INTERNATIONAL JUDICIAL CONFERENCE

Islamabad Pakistan

18-19 April, 2014

Law and Justice Commission of Pakistan, Islamabad

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FOREWORD

Judicial Conference has now become recurring annual event being organized by the Law and Justice Commission of Pakistan under the auspices of the National Judicial (Policy Making) Committee (NJPMC). The purpose of organizing this mega event is to provide an opportunity to the international and national luminaries in the field of law and judicial administration to discuss issues of common concern faced by the judicial system and make recommendations to solve the same. The papers presented and deliberations made in the working groups, led to the formulation of recommendations and the gist thereof was read out as Conference Declaration.

I am thankful to the Hon'ble Chief Justice of Pakistan, members of the National Judicial (Policy Making) Committee, Hon'ble Chairman and members of the Organizing Committee for their vision, leadership and support for holding this important event in a successful and befitting manner. I also express my deep appreciation and gratitude to the judges of the Supreme Court, Chief Justices and Judges of High Courts who chaired the Group Sessions and gave input in formulating recommendations. Last but not the least, I must appreciate the international delegates, who traveled from around the world and members of the judiciary, bar and media who attended the event and gave their invaluable input. The proceedings of the Conference together with the papers read and recommendations made are being published in this report.

Secretary

Date: 22-11-2014

Conference Proceedings

The Conference was held on 18 – 19 April, 2014 in the Supreme Court Building, Islamabad. Holding of Judicial Conference is a recurring annual event being organized by the Law and Justice Commission of Pakistan under the auspices of the National Judicial (Policy Making) Committee.

Participatory methodology formed the basis of this two-day Conference. The participants showed their keen interest in the interactive discussions in working groups. At the end of working sessions each group formulated resolution which was read over by the Chairperson of respective group in the concluding session. On the basis of each group's recommendations, a Conference Declaration was drafted which was adopted by the participants as "Islamabad Declaration."

Day 1 - Friday, 18th April 2014:

The Hon'ble Mr. Justice Tassaduq Hussain Jillani, Chief Justice of Pakistan/ Chairman National Judicial (Policy Making) Committee (NJPMC), inaugurated the Conference. The proceedings of the inaugural session commenced with recitation from the Holy Quran, followed by introductory remarks of Hon'ble Mr. Justice Nasir-ul-Mulk, Chairman Organizing Committee and the keynote address by the Hon'ble Chief Justice of Pakistan/Chairman, NJPMC. The complete text of these speeches is being published in this Report.

Day 2 - Saturday, 19th April 2014:

The Conference provided a platform and opportunity to the national and international luminaries in the field of law and judicial administration to interact, share experiences, views and concerns for devising best strategies to resolve issues related to selected topics. Thematic topics of the Conference were based on the issues identified after broad consultations. Foreign dignitaries, Chief Justices and judges of the Supreme Courts and Constitutional Courts, jurists, lawyers and legal experts were invited to deliberate on the selected topics. The participants assembled in the following four thematic groups which were chaired by the Judges of the Supreme Court of Pakistan.

I) **Judicial Review of Administrative Actions**
II) **Role of Judiciary in Protecting Human Rights**
III) **Access to Justice in the context of Constitutional Requirements**
IV) **Role of Judiciary in Promotion of Culture of Tolerance**

Each Group started its proceedings at 9:00 A.M. with a welcome note and introduction followed by presentation of papers and speeches. Thereafter, floor was opened for deliberations. Sessions ended at 4:00 P.M. with formulation of recommendations and approval of draft resolutions.

Formal concluding session was held in the Auditorium, Supreme Court Building, Islamabad. A large number of foreign and domestic delegates attended the same. The session started with recitation from the Holy Quran. The Chairpersons of each group presented the recommendations of his respective group. On the basis of recommendations a declaration was drafted and presented before the Conference which was unanimously approved as Conference Declaration.

The Chief Justice of Pakistan/Chairman, NJPMC in his concluding address highlighted the key areas and issues identified by the working groups and also read out Conference Declaration. He thanked the foreign and domestic delegates, Organizing Committee, rapporteurs, staff of the Law and Justice Commission of Pakistan and Supreme Court of Pakistan, who worked hard to make this event successful. He also appreciated the role of media for covering this mega event.

Inaugural Session

Mr. Justice, Tassaduq Hussain Jillani, Chief Justice of Pakistan/Chairman, Law and Justice Commission of Pakistan with Mr. Justice Nasir-ul-Mulk, Chairman Organizing Committee

Participants of the Inaugural Session

Introductory Remarks by Hon'ble Mr. Justice Nasir-ul-Mulk, Chairman, Organizing Committee

Bismillahir Rahmanir Rahim
Hon'ble Chief Justice of Pakistan;
My brother Judges of the Supreme Court;
Hon'ble Chief Justice and Judges of the Federal Shariat Court;
Hon'ble Chief Justices and Judges of the High Courts;
Hon'ble Chief Justices and Judges of the Supreme Court and High Court of Azad Jammu and Kashmir;
Hon'ble Chief Judge and Judges of Supreme Appellate Court and Chief Court of Gilgit-Baltistan;
Distinguished members of the District Judiciary;
Distinguished foreign delegates;
Your Excellencies;
Learned Law Officers;
Worthy Office Bearers of the Bar Councils and Bar Associations;
Learned members of the Bar;
Distinguished guests;

Ladies and Gentlemen,

Assalam-o-Alaikum,

It is a moment of great honour and immense pleasure for me to welcome you all to this year's International Judicial Conference and address the august assembly of legal luminaries and dignitaries.

I must express my gratitude to you for being a part of this Conference, providing us with a valued opportunity to learn from each other critical assessment of contemporary national and trans-national legal issues. I am particularly grateful to the foreign delegates who have gathered today in this Conference.

The Law and Justice Commission has been holding Judicial Conference as an annual symposium since the year 2006, providing a unique avenue for dialogues which have practical value in helping us to revamp the legal and judicial structure through the providence of law.

Deliberations in previous Conferences have helped us to improve access to justice in Pakistan. Some of the major developments saliently improved by recommendations reached at the Conference over the years have been improvement in the effective utilization of information technology in courts, altering the traditional methods for improved judicial training at better organized judicial academies.

We hope to continue with this tradition in this year's Conference and attempt to reach recommendations which will in long haul contribute towards reforming our judicial system.

Ladies and gentlemen,

It is a matter of concern to note that even in the contemporary age when human consciousness has shrunk the world to a cyber village, justice remains to a large extent illusory. The dream of human life with complete dignity of social, economic and cultural rights remains unfulfilled. It is in this context that we have arranged this Conference to debate ideas of justice and legal response to challenges which currently threaten common human predicament. Bar and Bench have a common interest in achieving justice for ushering in a period of equitable human development. Law and judiciary have to play an active and at times even an activist role in eradicating violence against the marginalized. The common idea linking the different thematic groups in the Conference is a search for principles of Rule of Law which will guide both the Bar and the Bench in their ethical commitment to strive towards justice for all. It is in this vein that we have divided the Conference into four working groups:

Group 1: **Judicial Review of Administrative Actions**
Group 2: **Role of Judiciary in Protecting Human Rights**
Group 3: **Access to Justice in the Context of Constitutional Requirements**
Group 4: **Role of Judiciary in Promotion of Culture of Tolerance**

Ladies and gentlemen,

In times when rights of the people are threatened by the capricious exercise of state power, judiciary has become a voice for the weak through its progressive jurisprudence of judicial review. We will in the first group discuss the historically enhanced role of the judiciary in reviewing administrative actions of the executive in order to preserve and protect rights of the people. As a guardian of the text and the spirit of the Constitution, it remains the responsibility of the judiciary to ensure that regimes of human rights are socially recognized, realized and respected.

In our second group we would discuss the role played by the judiciary for the protection of Human Rights. Our Constitution entails exhaustive requirements to provide the people access to affordable justice without delay. Our third group will entail a discussion on the subject. Our fourth group will explore the role Judiciary has played in creating a pluralist society by developing a culture of tolerance respecting human differences through its persistent and valiant efforts.

Ladies and gentlemen,

As Chairman of the Organizing Committee for the Conference, I express my gratitude to the members of the Organizing Committee: Hon'ble Mr. Justice Jawwad S. Khawaja, Hon'ble Mr. Justice Anwar Zaheer Jamali, Hon'ble Mr. Justice Khilji Arif Hussain and Hon'ble Mr. Justice Mian Saqib Nisar. I owe a special thanks to Hon'ble Mr. Justice Mian Saqib Nisar for overseeing the arrangements and ensuring that everything in the Conference is in place. Hon'ble Chief Justice of Pakistan Mr. Justice Tassaduq Hussain Jillani has remained an untiring force and motivation behind this Conference.

I must also thank Raja Akhlaq Hussain, Secretary Law and Justice Commission of Pakistan and the staff of the Commission for their hard work in organizing this Conference. My special thanks to Barrister Amber Darr for her proactive role as Content Director of the Conference. This Conference has been organized with a desire for a future where justice for all shall become a reality for our future generations to enjoy as a right.

I invite you all to deliberate and discuss freely throughout the sessions and to evolve meaningful recommendations, remembering that these thoughts and ideas will help in creating a new social reality.

With these words, I welcome you again to the Conference and good time in Islamabad.

Thank you

Keynote Address by Hon'ble Mr. Justice Tassaduq Hussain Jillani, Chief Justice of Pakistan/Chairman, Law and Justice Commission of Pakistan

My brother Judges of the Supreme Court of Pakistan;
Hon'ble Chief Justice Supreme Court of Azad Jammu & Kashmir;
Hon'ble Chief Justices and Judges of the Federal Shariat Court, High Courts of Pakistan and the High Court of Azad Jammu & Kashmir;
Hon'ble Chief Judge Supreme Appellate Court Gilgit-Baltistan and Chief Judge, Chief Court Gilgit-Baltistan;
Learned members of the District Judiciary;
Attorney General for Pakistan and Advocate Generals of Balochistan, Khyber Pakhtunkhwa, Punjab and Sindh;
Vice Chairman and Office Bearers of Pakistan Bar Council and the Provincial Bar Councils;
President and Office Bearers of the Supreme Court Bar Association;
Presidents and Office Bearers of the High Court and District Bar Associations;
Eminent International delegates;
Distinguished Guests;

Ladies and Gentlemen,

Assalam-o-Alaikum,

On behalf of the Judiciary, it gives me great pleasure to welcome you all to the inaugural ceremony of the International Judicial Conference 2014. It is an honor for me to address this gathering of distinguished legal minds from both within the country and abroad. I am particularly honored to have in our midst a number of distinguished foreign delegates who have taken time out of their busy schedules and have traveled considerable distances solely in order to enrich us with their knowledge and their presence.

In August, 2006, when the Supreme Court organized first International Judicial Conference to mark the 50th Anniversary of this Court, about 100 delegates from all over the globe participated. To mark the occasion, we erected a monument which you would find right in front of the Supreme Court Building and on it we inscribed a

pledge, a vision and a resolve. We said, ***"Completing fifty years is not merely a moment to rejoice. It is a moment to reflect and a moment to re-dedicate. On this momentous occasion, as we assemble, we reaffirm our faith and resolve to protect and preserve the Constitution----its abiding principles, its cherished goals and the civilizing institutions that it mandates to establish."*** History of this Court ever since then is a testimony to the fact that we have stood by the words, the pledge and the resolve.

Ladies and Gentlemen,

The International Judicial Conference, which now has become almost a regular feature, primarily serves three key purposes, which are crucial to the proper administration of justice in the country: It provides an invaluable platform to lawyers and judges for the sharing of ideas across different aspects of the law; it promotes communication and understanding between the bench and the bar and indeed throughout the legal community in a comfortable and collegial environment away from the adversarial norm of our courts, and finally, it allows for the generation of new ideas and approaches to tackle the myriad of legal issues that face not only our country today but are also relevant to nations throughout the world. The Supreme Court is proud to spearhead and support this initiative with the support of the Law and Justice Commission of Pakistan, and we hope that each one of you will participate fully to take advantage of the tremendous and manifold opportunities that an event such as this has on offer.

