the main instrument for governance. Since then sporadic efforts have been made to upgrade some laws; however, a consistent, systematic and comprehensive approach in this regard is lacking. To move forward as an independent State, the plethora of laws embraced in 1947 need to be reviewed with a thorough deliberation of the legislature and the members of the legal fraternity.

The global legal landscape is fast changing. We need to come out of our colonial past and accommodate change in laws and our legal system. ALL the existing laws in Pakistan are required to be critically examined and updated appreciating the jurisprudential and institutional developments worldwide, advancement in international commerce and business relations, dynamics of social, civil, political, and economic rights and liberties, and innovation in science and technology. In short, to strengthen the justice system of Pakistan, a robust project of legal and judicial reforms needs to be initiated and supported by the legislature, the executive, and the judiciary.

Reflections on Open Government in Pakistan

We are passing through uncertain times. It is stated that we have to learn to live with the virus. Okay. The marginalized segment of our society is already living with the virus of poverty and injustice. Now, we need to think how can we 'open up' our government after the Covid crisis ends? Whilst the lockdown hits the poor and vulnerable most, those sitting in comfortable zones should have used this time to consider ways to expose our government and all of our policymakers, to a severe but cleansing light. COVID-19 has exposed gaps in our policymaking and institutional outlook. We need to reset our national priorities.

Our executive branch seems to have 'hope' and 'faith', but without due appreciation for 'national unity' or 'discipline'. Egos appear to supersede the pursuit of any national consensus—a need that is, paradoxically, exaggerated in normal times but, evidently, forgotten when it's most needed. Our political leaders seem to lack any appreciation for the

reality we confront. Why have our elected leaders been unable to help us avoid widespread poverty and injustice? Why have our governments failed to provide health, education, and employment to the people? Why our institutions are not efficient enough and strong?

Even beyond the government, our legislature has lost its credibility, being unable to perform its primary role, namely lawmaking-through parliament. Unfortunately, frequent laws in our country are promulgated through an ordinance by the executive. There is hardly any meaningful debate in the parliament. Is a 'democracy' not a government of the people, by the people, and for its people? Is not 'democracy' without a functional parliament an oxymoron? Is it not the legislature's responsibility to address the needs of our society through effective lawmaking? Indeed, are our legislators accountable to their leader … or their voters? Clearly, a government with a functioning legislature acting for its people with appropriate laws is the need of the hour in Pakistan! In my opinion, our parliament should act for the people of Pakistan, not the vested interests of a particular leader or party; they should oppose any ordinance which is passed without 'meaningful' consultation: policy issues must be resolved through political forums.

One might also ask, with all due respect, a few questions of our judiciary. Has validating unconstitutional regimes made our country better? How can our judiciary demonstrate, through case-based decisions rather than suo motu policymaking, that judicial independence is a reality rather than a slogan in Pakistan? 'Justice' depends on clear and consistent judicial reasoning rooted in existing laws, not 'popular' decisions that simply reflect passing expressions of public opinion. The performance of judiciary is assessed based on the timely delivery and the quality of justice. Indeed, where our laws are inadequate, our parliament should be expected to improve them. Where financial support or independence is needed, the government should provide it.

And, finally, COVID-19 may help us—finally—update our understanding of national security to reflect a form of human security. The security of our people—surely the main point of any serious thinking about national security—requires an appreciation for the input of experts in health, economics, education, technology, politics, and law. Indeed, being located in a hostile neighbourhood, Pakistan needs adequate resources to safeguard state security. But it does not mean that public health and education are less important. We need to adopt a balanced approach to ensure both state security and human security. This twofold approach on security can guarantee our national security.

The lockdown may it be smart or relaxed is, for those with the privilege of thinking rather than merely surviving, an opportunity. It is an opportunity to reconsider our approach to good governance, rooted in parliamentary power, the rule of law, and human security. This notion of good governance is one where all of our institutions perform their functions whilst remaining within the limits established by our constitution. Have different models of democracy ('basic', 'Islamic', 'real', and or 'controlled' democracy) helped us address the challenges we face? Has judicial activism promoted the rule of law, constitutionalism and the fundamental rights of the people? Has political disunity or lack of consensus amongst the federation and provinces or within political parties on issues of national importance strengthened our institutions? No.

Can I recommend, instead, a renewed pledge and focus on 'functional' parliamentary democracy, national unity and discipline, and socio-economic justice aspired by Muhammad Ali Jinnah, the founder of Pakistan? After the Covid crisis is over, this more than anything else will help our poor majority restore its confidence in the state. Beyond COVID-19, this will help us kill the enemies (marginalization, injustice, and misallocations of power) eating the vitals of our nation from within.

CONCLUSION

Pakistan's justice system is at a crossroads. It consistently receives low rankings on worldwide justice-system indicators. It suffers from inefficiency and delays in the delivery of justice. It is no surprise that people have lost faith in our system. It lacks institutional capacity, discipline, and merit as well as real transparency, regulation, and accountability. Our legal history is bleeding from repeated attacks on the independence of our judiciary—not only by military or civilian governments but also by some weak members of our judiciary. Compromises on the rule of law and constitutionalism have affected the credibility of our system.