An important feature of this Conference is to share with you the matters and issues that have occupied the attention of the Supreme Court in the last year as also its vision for the future of administration of justice in the country. As you are all aware, the preceding year witnessed an important transition in judicial history when the responsibility of leading this apex body was transferred to me from my predecessor the former Chief Justice of Pakistan Hon'ble Mr. Justice Iftikhar Muhammad Chaudhry who after completing a momentous period of his career attained the age of superannuation. The challenges faced by the judiciary during the last few years have recharged the judiciary as an active and respected pillar of State which marked the beginning of a new era of constitutional jurisprudence. It was during this period that the judiciary finally put an end to constitutional deviations, expanded the social role of the rule of law and, most importantly, created greater awareness amongst the people of the values of democracy and the true meaning of fundamental rights guaranteed under the Constitution.

I would also like to take this opportunity to underscore the fact that it was the collective determination and effort of the superior judiciary in the post 2007 period that transformed this Court from a formal constitutional court to a Supreme Court with a Human Rights face. In this avatar, the Supreme Court has time and again affirmed that the essence of constitutional interpretation is, and has to be, the betterment of the people whilst still remaining within the bounds of the law. This resolve of the Supreme Court is also reflected in our official court anthem, ***"Justice for All"*** which I had the honor of penning on eve of the first International Judicial Conference held in 2006 and which was presented before you by the chorus of young children a short while earlier.

The insight and greater wisdom gained by the judiciary in the post-2007 period, which continues to inform its actions and decisions to date has five distinct facets: *First*, that mere formal constitutional legitimacy based on constitutional textual protections cannot protect judicial independence and power. It is, in fact legitimacy of the Supreme Court in the eyes of the public as the guardian of the values of justice that guarantees its true independence and sustained prestige. *Second, that* the Supreme Court is not merely mandated by the Constitution, but in fact bound by the spirit of its office, to exercise its independence in order to provide a much necessary check on the actions of the legislature and the executive. In the words of the renowned constitutional scholar, Brian Tamanaha, ***'the judiciary is the point of most direct confrontation between the government, law and the individual and it can therefore, serve as the best barrier against lawless governmental actions'.*** We are proud to state that the Supreme Court is now fulfilling this role with an appropriate zeal and enthusiasm but not without regard to the importance of upholding and respecting the independence of the other pillars of the State. *Third*, that the authority of the Supreme Court, especially under its judicial review jurisdiction, may be usefully extended to a number of areas from which the Supreme Court had historically maintained a distance. In accordance with this realization, the Supreme Court has increasingly exercised its power of judicial review of administrative actions to safeguard the rights of individuals against excesses of the executive rather than to bow down to the will of the executive. *Fourth,* that the Supreme Court may exert its Constitutional authority to bolster

and sustain constitutional democracy and to guard against subversion of constitutional values still avoiding not only constitutional breakdown but even an unseemly clash between institutions. *Fifth,* that it is not sufficient for a Supreme Court of a complex country such as Pakistan merely to implement the law. It is, in fact, important for the Court to display initiative and courage in the face of challenges to constitutional values from fluctuating majorities or passions of the day. The Court has conceptualized those values to enhance democracy and prevent the opposite trends. It was done because our Constitution visualizes substantive democracy and unless the Court plays its role, it can turn into a formal democracy where individual rights are a casualty.

The role of judiciary is assuming greater importance with every passing day as citizens are reposing greater confidence in this institution for redressal of their grievance. This is exacerbated by the lack of governance on the part of the executive and in turn the burden of such deficiencies is shifted towards the judiciary. Socio-political and economic dynamics have confronted the Courts with new issues and challenges. Some of those issues are:-

(i) There has been a judicialization of political issues.

(ii) On account of erosion or malfunctioning of other institutions, increasingly the Courts have been called upon to decide issues which ordinarily may not fall in their domain.

(iii) There has been a tendency for a parliamentary majority to bring in legislation which may violate fundamental rights guaranteed under the Constitution.

(iv) There could be gaps between the law and socio-economic demands as also perception of role of Courts in the advancement of constitutional goals. The law may not keep pace with social dynamics. The Courts fill the gap.

As the Supreme Court comes to grip with the new challenges, it needs to be mindful of two distinct yet related factors. It needs to be mindful, first of all, between maintaining and respecting the boundaries between Article 199 of the Constitution, which confers an original writ jurisdiction on the High Courts of Pakistan and Article 184(3) which allows the Supreme Court to directly take notice of matters of public importance emanating from a violation of any of the fundamental right guaranteed under the Constitution. Particularly, the Supreme Court needs to ensure that in its zeal to do good it does not neglect to define appropriate limits for the exercise of its jurisdiction under Article 184(3). Anything short of that would be tantamount to encouraging frivolous and motivated petitions, and subverting the purpose of Article 199, which would in turn negate the underlying intention and rationale of Article 184(3). Second, the Supreme Court needs to be mindful of the symbiotic relationship between good governance and the rule of law. It must remember at all times that good governance is only possible when every organ and institution of the State, including the Courts, function within and in accordance with their constitutional mandate. Whilst it is entirely appropriate that the Apex Court may, under Article 184(3) and 187 of the Constitution, be called upon to fill the gaps between the law and social needs, it is important that it does so in a way that not only preserves but also bolsters the trichotomy of powers.

In recent months the Supreme Court has taken up a number of cases, which have underscored the relevance, sensitivity and poignancy of these concerns. The cases relating to the law and order situation in Quetta and more recently in Karachi particularly come to mind in this regard. In both cases, the judiciary has directly dealt with the actions and omissions of the executive. It has done so, however, only after the executive had allowed the situation to reach a point where it could no longer be ignored. In both cases the efforts of the Supreme Court are geared towards understanding the situation and the root causes of the breakdown in law and order and then to assign the appropriate responsibility rather than in assuming the responsibilities of the executive itself. Both cases are still *sub judice* and whilst the Supreme Court is making all efforts to ensure that the executive discharges its duty in accordance with the law, it is making a conscious effort to ensure that it does so without in any way blurring the lines that distinguish the executive and the judicial organs of State. The determination of the Supreme Court to tackle the actions of the executive in areas where it felt that these had exceeded the limits of the law is also evident in its decision regarding the Hajj Corruption case, passed in December last year in terms of which it mandated the Federal Investigation Authority to take appropriate action against those politicians and government officials who had violated the law. You will have an opportunity during the course of this Conference, particularly in Group 1, to deliberate on this very important issue of the scope of judicial review of administrative actions and to put farward your recommendations in this regard.

Also in the preceding year, the powers of the judiciary have been tested in respect of human rights within the country. Whilst, we as members of the judiciary are motivated by the same desire to do good that any sensitive human being would be, we are also cognizant that it is important that in exercising its charitable instinct the Supreme Court submits to constitutional limits and adheres to all relevant norms of due process. In taking *suo moto* notice of the gruesome discoveries of mass graves in Khuzdar earlier this year, the Supreme Court has curbed its outrage in an attempt to strike precisely such a balance because the High Court and the Chief Executive had taken notice of that. The Supreme Court has also articulated its views in this regard in the Missing Persons case. It has stated that whilst it is fully cognizant of and sympathetic to the plight of the families of the missing persons, it must resist the urge to step beyond its constitutional limits. I commend this restraint because it is my firm conviction that even in the direst of human rights cases, the Supreme Court must remain conscious that its actions are not limited to a single time and space but become a source of jurisprudence for years to come. Even a seemingly small move outside the bounds of law has the potential of opening up wide cracks in the edifice of certainty and reliability of justice which in turn may be detrimental to the very foundations of rule of law in coming years. In Group 2 of this conference, we invite you to share your ideas with us regarding the appropriate role of the Supreme Court in human rights cases and help in defining the point at which the desire to help may surrender to the higher desire to uphold the law.

Another area of particular consideration for the judiciary is the need to provide access to justice to those individuals or groups that are otherwise removed from the mainstream, which you will have a chance to consider in Group 3 of this Conference. As you are aware, the Supreme Court has considerable powers under Article 184(3) of the Constitution to exercise original jurisdiction in matters of public importance regarding the enforcement of fundamental rights guaranteed for the citizens of Pakistan irrespective of their economic status, race, color, caste or creed. It is this Article, which allows the Court to take notice of matters without the aggrieved filing a formal petition before it. The Supreme Court may, therefore, take notice of its own accord, or *suo motu* notice, or in response to a complaint or information received. We at the Supreme Court believe that whilst it is imperative that the Supreme Court exercises this power to reach out to those who for social and cultural reasons may feel handicapped in reaching out to the Supreme Court, we are also cognizant that this power has to be exercised fairly, equitably and judiciously so that the integrity of the mainstream system is not compromised. One such matter that came before the Supreme Court earlier this year was with respect to the threats received by the ancient tribe of Kalash which lives nested in the mountains near Chitral. The Kalash are a gentle people that have led a peaceful existence. Whilst they have protected and maintained their culture and traditions they have in no way posed any threat to the values and security of Pakistan. The problem is that their unique geographical and cultural placement has rendered them somewhat isolated from the rest of the country and unable to easily invoke the mainstream legal system of the country to come to their aid when faced with threats from militant groups. Had the Supreme Court turned a blind eye to the predicament of the Kalash, these people who are an asset to Pakistan's cultural diversity, would have been left without any support and over time would have become alienated from the country. It goes without saying that such an outcome would impoverish the country's rich history, traditions and beauty. We hope that you will examine these and other related issues in the course of this Conference and share with us your valuable views on the appropriate scope and limits of the exercise by the Supreme Court of its powers under Article 184(3), particularly as these relate to increasing the access to justice of socially disadvantaged groups.

This brings me to the next related and indeed an important point for consideration for the judiciary in today's Pakistan, and this is, its role in promoting a culture of tolerance. Protection of minorities is not only amongst the Principles of Policy expressed in our Constitution and, therefore a legal duty for us as Pakistanis, but is also a universal value and, more importantly, an integral pillar of Islam. The UNESCO Principles on tolerance adopted by the member States, including Pakistan in 1995, state inter alia that: 'Consistent with respect for human rights, the practice of tolerance does not mean toleration of social injustice or abandonment or weakening of one's convictions. It means that one is free to adhere to one's own convictions and accepts that others adhere to theirs. It means accepting the fact that human beings, naturally diverse in their appearance, situation, speech, behavior and values, have the right to live in peace and to be as they are. It also means that one's views are not to be imposed on others. These principles are not merely constructs of a modern world but in fact echo the values enshrined in the Holy Quran, which speaks of the basic dignity of all human beings and emphasizes particularly, in Surah Baqarah that ***'there is no compulsion in religion'***. These principles also re-affirm the time-honored traditions

of our Prophet Hazrat Muhammad PBUH who not only spoke of but also practiced the equality of all human beings, regardless of their race, color, language or ethnic background. It is in the spirit of upholding these principles and values that in recent months, the Supreme Court has taken suo motu notice of a bomb attack on a church in Peshawar and other issues of minorities' rights. These matters are highly sensitive, not only because these speak of our commitment to protecting minorities residing within the country but also because these are likely to define the parameters of the future of Pakistan as a tolerant and inclusive State. We hope that you, in your capacity as jurists and citizens of this world will, in the deliberations in Group IV of this Conference, share your views regarding the importance of creating a tolerant society and the role that the judiciary may play in this regard.

Ladies and Gentlemen, whatever the challenges may be of the administration of justice in the country, the Supreme Court is ready and determined to lead the way. We, as members of the judiciary, are committed to the universally acknowledged judicial values of judicial independence, which we recognize is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial; impartiality applied both to the decision itself and the process by which the decision is made; integrity which entails that justice must not merely be done but must also be seen to be done; propriety which means that we accept that we are subject to constant public scrutiny and, therefore, must act within certain personal boundaries which are at all times consistent with the dignity of our office; equality which entails ensuring equality of treatment to all before the courts irrespective of race, color, religion, national origin, caste, disability, age, marital status, social and economic status and other similar factors and finally, but most importantly, competence and diligence which we shall strive to enhance through all means and opportunities available to us.

Any efforts that the judiciary may make in the administration of justice, however, are likely to remain inconclusive without the active and meaningful support of the lawyers. It is the dynamic between the bench and the bar within the courtroom that makes for a vibrant culture of justice. Our lawyers have displayed their commitment to the independence of judiciary and the values of justice by taking to the streets in defence of rule of law, in defence of the Constitution and in defence of the judiciary. It is now time for the lawyers to convert this energy and enthusiasm to fighting battles within the courtroom, through the weapons of law available to them lest the profession and indeed the very cause of justice may become a victim of threats from within.

Ladies & Gentlemen,

Pakistan like other transitional democracies has had its share of societal conflicts reflecting sectarian, racial, ethnic and political divide. These societal conflicts have led to violence. The judiciary has a role to play by effective enforcement of law because we believe that it is the law that liberates an individual, a society or a nation. The judiciary through its verdicts can also promote the values of trust, of tolerance, of protecting minorities and the weaker sections of the society. The judiciary thereby affects the behavior patterns, because:

> ***"Morality cannot be legislated but behavior can be regulated. Judicial decrees may not change the heart but they can restrain the heartless."*** **(Martin Luther King-I)**

Thank you

Working Sessions

GROUP-I

"JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS"

Hon'ble Mr. Justice Nasir-ul-Mulk, Judge Supreme Court of Pakistan Chairing the Session

Participants of the Session

Judicial Review of Administrative Actions

Introduction

The problem of controlling the state is the central question in the strive for constitutionalism. This desire for control implies it is a worthwhile enterprise, as control can obviously not be an end in itself without serving a purpose. With constitutionalism, this purpose is usually found in the pursuit of freedom. It is the violations of freedom that convinces us of the need to control the state and teaches us through hard experience how this can be achieved. Freedom though is multifaceted, often asking the state not only to avoid intruding on the personal sphere, but also to actively help people realise freedom in a socio-economic sense. In achieving this aim, society as the vehicle for all human activity may not be collapsed in the state's needs and aspirations, but must be dutifully governed in the cause of freedom. This entails striking a balance between the state and society.

The concept of Judicial Review of administrative and legislative actions has developed in common law countries like England, the USA, India and Pakistan. In Pakistan and India, development of judicial review of administrative actions has closely followed the pattern of Britain and the USA. There has not been marked opposition to the administrative process but it has been accepted as an inevitable consequence of national planning and growth of the welfare state.

Judicial Activism is a neologism term for judicial review in which the superior courts decide whether a law, administrative action, amendment or any constitutional provision lies within bounds of the Constitution. This power is being exercised by all the superior courts, throughout the world, to keep a check and balance on the actions of legislature, as well as the executive, and to strike down all the extra-constitutional actions performed by the legislative or executive authorities. Supreme Court, in Pakistan, exercises this power by asserting Article 184(3) of the Constitution of Pakistan 1973. This Article of the Constitution bestows the power of original jurisdiction to the Court through which it can pronounce declaratory judgment, *inter alia,* on a 'question of public importance with reference to the enforcement of any of the Fundamental Right.' [1] This law could only be exercised, if the matter is of public importance and concerns fundamental rights as enshrined in Articles 8 – 28 of the Constitution. The term ***'public importance'*** in a general context is described by Mr. Justice Javed Iqbal in following words: "the adjective public necessarily implies a thing belonging to people at large, the nation, the State, or a community as a whole."[2]

As the Pakistani Legal System matures, it becomes imperative that all stakeholders partake in attempt to define judicial review and also take part in it. For this reason a session at the International Judicial Conference was dedicated to the topic "Judicial Review of Administrative Actions". The discussion which took place in the session as well as the recommendations granted therein are summarized below.

The session was chaired by Hon'ble Mr. Justice Nasir-ul-Mulk, Judge, Supreme Court of Pakistan. Joining us on the panel were Hon'ble Mr. Justice Mazhar Alam Miankhel, Chief Justice, Peshawar High Court and Mr. Kashim Zannah, Chief Judge, Nigeria. The session was set in motion at 9:00 A.M. and went on till 2 P.M., with a brief break for tea at 11:30 A.M.

Superior judiciary has to preserve, protect and defend the Constitution. It is an onerous task. Changing times will require different judicial philosophy, innovations, interventions and techniques to preserve, protect and defend the Constitution. To preserve means to keep alive. To preserve the Constitution would mean to keep alive democracy, freedom, equality, and tolerance, social, political and economic justice. While protecting and defending the Constitution might require an order striking down actions or administrative decisions, "preserving" requires more than just declaratory orders. Preserving requires guidelines, policies and future framework for the institutions, while simultaneously holding the persons responsible for damaging the Constitution to be fully accountable. Superior judiciary has been further equipped with articles 184(3), 187 and 199 where enforcement of the fundamental rights has been the singularly most important duty casted upon the superior judiciary.

1 The Constitution of Pakistan 1973. Art 184(3).
2 Pakistan Muslim League v Federation (2007) PLD SC 642

"Enforcement" does not mean upholding fundamental rights. Enforcement is complete when the judge travels deep into the problem and redresses the error in the system.

The start of new era for judicial activism took place in Pakistan when Chief Justice Iftikhar Muhammad Chaudhry regained his power in September 2009.[3] The restoration of chief justice back to his post, who had been dysfunctional since 2007, made judiciary more stronger and it emerged as an independent organ of the state. The new power of judiciary was evident from the fact that it started taking more interest in public matters, social violations and human rights affairs. The Chief Justice of Pakistan who had long been dysfunctional and after a hard-fought battle for his restoration now seemed more active than ever before and a separate Human Rights Cell was established under his supervision which would take care of all the violations in this regard. This Cell instead of working on the previous processes had new style of work and thus more cases were received by the Supreme Court of Pakistan due to its ***'activism'***. According to the figures, 54935 cases of human rights violations and public policy were received by Supreme Court in a short era of 13 months out of which it was able to decide 53082 cases which shows us the efficiency and effectiveness of the Cell.[4]

Other than these, there were several different cases which were decided by Supreme Court which made sure that just and fair decisions were made at any cost. The judgments in Hajj Corruption case, Bank of Punjab case, National Insurance Company Scam, New Muree Housing Project, Appointment of Chairman National Accountability Bureau and Joint Venture Agreement reflected the independence and dominance that the Supreme Court had over other organs of the state. A large number of Constitutional Petitions and *suo motu* actions involving misuse of public funds, loss to the national exchequer, extra-judicial killings, rape cases, missing persons issues, karo kari cases, child marriages, private jails, police torture cases, illegal appointments, illegal promotions, illegal constructions, controversial allotments of state-land on throw away prices, written off bank loans, and matters pertaining to conservation of environment were taken up and decided under Article 184 (3) which ensured that there was no one now who can interfere with the new power of Supreme Court.[5]

Advocates of strict separation of powers maintain that the judiciary should not venture into the fields of the legislature and the executive and stay within the parameters set for the judiciary under the Constitution. However, such parameters are hard to determine in today's world where the role of the state has evolved into that of a welfare state requiring the executive to provide social services to its citizens. The state has to lay down extensive regulations and comprehensive machinery for the performance of such functions. The regulatory bodies created by the administration in this behalf themselves need regulation and oversight. In a country like Pakistan the general perception amongst citizens is that administrative bodies and agencies are prone to misuse and abuse their powers. The ordinary citizens therefore look up to the judiciary to protect them from such abuse. The malfunctioning of the executive and legislative bodies creates a gap for the courts to fill. Exercising restraint in the face of violations of rights of citizens would be an abdication of jurisdiction on the part of the judiciary. In order to redress the grievances of the people against corrupt machinery the judiciary has had to expand its jurisdiction.

Summary of Speeches

Mr. Rakesh Munjal, Senior Advocate, Supreme Court of India

A distinguished speaker at the thematic session conducted by Group I was Mr. Rakesh Munjal, Senior Advocate Supreme Court of India. Mr. Munjal is based in New Delhi and is also Vice President SAARC Law. Mr. Munjal's presentation dealt with various aspects of judicial review of administrative actions, focusing on the Indian perspective and the development of Judicial Review by the Supreme Court of India. He argued that the origins of the concept of judicial review can be traced to, what is termed as one of the basic principles of jurisprudence, the maxim **'*ubi jus ibi remediium*'** meaning where there is a right there is a remedy. The basis of the law on control of executive powers must be effective scrutiny against arbitrariness and discrimination in the operation of the State, with an emphasis on restrain in exercising powers and promotion of fairness, impartiality and proportionality by State functionaries; the courts play the more significant role in the machinery of administrative law in view of the checks and controls exercised over the administration itself and the grant of relief to the aggrieved.

3 Judicial Activism – Syeda Saima Shabir
4 Judicial Activism – Syeda Saima Shabir
5 Judicial Activism – Syeda Saima Shabir

The history of judicial review in India may be linked to the pre-partition Government of India Act, 1858 which was followed by further restrictions imposed by the Indian Council Act, 1861 with both Acts placing restrictions on law making powers of the then legislative body. However, after many developments as well as independence in 1947, the Indian Constitution now provides for the prevalent powers of review over executive administration. The powers of review available to the Courts in India can be divided into two conceptual categories: (i) constitutional – examining the 'legislative competence' of the Parliament or State Legislatures; and (ii) administrative – examining administrative acts and subordinate legislation to ensure compatibility with fundamental rights. Article 32 of the Indian Constitution grants the right to move the Supreme Court for enforcement of fundamental rights, as also the power to issue appropriate order, directions or writ; whereas Article 226 provides corresponding powers to the High Court. In 1954 the Supreme Court of India ruled that the fundamental principles underlying prerogative writs under English Law without adherence to technicalities would be adopted in exercise of judicial review. Furthermore, the Constitution also empowers the Supreme Court to exercise powers of review over legislation, imposing a constitutional duty to declare unconstitutional any such law which is in contravention of a constitutional provision.

The paper highlighted the overall role of the Indian Judiciary in protecting fundamental rights and maintaining the supremacy of the Constitution by exercising the powers of judicial review. In exercising such powers over administrative actions the Courts have upheld principles of proportionality and reasonableness. In addition principles of natural justice have been widely applied in numerous decisions of the Supreme Court with stress that they should also be adopted by executive institutions, these include, *inter alia,* the rules of *audi alteram partem,* the right to a fair hearing, and the rule that no man should be a judge in his own cause. Finally, the paper briefly expounded upon the threat to state constitutionalism posed by incautious exercise of such powers by the Court.

Mr. Hamid Khan, Advocate Supreme Court of Pakistan

Mr. Hamid Khan is an Advocate Supreme Court. In his paper ***"Judicial Review of Administrative Actions"*** he outlines the debate over ***"judicial activism and judicial restraint"*** and discusses whether the scope of judicial review should be expanded or extended. He traced a history of judicial review of administrative actions and argued that it is an established doctrine ever since the US Supreme Court introduced it in **Marbury v. Madison [1803] 5 U.S.137 (1803)].** Pakistan and India are not different from other democratic countries when it comes to judicial review of administrative actions of the government and its officials.

The Supreme Court of Pakistan, while exercising its jurisdiction *suo motu* and in human rights cases, has uncovered mega scams and scandals of public money in the cases: ***Bank of Punjab vs Haris Steel Industries (Pvt) Ltd*****: (*****PLD 2010 S.C. 1109); Alleged corruption in Rental Power Plants etc*****:** (***2012 SCMR 773)***; ***Air Marshall (Retd) Muhammad Asghar Khan vs General (Retd) Mirza Aslam Baig:*** **(2012 SCMR 2008);** ***Suo motu case*** **no. 15/2009 (Corruption in Pakistan Steel Mills Corporation): PLD 2012 S.C. 610;** ***Suo motu case*** **No. 7 of 2011- Non Transparent Procedure of purchase of 150 Locomotives by Ministry of Railways:** (***2012 SCMR 226).***

These and similar judgments have established the Supreme Court of Pakistan as one of the most independent Court in the world under the Chief Justice Iftikhar Muhammad Chaudhry. There are however, indications that after the retirement of the former Chief Justice the Supreme Court may be breaking away from its recent past of judicial activism and might be relapsing into the distant past of inactivity, judicial restraint and indifference.

Mr. Ashtar Ausaaf Ali, Advocate Supreme Court of Pakistan

Mr. Ashtar Ausaaf Ali, Advocate Supreme Court and former Advocate General Punjab, was another speaker at the session. He presented a paper entitled "*A Question of Quo Warranto*", focusing on the concept of *quo warranto*, writs thereof and the application/development of the concept by the higher judiciary of Pakistan. In his paper he argued that the views held by Montesquieu on the power of institutions and the potential for arbitrary decisions and personal prejudices reflect his understanding of how mankind tends to get swept away despite best intentions giving rise to the need for an overarching set of guidelines that would prevent individual powers from expanding arbitrarily as well as a system of review over the exercise of such authority. Montesquieu thus introduced the foundational concept of separation of powers which provides for breaking the power of the State into three branches: the executive, the parliament, and the judiciary; enabling each branch to keep a check on the other while preserving their respective independence, which, as per the author, forms the basis of judicial review of

administrative power. The powers of judicial review entail the power to pass appropriate orders, directions and writs which includes the writ of *quo warranto*.