An 'institutionalized relationship' between the bench and the bar is (almost) missing. There are meetings, but these are merely for convenience and mutual support. Our bar councils are highly politicized; they have failed to perform their main role: the regulation and improvement of the legal profession. Bar elections are contested without any serious manifesto for reform. Hollow slogans regarding the 'welfare of the bar' and 'legal reforms' are used to influence voters. There is hardly any programme for the professional

development of young lawyers. Legal education and the training of our lawyers is extremely poor. There is neither an effective check on entry to the bar nor any mandatory training after joining.

The issues confronting our justice system are generally ignored. An overhaul is needed, but with thorough deliberation and collaboration involving several stakeholders, plus serious financial support from the government as well as a strong commitment, both from the government and from our judicial leaders and the bar. A few ceremonial speeches or cosmetic steps and a bit of window dressing cannot address the problems. Justice has to be delivered to the people of Pakistan in both letter and spirit.

This book discusses some of these issues—the tip of the iceberg. It highlights an immediate and pressing need for both legal and judicial reforms, paying particular attention to the need for improvements in legal education. It also suggests changes in judicial and legal policymaking processes, for example with respect to judicial appointments and accountability as well as the regulation of the bar and the capacity-building of lawyers: professionalism, ethics, and the eradication of gender-based discrimination in our field.

Ideas and innovation, focusing on the rule of law and the supremacy of the constitution whilst embracing the use of technology, cannot be neglected. How will human rights be protected in a digital age? Fundamental rights and the suo motu powers of the Supreme Court have been debated in some detail, yet both deserve still more attention. Terrorism and the application of international law has been examined—not only in Pakistan but also in Kashmir, Palestine and Myanmar. The establishment of military courts has been examined and criticized. But, at a grassroots level, I have also stressed the flaws in our criminal justice system and the plight of our district courts.

This book aims to encourage a constructive debate, focusing on justice and legal reform in Pakistan. Nations progress when they promote education and research, non-discrimination, constitutionalism, human rights, an independent judiciary, justice, merit, and accountability. I am a lawyer in Pakistan. But I remain a student of law. My careful study of our justice system has drawn my attention to key areas needing more attention. Practice *within* our justice system, however, has shown me how important it is to engage these areas—via nuanced understanding and vigorous reform—to serve the citizens of Pakistan. Pakistan deserves a stronger justice system. Many stakeholders, including both scholars and practitioners (legal, judicial, political), will be needed to imagine, create, and sustain it.

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He has the honour of delivering lectures at National Defense University, International Islamic University, Foreign Service Academy, National Police Academy, Civil Services Academy, Punjab Judicial Academy, Pakistan College of Law and Punjab University Law College. He was invited as a visiting scholar at SOAS, University of London. He has attended the Hague Academy of International Law courses. He also worked as a consultant in a Legal and Judicial Reforms Project in Pakistan conducted in collaboration with the Asian Development Bank.

Backside

A multi-dimensional view of justice, the judiciary, and law in Pakistan from a powerful and important perspective—an elite lawyer from a modest background combining academic analysis with policy-oriented suggestions and a strong attachment to grassroots public concerns. This collection is a breath of fresh air. What does a sincere personal commitment to justice and the rule-of-law look like in Pakistan? Read this book.

Dr Matthew J. Nelson (SOAS)

The academic platform remains a very powerful tool when in the hands of a capable one. Dr. Zia Ullah Ranjah's book is one such academic work. It is a great effort to carefully study and examine Pakistan's justice system. Dr. Ranjah has made a conscious and effective effort to look into the intricacies of our justice system. It's strength lies in the fact that it deals with the topic in a thorough manner. Dr. Ranjah's long experience in research writing reflects in the details, structure and narratives of this book. It presents a nuanced understanding of policy issues with concrete proposals for rigorous reforms in the legal profession. It is a useful read for anyone working in the justice system in Pakistan and wants to attain deep understanding of its structure and working. And this book is a must read for anyone interested in judicial and legal reforms on Pakistan. I would recommend it for all students of law.

Prof. Humayoun Ihsan

A multi-dimensional view of justice, the judiciary, and law in Pakistan from a powerful and important perspective— an elite lawyer from a modest background combining academic analysis withpolicy-oriented suggestions and a strong attachment to grassroots public concerns. This collection is a breath of fresh air. What does a sincere personal commitment to justice and the rule-of-law look like in Pakistan? Read this book.

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Pakistan deserves a strong justice system. This book is an important contribution and an essential reading for improving Pakistan's justice system. The clear and focused approach of Dr. Zia Ullah Ranjah is expected to raise a rich debate on justice system reforms in Pakistan.

Stephen McNamara
Solicitor of the Supreme Court of England