The concept of *quo warranto*, literally translates to 'by what authority?' *Quo warranto* in practice relates to judicial scrutiny of and control over statutory appointments to public offices with the primary inquiry involving the question whether appointments have been in accordance with the law and whether the appointing authority has acted within the scope of its powers. The paper refers to recent Pakistani case law in demonstrating the application of the concept, the tests and standards used by the judiciary in Pakistan and the implications thereof; highlighting the challenges faced by the judiciary in keeping various institutions as well as the judiciary itself within the prescribed limits of their respective constitutional and legal powers.

The Hon'ble Mr. Justice Kashim Zannah, Chief Judge of the High Court of Justice in Borno State, Nigeria

The Hon'ble Mr. Justice Kashim Zannah is the Chief Judge of the High Court of Justice in Borno State, Nigeria. In his paper***, "Restraint to Responsibility: The Supreme Court and the Consolidation of Democracy in Nigeria"*** he discusses judicial review of the administrative actions of the electoral body in Nigeria, the Independent National Electoral Commission (INEC). He started with a history of the Nigerian movement for democracy. Nigeria attained independence from British colonial rule in 1960. But the military ended the attempt at democratic governance in 1966. Public pressure and demand for democracy forced the military out by 1979 but it returned in 1984. The military again exited in 1999, handing over to an elected government to govern under the 1999 Constitution. Section 6 of the Constitution of the Federal Republic of Nigeria, 1999 vests judicial powers in the courts, that the powers "shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law" and to "all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

The Independent National Electoral Commission (INEC) issued guidelines setting out conditions for the registration of political parties, parts of which were based on the Electoral Act. Some of the requirements were considered onerous and enabling only the rich to form political parties. Only registered parties could field candidates and independent candidacy was not allowed. The Supreme Court's power of judicial review was invoked. The court drew a distinction between those guidelines that were merely administrative, procedural or evidential and those that were substantial. The court then proceeded to nullify most of the guidelines issued that it deemed substantial in nature and which had enlarged the conditions of eligibility laid down in section 222 of the Constitution.

The Supreme Court also has the power to review declaration of election results by the Electoral Commission where they are so challenged. While previously the Court resorted to mere technicalities to limit its power to review the Commission's actions recent obiter of the Court in Achike, JSC in the case of ***Egolum v. Obasanjo (1999) 7 NWLR (611) 355 at 413.*** Indicates a shift in position wherein the Court is more likely to now resolve these petitions on merit.

The Supreme Court has also held in the case of ***AC & Anor v INEC (2007) LPELR-66 (SC)*** that the power to disqualify candidates based on constitutional provisions now rested exclusively with the courts. This is a shift from *INEC v AC & Anor.* (2007) LPELR-9028 (CA) in which the Court of Appeals held that INEC "has the power and authority not only to screen candidates sent to it by political parties, but to also remove the name of any candidate that failed to meet the criteria set out by the Constitution without having to go to court."

However, one area, which the Supreme Court was reluctant to interfere in, was the route through which a political party nominated a candidate. Parties were thus able to ignore party rules nominating any candidate they so choose. A High Court judge failed to follow the SC and suggested that it review "its position on the internal affairs of political parties." The Supreme Court came down hard on the judge, and reaffirmed its position of non-interference in the selection of a party's candidate ***(Dalhatu v Turaki, (2003) LPELR-917 (SC)).*** The Court changed its position in ***Ugwu & PDP v. Ararume & INEC (2007) 12 NWLR (Pt.1048) 365*** where it held that INEC's actions were subjected to judicial review and ordered it to recognize the candidacy of one Mr. Ararume. The Court reaffirmed its position in ***Amaechi v INEC & Ors (2008) LPELR-446 (SC)*** where it held that Mr. Amaechi was the rightful candidate despite the swearing in and appointment of the candidate who had replaced him in the elections as Governor (and was ordered to step down as Governor).

The decision to review the declaration of the Governor of Adamawa State as the winner in the general elections conducted in 2003 clearly marked the end of judicial reticence in reviewing the actions of INEC. On the 24th day of March 2004, Mr. Justice Kashim Zannah heading a panel sitting as the Election Petitions Tribunal for Adamawa State nullified the election results. The Governor threatened to retaliate by "beating up such a judge" (The NEWS, April 12, 2004, p.23).

The media along with academics and politicians (of the underdog variety) has lauded Nigerian judges and academics and politician (of the underdog variety) for the role in sustaining the democratic endeavor that commenced in 1999 by exercising their power to review the actions of INEC. In conclusion, Courts must not shirk the demands made upon them for effective adjudication even if doing so requires a departure from convention. Nigerian Courts were entrusted with the responsibility of actually participating in building a democracy and not merely to maintain its stability.

Dr. Ishrat Hussain, Dean and Director, Institute of Business Administration, Karachi

Mr. Hussain started his speech by noticing that economic development literature and empirical evidence over last five decades have clearly established the link between growth and poverty alleviation with good governance. Good governance has now been very much become synonymous with rule of law, property rights and enforcement of contracts, accountability, and transparency. It has also become evident that there are some key institutions which are critical for ensuring good governance. Judiciary and Quasi-Judicial institutions do form part of this core group of key institutions. He commended the judicial activism of the Supreme Court by highlighting the changes brought by it. He argued that the recent judicial activism and suo-motu actions by the Supreme Court and High Courts have done a great deal of good in establishing a new equilibrium between the Executive, Parliament and the Judiciary. This movement while commendable, should not distract the attention from the more mundane tasks of (i) ensuring broad based access to justice; (ii) revision of outdated procedures and laws; (iii) use of modern technology in case management; (iv) encouragement of Alternative Dispute Resolution (ADR) mechanisms, (v) tracking and enforcement of National Judicial Policy 2009; (vi) directing the Special Courts and Tribunals to abide by the deadlines for disposal of cases. These measures will have more lasting and fundamental impact on the economic governance of the country and help remove some of the obstacles in the way of investment and equitable economic growth.

However, he in the end noted with dismay some of the negative effects of Supreme Court's judicial activism upon the society and economy of Pakistan. He welcomed Anita Turab case judgment whereby the security of tenure of civil servants has been made a justiciable right. He submitted that invoking the fundamental rights ambit to review validity of individual decisions and staying the decisions taken has weakened the powers of the Executive branch and resulted in inordinate delays in the process of filling in these key positions. As a result there is a state of paralysis in these bodies at present. Many of the petitions filed by those who are superseded are frivolous but they linger on for long in the courts. The judiciary should certainly ensure that the rules, procedures and processes are in place and have been observed but the application of these rules and processes should be left to the Executive branch.

Mr. Justice (R) Rana Bhagwandas, Former Judge Supreme Court of Pakistan

Mr. Justice (R) Rana Bhagwandas started by noting that days had gone when the concept of a decent living was only translated into the right to seek safety and security from the State. This was quintessentially the basis of the theory of social contract expounded by Rousseau. But much water has flown under the bridge. This right of decent living found in the theory of social contract has developed in geometric progression into what is called the fundamental right of life embedded in Articles 9 and 14 of the Constitution of Pakistan, Article 21 of the Indian Constitution, Section 2 of the UK Human Rights Act, 1998, Article 2 of the European Convention on Human Rights 1776, US Declaration of Independence, Article 6.1 of the International Covenants on Civil and Political Rights as adopted by UN General Assembly in 1966, and section 7 of Canadian Charter of Rights and Freedom.

He argued that the right of a citizen to livelihood and the duty of the state to provide such opportunities with dignity is the essence of the present social order. We expect the Government to protect individual liberty and economic and physical security of each citizen. But such expectation becomes a farce without a vibrant judiciary to enforce such rights. He further argued that in order to appreciate the topic of judicial review, which is of current

relevance, we have to appreciate not only what are "human rights" but also have to re-evaluate the role of the judiciary in the context of the protection of those rights.

The function of the higher courts in this country has not been limited to exploring what the Constitution-makers meant when they wrote those words but also to develop and adapt the law so as to meet the challenges of contemporary problems of the society and respond to the needs of the society. The Constitution cannot be a living and dynamic instrument if it lives in the past only and does not address the present and the future. The growth of *judicial review* is the inevitable response of the judiciary to ensure proper check on the exercise of public power. Growing awareness of the rights in the people; the trend of judicial scrutiny of every significant governmental action and the readiness even of the executive to seek judicial determination of controversial issues, at times, may be, to avoid its accountability for the decision, have all resulted in the increasing significance of the role of the judiciary. There is a general perception that the judiciary in this country has been active in expansion of the field of judicial review into non-traditional areas, which earlier were considered beyond judicial purview.

Dr. Aslam Khaki, Advocate Supreme Court of Pakistan

Dr. Aslam Khaki, Advocate Supreme Court was another speaker at the session. Principles developed by Superior Courts through judicial review have become central to public administration and exercise of powers by executive authorities, holding individual rights as sacred and protecting from arbitrariness. In view of the recent popularity of judicial review of administrative actions within Pakistan, the same must be viewed critically and exercised in a manner that is ethical, unadventurous and procedurally sound. By way of introduction the purpose of judicial review may be derived from Professor De Smith as being one of a number of legal controls of administrative actions; while, in accordance with Lord Woolf's views, it is pertinent to note that powers of judicial review of administrative actions must be exercised keeping in view the fact that the business of administration would be made practically unworkable, if every executive decision or act was reviewed.

Article 184 of the Constitution of Pakistan, 1973 grants the Supreme Court with the power of judicial review of administrative actions, and Article 199 grants similar powers to the High Court. The power of judicial review of administrative actions in Pakistan relates primarily to the procedure/method employed by the authority rather than the content or merits of the action/decision itself.

Recommendations:

After deliberations, the working group recommended that:

1. Judiciary has not only in Pakistan but all over the world, particularly in developing countries, strived to establish ***'constitutionalism'*** by exercising the power of judicial review as a rational limitation over the decisions and actions of other organs of the state; this spirit must be maintained and kept alive.
2. The power of judicial review be exercised to recognize and enforce emerging contemporary human rights such as right to health, food, shelter and other amenities of life so that the Constitution as a living and organic text is preserved.
3. Judicial review be exercised so as to eradicate rent seeking behavior and encourage Foreign Direct Investment and other economic activities within the country.
4. In order to compliment the exercise of power of judicial review by the Superior Courts the District Judiciary and other judicial forums be strengthened so that people have access to justice at their doorstep.
5. The exercise of suo motu jurisdiction by the Supreme Court of Pakistan be duly structured and regulated by the Court.
6. The trichotomy of power enshrined in the Constitution be respected and judicial powers exercised in a way that executive policies are neither hampered nor stunted.

7. While seeking judicial review of legislative instruments the sanctity of the people's trust in the legislature to legislate shall be kept in mind, albeit within the Constitution.

Rapporteurs

Ms. Amna Abbas
Ms. Maryam Mansoor
Syed M. Ghazenfur

Group – II

"ROLE OF JUDICIARY IN PROTECTING HUMAN RIGHTS"

Hon'ble Mr. Justice Anwar Zaheer Jamali, Judge Supreme Court of Pakistan Chairing the Session

Participants of the Session

Role of Judiciary in Protecting Human Rights

Introduction:

The Constitution of the Islamic Republic of Pakistan calls for the establishment of a democratic state where ideas of social justice and rule of law reign supreme. The judiciary in this regard has the heavy responsibility of being the pillar on which the values a country are founded upon, are upheld. It is tasked with being the steadiest branch of the state, a guardian of the Constitution and a watchdog of people's fundamental rights and basic liberties. In order to be able to discharge this duty, it is vital that the judicial system be independent from any external influence or control in order to ensure that the principles laid out within our constitutional framework are treated as something more than mere aspirations.

Pakistan's judiciary has a long and distinguished history of ensuring that fundamental freedoms of all citizens are protected and has demonstrated an unwavering commitment to the protection and enforcement of fundamental freedoms enshrined within our constitutional settlements, laws and jurisprudence. In availing their constitutional discretions under Article 184 (3) and Article 199, Pakistan's judiciary is often times considered to be activist in nature especially with regard to the protection of fundamental rights. Such an activist nature shall always beg the question of the dangers of judicial activism in the field of human rights and the extent to which courts should broaden the scope of interpretation, especially in the light of keeping up with progressive social norms and societal expectations. While it is important that the Courts do not overstep their constitutionally defined role, it is also understood that respect and enforcement of fundamental rights will hardly ever be achieved if the judiciary unduly shackles itself from deploying the instrument of law in the direction of achieving justice.

Keeping in view the above the working session chaired by Hon'ble Mr. Justice Anwar Zaheer Jamali, Senior Judge of the Supreme Court of Pakistan and Co-chaired by Hon'ble Mr. Justice Umar Ata Bandial, Chief Justice of the Lahore High Court and Hon'ble Mr. Justice Muhammad Anwar Khan Kasi, Chief Justice of the Islamabad High Court, focused its attention on a number of key concerns in relation to protection of human rights. These included amongst many others, the ability of the Court to provide effective remedies in cases concerning human rights violations, ensuring judicial independence by understanding the obstacles which exist that impinge upon the ability of the judiciary to render justice impartially, and the role of judicial training and legal education in the application of human rights standards by courts.

Summary of Speeches:

Hon'ble Mr. Justice Mohan Peiris, PC, Chief Justice of the Supreme Court of Sri Lanka

Justice Mohan began his presentation by emphasising on the danger of individual legal systems considering themselves to be islands ***"entire of themselves"*** as it ignores the fundamental truth that laws themselves are rarely, if at all, the product of national virtuosity alone, but rather an assimilation of various foreign influences. Such influences are necessarily important as comparative analysis and understanding of laws and practices in different jurisdictions are often times crucial in improving laws and dispensation of justice within the state. He therefore lauded the initiative of the Supreme Court in organizing International Judicial Conferences which are paramount in fostering a greater understanding of legal concerns facing all jurisdictions. His Lordship then moved to provide a better understanding of the Sri Lankan experience in fostering the promotion of fundamental rights. The Constitution of Sri Lanka includes a chapter of justiciable Bill of Rights for which the Supreme Court has the exclusive jurisdiction to investigate infringement of fundamental rights and to grant "just and equitable" remedies. The Sri Lankan judiciary has interpreted this Bill of Rights purposively to ensure that the Court discharges its duty in ensuring that it stands as bulwark against human rights violations. It was stated that the Court when discharging its role must bear in mind that such a Bill of Rights is not a self-executing document and that even the most generous Bill of Rights can be reduced to mere parchment in the face of narrow and insensitive judicial interpretation.

One of the ways in which this was won by interpreting Article 3 of the Sri Lankan Constitution which declares that sovereignty lies in the people and is inalienable to mean that sovereignty lies not with the Parliament but in the people. The Parliament is merely one of the organs through which popular sovereignty is exercised. Moreover, Article 4 of the Constitution makes other important declarations according to which the sovereignty includes fundamental rights. The Sri Lankan judiciary has deduced certain fundamental rights which are not specifically

mentioned in the Constitution on the principle that certain unarticulated rights are implicit in the enumerated guarantees. For instance, while the Constitution does not specifically refer to a right to life, this has nonetheless been guaranteed by the Courts. Moreover, other rights such as the "right to safe environment" was articulated as a fundamental right by reading the "equal protection of law" clause also mean that it is a fundamental right not to be threatened by large scale pollution.

Ms. Birgul Yigit, Rapporteur Judge, Court of Jurisdictional Disputes Ankara, Turkey

Ms. Yigit began in her presentation explained how the Turkish Legal System works with regards to claims of human right violations. Laws in Turkey can be divided into three categories; Constitutional, National Regulations and International Agreements. While the Constitutional Courts have used the Constitutional Provisions and National Regulations, Continental European Legal System also had a deep impact. Turkey is signatory to various European Human Rights Legislations. Ms. Yigit explained that this led to introduction of National Regulations in response to decisions of European Court on Human Rights.

Ms. Yigit further assessed the role of Turkish Constitutional Courts in upholding and duly protecting the human rights of its citizens. The Constitution of Turkey categorizes fundamental rights as personal rights and duties; social and economic rights and political rights and duties. Apart from the course of ordinary procedure, the Constitutional Court has also established an individual application system in addressing individual human rights claims. There are three ways of application to the Constitutional Court. Firstly, there can be an application by the President, Assembly Groups, Government and the Opposition Party. Provided that in the case of Assembly Groups at least one fifth of the members of the Assembly have approved for it. Secondly, the application can be send by any citizen of Turkey and thirdly, even the Court of first instance can send an application to the Constitutional Court.

She concluded her presentation by elaborating upon the consequences of Constitutional Court's activism in human right claims. It has resulted in the Court of first instance as being treated as a human rights court since if human rights abuses have been caused by the first instance Court's decision, Constitutional Court will remand back the case to it for retrial. Where such a retrial is not possible, Constitutional Court will itself decide on a compensation for the applicant.

Mr. Abdul Basit Mufta Al- Ashaal, Special Prosecutor, Libya

Mr. Al-Ashaal during the course of his presentation emphasised the importance of the judicial system of any state to ensure that citizens are guaranteed their fundamental right. Citing examples from the practices of the Holy Prophet (S.A.W), Mr. Al-Ashaal once again relayed that such a role has been ordained within the teachings of Islam itself. In times of crisis and conflict it is even more incumbent upon the judiciary to protect against human rights violations and provide justice to those who have been wronged.

He further stated that this role of the judiciary in protecting fundamental freedoms is often thwarted in the face of inordinate delays plaguing a country's justice system and cited a number of recommendations that would help in ensuring speedy justice. These included suggestions such as undertaking a review of the distribution of courts in a particular area and providing suitable centers within courts to ensure that disputes are dealt with in a timely manner.

Mr. Justice (R) Fasih-ul-Mulk, Former Chief Justice of Peshawar High Court

Justice Fasih-ul- Mulk approached the subject of the thematic session by demarcating his presentation in two parts. He first led the session into considering what the role of judiciary should be in protecting human rights, and second, the response of Pakistan's judiciary to this concern.

It was pointed that while all institutions of the state are bound to protect and promote human rights, the nature of the duties bestowed upon the judiciary means that they are necessarily at the forefront of battle for ensuring that fundamental freedoms are protected. Therefore, the manner in which the judiciary governs itself in matters of judicial appointments and promotion, as well as how conduct unbefitting judicial and administrative staffs are to be proceeded against, are of paramount importance.

His Lordship then went to examine decisions of the Federal Shariat Court, the High Courts, as well as the Apex Court whereby fundamental rights such as the right to due process, unlawful detention, the right to privacy being part and parcel of the inviolability of the dignity of man as well as a woman's freedom to marry not subject to consent of her guardian were protected.

His Lordship concluded by stating that while, such examples are laudatory in and of themselves, it is always important that the judiciary evaluate where there can be room for improvement. In this regard he recommended that there may be comprehensive judicial training programs which would assist the courts when faced with human rights violations.

Dr. Sajjad Karim, Member European Parliament

During the course of his presentation Dr. Karim, while reiterating the importance of the judiciary in the preservation and promotion of fundamental rights, highlighted the myriad of new human rights concerns that judiciaries all over the world are facing. More than this however, the concern of legislators and judges alike is the manner and medium through which such abuses are perpetuated. With the speed of technological innovation and the proliferation and wide availability of new technologies, in the absence of guidelines by law makers, the judicial branch of the state is often times ill equipped to effectively deal with such concerns. For example, objectionable material such as websites exploiting young children, are a massive human rights concern. In attempts to stop such activities, sites are banned, servers confiscated, perpetrators tried, with the unfortunate result that these sites are up and running once again in a matter of hours. Moreover, it calls into question how far the Courts can go in such situations, especially when attempting to regulate a resource such as the internet. It is these questions where dialogue is needed both at national and international levels so as to enable one of the most important branches of the state to ensure that fundamental freedoms that underpin the central ideals of any democratic nation, are protected.

Dr. Parvez Hassan, Advocate Supreme Court of Pakistan

Dr Hassan unfortunately could not present his paper in person due to some unavoidable circumstances. Nonetheless, his paper was distributed during the course of the session and has been summarized below.

The paper looks at the case of South Asia in regards to Environmental Judicial Activism. It makes a comparative study of Pakistan, India, Bangladesh and Sri Lanka in deducing the role South Asia has played in fulfilling the aspirations of various agreements, conventions and treaties made in pursuance of protecting the environment. The paper holds that there is a need to synthesize human rights with environmental issues. The best way to go about is internationalization of environmental issues; this will create an atmosphere where regional and national initiatives can be catalyzed. Since, there exists a gap between the interests and priorities of the developed and developing countries; there is a need for a global partnership.

The paper recommends that there should be creation of new socio-economic rights such as "right to water". Once such rights are created, the Courts can take a rights based approach in tackling with environmental claims. The Constitutional Courts in South Asia have developed soft law principles such as polluter pay, sacred trust, sustainable development etc. There is a need of transforming soft law principles into binding treaty obligations of the State. The interesting observation of the paper is that in Pakistan there is no state policy or fundamental right concerning the environment. Compared to Pakistan, Sri Lankan Constitution in its chapter on Directive Principles of State Policy asserts that the state shall protect, preserve and improve the environment for the benefit of the community.

Mr. Anees Jillani, Advocate Supreme Court of Pakistan

Mr. Jillani began his presentation by stating that respect for fundamental human rights is within the individual and collective interest of nation-states and that there are rights universally proclaimed by all nations. He emphasised the role of Judiciary and the Constitutional Courts in the protection of human rights of accused and arrestees in criminal trials including suspected or proclaimed terrorist. The missing persons case in the Supreme Court of Pakistan is one such example that was cited where the judiciary has attempted to ensure the rights of accused both in criminal and terrorism related trials.

Mr. Jillani explained the practical effect of Constitutional Provisions such as Article 9, 10(1) and (2) and that as per these articles, the accused should be informed of his offence and that his right to consult a legal practitioner must be defended. Also, he has to be produced before the magistrate within 24 hours. These constitutional provisions guarantee the accused the right to a fair trial. Coming over to the criminal trial stages, Mr. Jillani holds that accused has rights in all the stages of his trial, starting from investigation to sentencing.

He also stressed the need to adopt and enforce the Human Rights Instruments and International Agreements on Human Rights in letter and spirit and that Pakistan should also ratify the International Treaties on Civil and Political Rights. There should also be more emphasis on social, cultural and economic rights of the oppressed since these rights can only guarantee other civil and political rights.

Ms. Lorna Seitz, Director, International Consortium for Law and Development, USA

Ms. Seitz shared her experiences working with legislators and the judges in various countries with the aim of ensuring that the courts were adequately equipped to effectively deal with the human rights violations and their fallout. Out of many pertinent observations Ms. Seitz underscored the unfortunate divide between law makers and judges in such circumstances. Courts are often left floundering in the face of lack of effective legislation and law makers must be cognizant of the realities of the judicial experience when adjudicating such trials. Moreover, it is incumbent upon law makers to identify the structural issues prevalent in society, owing to social and economic disparities as these later become a major obstacle for the fulfillment of the constitutionally guaranteed fundamental rights. Only when such structural problematic behaviors are identified, can there be effective legislation that is able to thoroughly deal with human rights violations.

Mr. Saghir Bukhari, Senior Programme Officer, ILO Country Office for Pakistan

Mr. Bukhari traced the historical development of human rights with its culmination in the formulation of the Universal Declaration of Human Rights (UDHR) which was adopted by the 56 members of the United Nations. The passing of the Covenant on Civil and Political Rights and Covenant on Social and Cultural Rights in 1966 along with the UDHR now make up International Bill of Human Rights.

He then went on to describe the United Nations work with regards to protection and promotion of human rights in Pakistan. This has been done firstly by ensuring that human rights was incorporated and mainstreamed as one of the normative principles in their One Programme II (OPII). Moreover, human rights Task Force currently operates as an advisory body to the Resident Coordinator and UN Country Team (heads of all UN agencies) on all issues related to human rights.

Mr. Bukhari then moved to highlight some of the key human rights issues currently plaguing Pakistan. Law enforcement and the current security situation were cited as one of the major problems being faced by the state today and that a lack of law enforcement and implementation mechanisms greatly reduced the ability of the state to adequately address such concerns. In addition to this, bonded and child labour, violence against women and children, enforced disappearances and lack of protection to journalists and activists were also listed as being part of the wide array of human rights violations faced by the country.

In concluding his presentation, it was recommended that such concerns can only be effectively dealt with in the situation where the important state institution work in unison to ensure that the countries constitutional and legal framework is resolutely implemented.

Ms. Fehmida Iqbal Khan, Community Mobilization & Networking Advisor UNAIDS

Ms. Khan's presentation stressed the need for enforcement of laws to tackle the epidemiological situation in Pakistan. As per the record, Pakistan had an estimated 83468 people living with HIV by the end of 2013. Though HIV treatment, care and support facilities are available through 18 HIV treatment centers, 5 pediatrics AIDS centers; however, majority of the treatment, care and support facilities were only confined to key urban cities while majority of the population still do not have access to basic health facilities related to HIV. In such a scenario, it was stressed that the role of the Courts and the legal system in bridging the gap between essential health services and ordinary citizens, became essential.

She held that the Constitutional Courts have a role in promoting rights of individuals in accessing governmental health services, challenging social stigmas, discrimination and unfavorable treatment. The paper emphasised that the solution to epidemiological situation Pakistan does not exclusively lay in the law but it is the overall mind-set of the society which will also have to be challenged by the Courts. Moreover, the State should provide legal aid services to citizens who can afford legal costs involved with litigation. Also, civil society through its various associations, unions and organizations can create awareness among people.

In her conclusion, Ms. Khan recommended that there should be informed and protected judicial application of law. This would include training of judges in regards to epidemiological legislations and human rights issues. While the Supreme Court is developing its authority by practicing more pro-people activities, accepting human rights issues and affirming to International Standards, there is a need for legislation and more activism of the Courts in regards to HIV and that this will ensure a sense of dignity and justice among people living with or vulnerable to HIV.

General Discussion

The session was well attended by a number of stakeholders, Hon'ble members of the superior and district judiciary, members of the bar as well as legal experts from both within Pakistan and abroad. The address of each distinguished speaker was followed by a question and answer session in which the audience participated with great enthusiasm. With the assistance of speakers and participants, the following recommendations were put forth for approval at the end of the session.

Recommendations

1. While the value of public interest litigation as a means of ensuring that fundamental rights are protected cannot be ignored, the Superior Courts ability to exercise a roving and supervisory role to ensure that fundamental rights are complied with shall remain severely limited. Superior Courts are already overburdened with civil and political claims. It is therefore, of utmost importance that the subordinate judiciary, which has a close nexus with the public at large, play a pivotal role in safeguarding the fundamental rights of citizens.

2. Citizens routinely avoid recourse to the country's legal system due to lack of faith that their disputes shall be fairly and swiftly resolved. It is incumbent upon the judiciary that those who have had their rights infringed must have access to justice by ensuring that speedy justice is available as opposed to their petitions languishing in cold storage for years. For this purpose the judiciary should abridge the lengthy legal procedures and hurdles that are currently faced by litigants.

3. In 2012, the legislature passed an Act establishing the Federal National Commission of Human Rights which was mandated to enforce fundamental rights of all citizens of Pakistan. One such provision called to specify a Court of Sessions which was to be designated as a Human Rights Court for a particular district. It is proposed that such measures are enforced to ensure speedy resolution of human rights cases.

4. Legal aid facilities must be made available for those individuals who are either marginalized or a recognized vulnerable group, and cannot afford the costs of litigation or adequate legal representation. The bench and the bar should work in unison to apply and expand current arrangements for the provision of legal aid especially as they relate to human rights abuses.

5. Social, cultural and economic rights should be identified as inalienable. Not only do these rights foster social justice, they also pave the way for the fulfilment of other political and civil rights, which are not attainable without citizens first being guaranteed their basic right to life, liberty and dignity. These second generation rights, as often are called, are the only means of self-defence and actualization for millions of impoverished and marginalized individual groups all over the world.

6. Legislators should identify the structural issues prevalent in society owing to social and economic disparities which become an obstacle for the fulfillment of the constitutionally guaranteed fundamental rights. Only when such structural problematic behaviors are identified, there will be legislation that will effectively deal with human rights violations.

7. The judiciary must be aware of the wide array of new human rights challenges currently being dealt with all over the world. For this attention must be paid to the way in which new human rights concerns such as access to adequate healthcare, environmental rights, economic rights, the rights of indigenous peoples and rights of those suffering from debilitating and stigmatizing diseases such as HIV/AIDS, are being heard and dealt with before the United Nations and other international bodies.

8. In criminal and terrorism related trials, the accused shall be guaranteed his basic rights to a fair trial and due process of law. In a similar vein, it is also recommended that in safeguarding this right to due process, it is of utmost importance that laws be promulgated to provide a system of protecting witnesses, investigators, prosecutors and Judges so as not to adversely affect the course of high profile trials.

9. Citizens must be aware of their fundamental rights as well as avenues that can be used to enforce them. For these reasons it is necessary that civil society and the legal fraternity works in unison to promote awareness amongst the populace about their rights enshrined under domestic laws, Constitution and International Law.

10. Adequate resources and expert training should be provided to Judges, Prosecutors, Investigators and Criminal Lawyers with special focus on the different ways in which human rights concerns should be adjudicated.

11. An understanding of international human rights laws, especially with respect to the variety of treaties that have been signed and ratified by the state, must be given due consideration when adjudicating upon human rights abuses in Pakistan.

Rapporteurs

Ms. Nyma Anwar Khan

Mr. Yahya Farid

Ms. Annum Haider

Group – III

"ACCESS TO JUSTICE IN THE CONTEXT OF CONSTITUTIONAL REQUIREMENTS"

Hon'ble Mr. Justice Jawwad S. Khawaja, Judge Supreme Court of Pakistan Chairing the Session

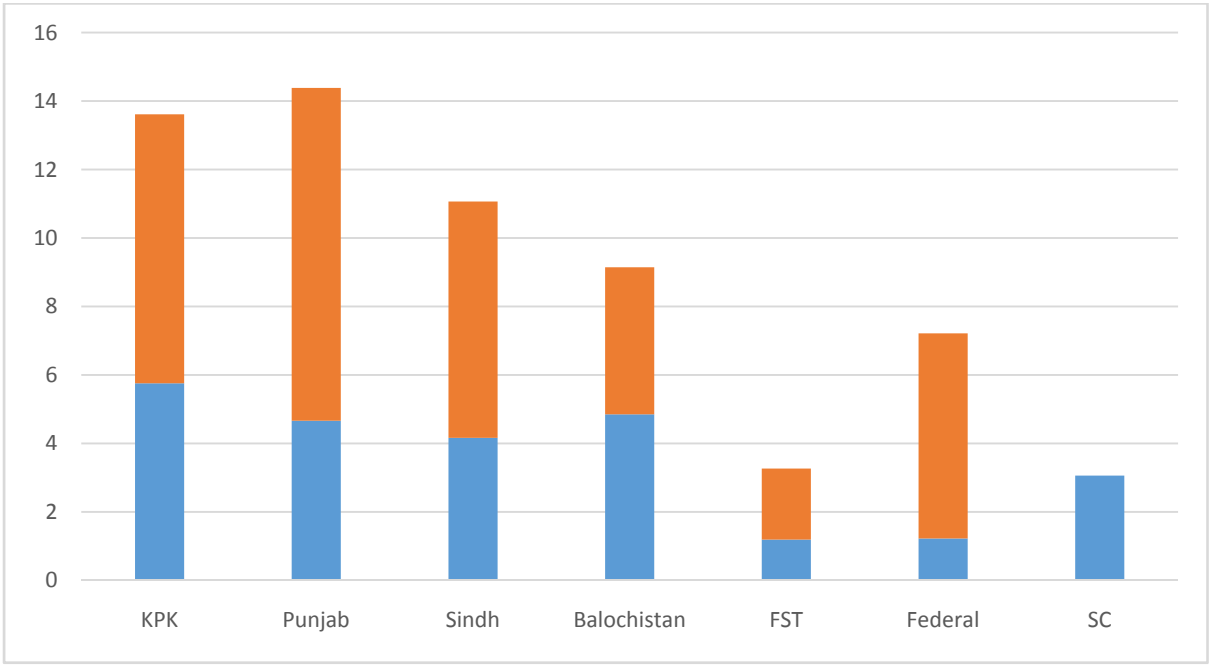
Participants of the Session

Access to Justice in the Context of Constitutional Requirements

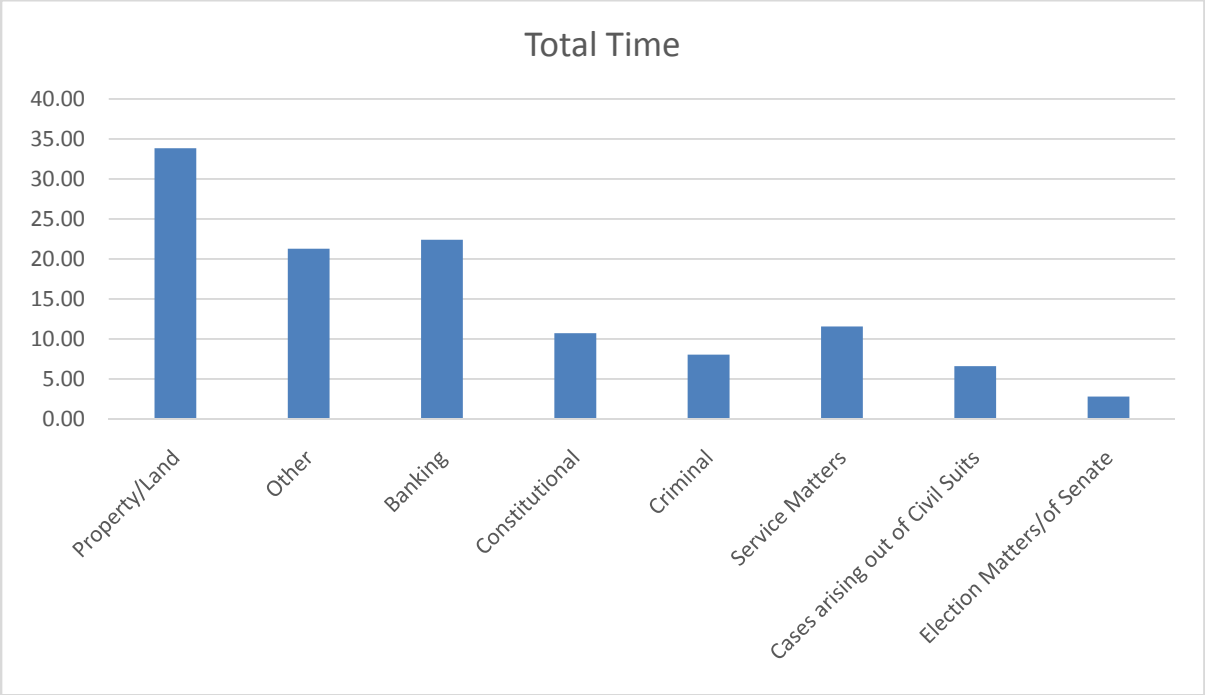
The session was chaired by the Hon'ble Mr. Justice Jawwad S. Khawaja, Judge, Supreme Court of Pakistan and co-chaired by the Hon'ble Mr. Justice Qazi Faez Isa, Chief Justice of the Baluchistan High Court and the Hon'ble Mr. Justice Maqbool Baqar, Chief Justice of the High Court of Sindh. The following five speakers were invited to speak at the session:

1. Rt. Hon. Lord Justice Geoffery Charles Vos, Judge of the Court of Appeal of England and Wales;
2. Mr. Amarjit Singh Chandhiok, Senior Advocate Supreme Court of India;
3. Professor Moeen Cheema, Professor of Law at Australian National University;
4. Dr. Ijaz Shafi Gillani, Chairman Gallup Pakistan; and
5. Mr. Faisal Siddiqi Advocate from Karachi.

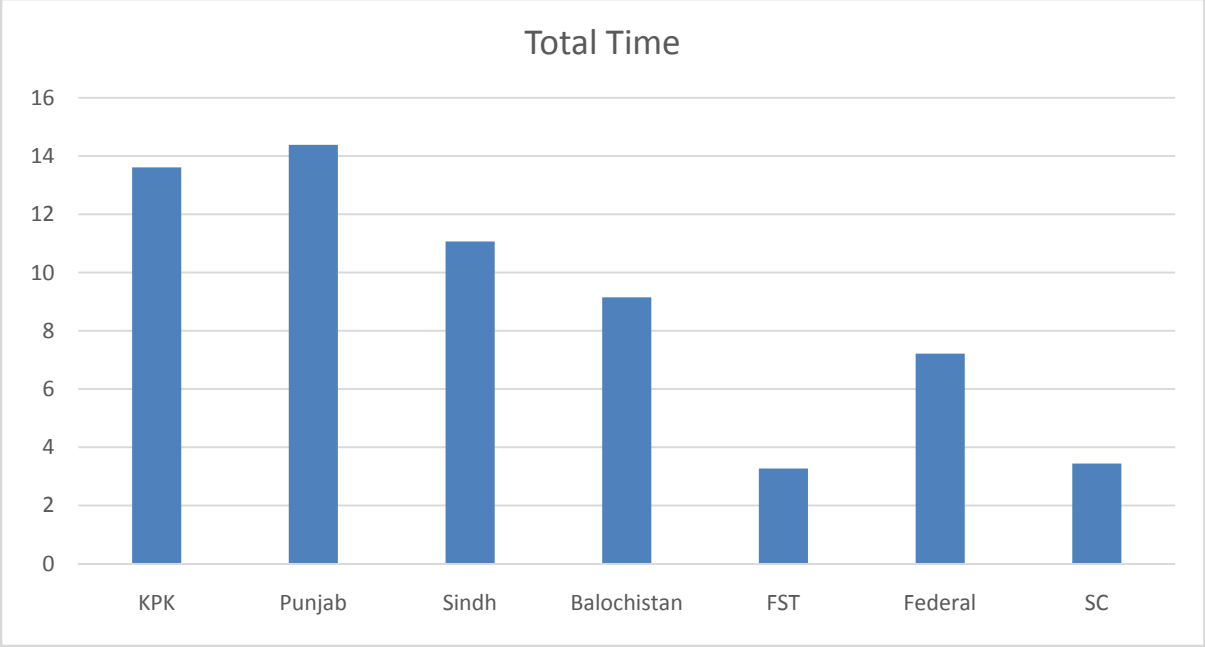
The session commenced at 9 a.m. with the Chair's brief key note. The Chair, who was moderating himself, first extended a warm welcome to all present. The speakers were introduced to the session, after which the Chair took the opportunity to emphasize the need to make public debate about access to justice, particularly delays in the judicial process. In this reference, he presented certain figures which are given in the graphs below. At this juncture, the Chair called for the participants to recognize our own contribution as lawyers, judges, and ordinary litigants to this sorry state of affairs. In furtherance of this responsibility, he drew the attention of the session to tables 2 and 3. While a major chunk of a case's life is spent in the High Court and District Courts, the Chair called upon the participants to recognize that delay was rampant at the Supreme Court level as well. This, according to him, needed to be recognized and addressed. And for this purpose an empirical study should be conducted. For instance, he said that as per Table 4, at the Supreme Court of Pakistan level more time is spent on appeal cases as compared to petitions. Why is this so? We might all have our theories about this, he said, but only when we empirically identify the causes of delay can we truly start working towards a solution.



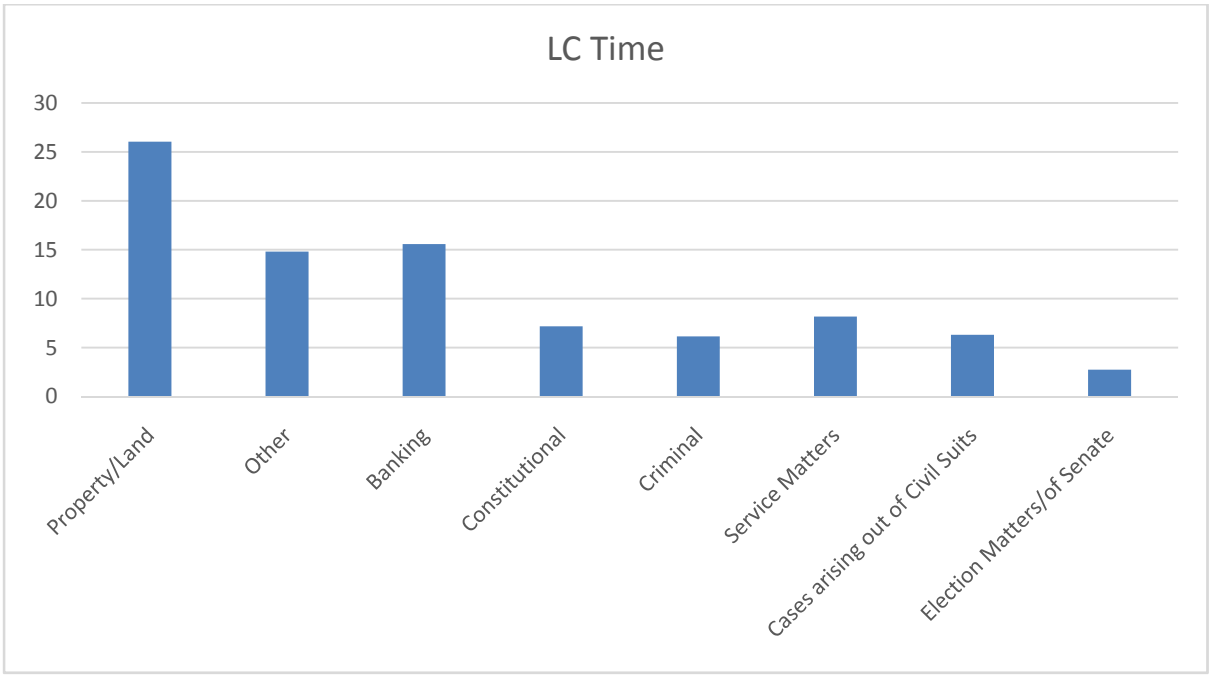
Average time of disposal (years)



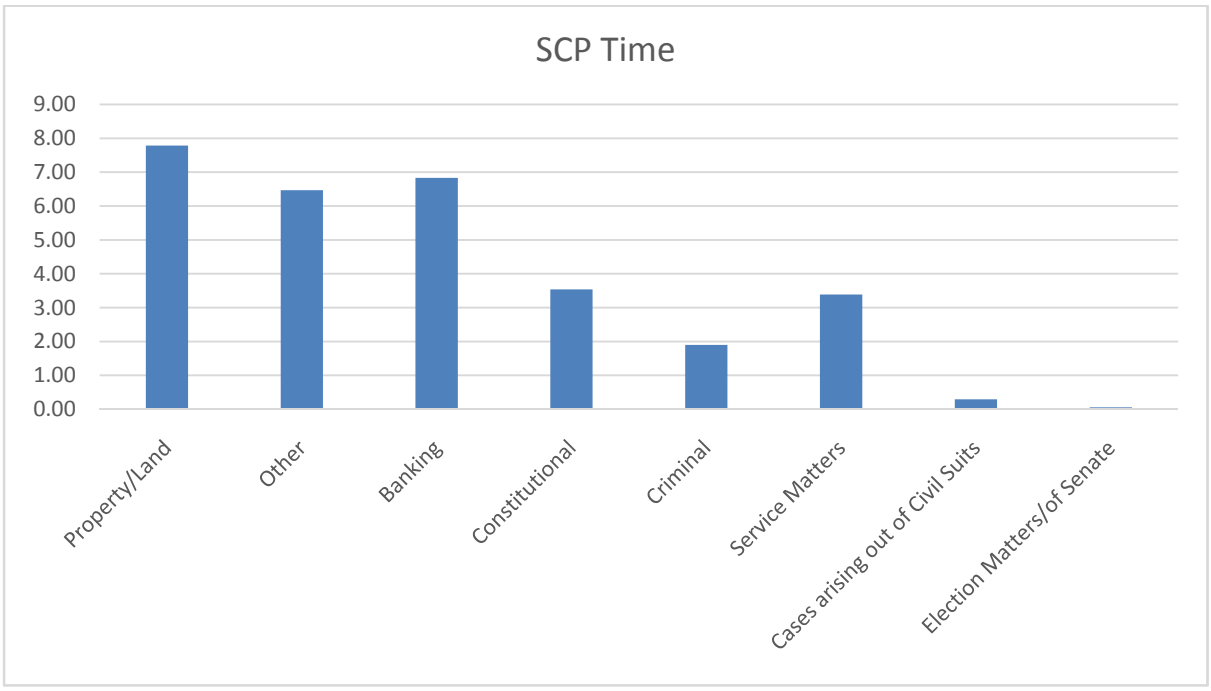
Average time of disposal category-wise (years)



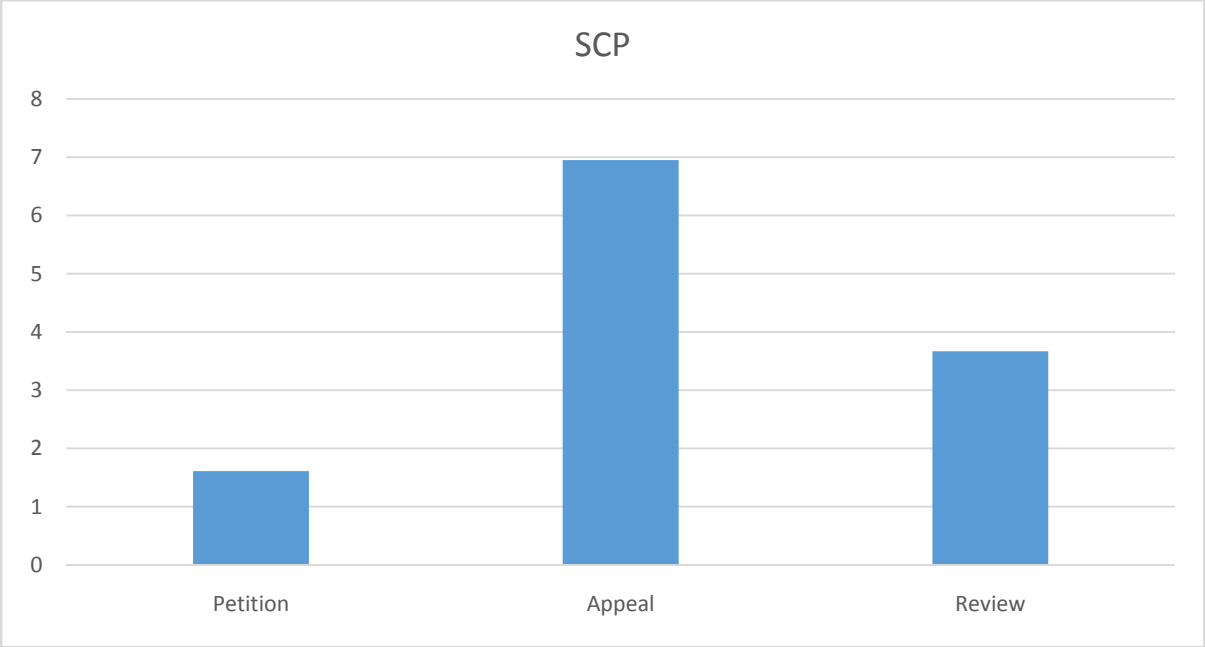
Average time of disposal province-wise (years)



Category-wise lower Court time (years)



Category-wise Supreme Court time (years)



Category-wise Supreme Court time (years)

The Rt. Hon. Lord Justice Geoffery Charles Vos, Judge of the Court of Appeal of England and Wales, began his speech by emphasizing the constitutional significance of the access to justice. He recognized that the problems faced by the UK in providing access to justice are not identical to those of Pakistan, but in some respects, the problems that the UK faces pose a real and significant risk to the rule of law. Lord Justice Vos quoted the famous definition of the rule of law given by Lord Bingham, ***"that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts"***; and that the entitlement of all persons to laws administered by an open court is a central requirement of the rule of law.

Lord Justice Vos went on to list a few of the challenges faced in achieving access to justice:

> That there are insufficient publicly available lawyers to make it possible for ordinary citizens to access the court process;
>
> That the costs of the open court process is prohibitive;
>
> That no adequate system of public funding of court proceedings exists;
>
> That delays in the court process are such that ultimately justice is denied;
>
> That judges or decision-makers are corrupt, so that justice is not ultimately achieved.

Lord Justice Vos commented that both the UK and Pakistan are fortunate to have a constitutionally entrenched independent justice system staffed by some of the most truly independent judges in the world. That may not always make those judges popular, but fortunately judges do not seek popularity. They seek to administer justice and apply the law for the benefit of all citizens equally without fear or favour. Access to justice does not only depend on independent judges being available. It also depends on citizens being practically able to have their disputes and grievances placed before them – whether the disputes in question are between private persons or between the citizen and the organs of the state.

Lord Justice Vos also talked about the necessity of legal aid in providing access to justice. In particular, he mentioned the changing structure of the legal aid system in the UK. He said that even criminal legal aid is not

available for all defendants. Few family and children disputes are now covered, and civil legal aid is practically unavailable save in the most exceptional circumstances. Senior lawyers rarely undertake legal aid cases these days, because funding is hugely restricted. Instead, many act pro bono, but not enough do this to replicate the representation that was previously afforded to the less privileged sections of society – which are so often disproportionately affected by legal problems. The absence of legal aid has led, of course, to an explosion of litigants acting in the courts in person. But more than that, it has slowed the court processes down, and meant that many grievances are simply not vindicated at all. This has happened because of our failure to react quickly enough to adapt our justice system to changing times. The system has become altogether too complex. Cases have become too lengthy and therefore too costly. In crime, technology and the availability of more and more IT and forensic evidence has been partially the cause. But we cannot turn the clock back – and we should not wish to.

Years ago, it was the photocopier that caused cases to become more complex. Now almost every communication can be retained and recovered to be argued about in complex litigation. This has allowed lawyers to become lost in a forest of trees, unable to see the wood. We must focus on the main point in any case. But this does not always happen, and judges do not always require it. We should have seen some years ago that it was necessary, sometimes ruthlessly, to control the length of legal proceedings. Lord Justice Vos also mentioned that English Court of Appeal decisions in the 19th century were rarely longer than 3-4 pages. Now, they frequently run to 40, 50 or more pages, sometimes far more. We cannot expect justice at an acceptable cost or to be delivered within an acceptable time frame, if we regard ourselves as free to deal with every point, however insignificant, at inordinate length. To return to the point here, if the citizens of our countries are not, in practice, easily able to vindicate their legal rights, society is at risk. To ensure that this can occur, judges, lawyers and court staff must move with the times. We cannot continue to operate the same justice system that prevailed years ago. We cannot allow imperceptible changes to occur without review. In this vein, Lord Justice Vos said that the UK can learn from Pakistan; cases are shorter and less elaborate, and ordinary citizens have access to the highest court in the land. He concluded his speech by saying that the most important thing is to keep a close eye on proportionality so as to ensure that our procedures do not outgrow their importance, and that cases are dispatched quickly and cheaply. That gives both citizens and governments the best chance of being able to fund court processes that deliver effective justice.

Mr. Amarjit Singh Chandhiok, Senior Advocate Supreme Court of India, started his speech by saying that the topic of access to justice will never lose its relevance as long as there will be inequality and deficiencies in the system of governance and administration of justice. Access to justice means that the citizenry are able to have their voice heard, exercise their rights, challenge discrimination or hold decision makers answerable or say, accountable. Access to justice is said to be a right vested in every citizen and is a necessary complement of administration of justice. In any country where poverty and illiteracy afflict and fetter majority of the population, it will be reasonable to expect that substantive justice to them could mean very little improvement in their lives. Poverty of law is one of the reasons behind persistence of poverty and lack of substantive justice to the most desperate clients of the legal system. More countries including Pakistan, than ever before, are working to build democratic governance. Their challenge is to develop institutions and processes that are more responsive to the needs of ordinary citizens, including the poor, and that promote development. Mr. Chandhiok also lauded the role of the judges of the superior judiciary in the lawyers' movement in putting the issue of access to justice at the forefront of public discourse in Pakistan.

The Chair questioned Mr. Chandhiok regarding one of Lord Justice Vos' recommendations viz. writing brief and compendious judgements. The Chair specifically mentioned the judgements of the pre-partition Deccan High court, which would write its judgements in Urdu and were reported in the AIR but are not available in Pakistan. Mr. Chandhiok agreed with the Chair that such judgements could provide templates for Pakistani courts to write their judgments in Urdu to make the law more accessible to the people; and that he would endeavour to unearth these judgements and send them to the Supreme Court.

Professor Moeen Cheema gave a presentation on the upcoming book titled "***The Politics and Jurisprudence of the Chaudhry Court***". His presentation dealt with the following themes, which Professor Cheema stated were central to the jurisprudence and political impact of Supreme Court decisions and actions during the tenure of Mr. Justice Iftikhar Muhammad Chaudhry as Chief Justice of Pakistan:

1. Separation of powers v. Rule of Law
2. Rule of Law and Rights Jurisprudence
3. Academic criticism of the Court
4. Judicial activism or "proactivism"
5. Jurisdictional overlaps
6. The question of fact-finding
7. The problem of enforcement
8. The Human Rights Cell as an administrative ombudsman
9. Studying the role of the Human Rights Cell
10. Institutionalising Human Rights Cell procedures
11. Legal Aid

Professor Cheema said that under Chief Justice Chaudhry, the Supreme Court expanded the sphere of public interest litigation that began in the Supreme Court decisions of the 1990s such as the *Shehla Zia* and *Darshan Masih* cases. Moreover, the Court took on a heavy workload and began to deal with a number of cases, not just high profile cases that are reported with gusto in the media. He gave the example of the *Anita Turab* case where the Court not only elaborated on and enunciated on principles of fundamental rights but also delved deeper to reform underlying procedures to improve access to justice.

Dr. Ijaz Shafi Gillani gave a different perspective to the discourse. As the Chairman of Gallup Pakistan, he presented the perception of the Supreme Court among members of the public at large over the years. The statistics that he cited compared the opinion polls gathered by Gallup Pakistan before and after the lawyer's movement. In effect, public confidence in access to justice and the rule of law through due process has visibly increased in Pakistan following the lawyers' movement and the restoration of the judiciary.

The public confidence in the system of administration of justice can be witnessed in the exponential increase in the amount of criminal cases that are being reported to the police. Previously, victims would not report cases of violence because they lacked confidence that their grievances would be addressed. Now, however, due to the actions of the Supreme Court under the former Chief Justice, the Supreme Court has captured the public imagination. This is particularly true because of the high profile cases where the highest officials of the executive have been taken to task by the Supreme Court for not fulfilling their duties under the law and the Constitution. For example, post-2009, 78% of murder cases were reported to the police whereas, only 53% of the people polled by Gallup Pakistan favour mob justice. Dr. Gillani, who is also co-editor of the book "***The Politics and Jurisprudence of the Chaudhry Court***", encouraged the participants to read the book to find the first detailed academic critique of its kind from Pakistan.

Mr. Faisal Siddiqi focused his talk on the relationship between access to justice and poverty. In exploring this relationship between access to justice and poverty, his paper concentrates on only one aspect of this relationship. He raised the general question as to whether economic inequalities in Pakistan deny the majority of the people of Pakistan from having equal access to the courts of justice on the basis of class inequalities; and the specific question as to whether the absence of the right to effective legal aid, or right to be represented by a competent counsel, due to economic inequalities, leads to lack of equal and effective access to the courts of justice for the poor.

Access to the courts of justice involves access to both civil and criminal courts, from the initiation of the case in the court of first instance and to the court of last instance, at the expense of the state, and/or as provided by public-private organizations. Therefore, any effective state, or private, legal aid system for the poor and the powerless,

who can't afford an effective lawyer, would involve civil and criminal legal aid, at all stages of the court proceedings.

In addition to the above, in the discussion of free legal aid to the economically poor accused in criminal cases, what should not be forgotten is that free legal aid is also the need of the economically poor victims of crimes pursuing their cases against the perpetrators of crime e.g. rape victims, family members of murder victims, victims of religious, ethnic and terrorist violence etc. Also, in cases involving large scale violation of fundamental and human rights of a large class of people, the importance of free legal aid cannot also be underestimated for the enforcement of such fundamental and human rights of a large class of people, who may not even be aware of their legal remedies, let alone have legal resources to rectify such violations. Therefore, there is connection between free Legal Aid and Public Interest Litigation initiated by third parties for the enforcement of such fundamental and human rights of a large class of people.

For recent examples, on a Public Interest Litigation Petition, a Division Bench of the Hon'ble High Court of Sindh, applying the principles of constitutional torts, granted compensation to families of around 270 victims and to the injured of the Baldia Factory Fire Incident[1], through a judicially formed commission, whereas, the normal tort litigation would have lasted for over a decade, which the poor could neither pursue nor afford. Also, on a Public Interest Litigation Petition, a Divisional Bench of the Hon'ble High Court of Sindh is in the process of forming a judicial commission to investigate the 'Thar tragedy'. Could the poor destitute families of over 200 dead children, be visualized to have the ability to access the court of justice. The importance of PIL to provide access to the poor and powerless is obvious from the fact that a record number of 201, 450 cases were instituted with the Human Rights Cell between 2009 and October 31st, 2013[2] and there is an explosion of Public Interest Litigation under Article 184(3) of the Constitution.

The numbers are as follows:

PIL Cases instituted at the Supreme Court[3]

Year	*Suo Motu* Cases	Human Rights Cases	Constitutional Petitions[4]	HR Cell Applications[5]
1988 to 1999	3	13	23	-
2000	2	3	33	-
2001	2	2	11	-
2002	2	2	42	-
2003	4	2	58	-
2004	4	0	43	-
2005	15	12	41	-
2006	15	80	34	-
2007	27	77	90	-
2008	2	4	18	81
2009	28	97	68	9879
2010	27	135	81	59878
2011	20	42	92	48388
2012	11	69	132	42999

[1] Around 270 workers were burnt alive on September 11th, 2012, at the factory of Ali Enterprises at Baldia, Karachi

[2] Data provided to the Human Rights Cell, Supreme Court of Pakistan.

[3] The data for the years 1988 to 1999 is based only on reported cases in the law journals and would require further verification and research. The rest of the data is based on the Report of the Proceedings of the International Judicial Conference, 2013 (19-21 April, 2013), Islamic Research Institute Press, at 57-58 and figures may not be exactly accurate because the aforementioned data is in the form of a chart in which exact numbers are not specified. The complete data for the year, 2013, was not available.

[4] Moreover, in terms of the data for the years 2000 to 2012, it is not possible to distinguish between Constitution Petitions which can be described as Public Interest Litigation and Constitution Petitions which cannot be although an examination of the reported judgments shows

The attraction of Public Interest litigation under Article 184(3) of the Constitution for the poor and less powerful is obvious as it ends the domination of lawyers, elimination of complex procedures and the elimination of the unending appeal process with only one right of appeal. Public Interest Litigation is both an alternative to free legal aid and if supported by free legal aid; its benefits for the poor can be greatly extended.

As Justice Jawwad S. Khawaja reminds us *"Some of our greatest national problems will be relieved if only we realize the momentousness of what has transpired in this country since 2007, through the blood, sweat, tears and toil of our people."*[6]. What happened as a result of the Lawyers-Judges movement 2007-9 is that the entire basis of judicial power and legitimacy went through a radical transformation from judicial power being based only on constitutional guarantees of security of tenure and moral legitimacy to judicial power being based on public legitimacy. Therefore, the question is whether such judicial power based on public legitimacy is sustainable, if the poor i.e. the vast majority; do not have equal access to justice. In short, the access to justice to the poor is now intrinsically linked with sustaining and increasing judicial power based on public legitimacy.

Conclusion and Recommendations

After the papers were read out by the speakers, the Chair invited Mr. Daulat Abadi, Prosecutor-General of Tehran, to give his views on access to justice in Iran. Mr. Abadi, addressed the audience in Persian, but circulated a translation of his address which detailed the various provisions in the Iranian Constitution that provide for access to justice.

With the conclusion of Mr. Abadi's address, the Chair opened the floor for a general discussion on the session's agenda. He directed those present to focus their attention on framing 3-4 recommendations that could be implemented in letter and spirit.

In pursuance of this opportunity, a number of questions and comments were raised by members of the Bar and the District Judiciary. Mr. Iqbal Hashmi, Advocate, for instance, raised interesting points regarding the fundamental right of access to justice with particular regard to the delays in adjudication. Sikander Javed, Advocate stressed the importance of publishing judgments in Urdu so as to make the law of the land accessible and comprehensible to the litigant public.

Mr. Sultan Tareen, Additional District & Sessions Judge from Karachi, suggested that amendments need to be made in the procedural law of Pakistan, particularly in the High Court Rules and Orders. He was of the opinion that the acceptance of adjournment applications needs to decrease and that the High Court Rules and Orders should also provide for a mechanism to implement the National Judicial Policy. He also felt that defence counsel often try to delay proceedings after bail or stay has been granted (depending on the nature of the case) and that the law should be amended to restrict the defence counsels' ability to pursue such a course of action. Lastly, he noted that the subordinate judiciary needs assurances and protection from the superior judiciary to safeguard from pressures placed upon them by the Bar as well as litigants.

Hafiz Naseem Akhtar, Additional District & Sessions Judge from Hyderabad, suggested that one Sessions Judge in each district should be appointed as Director of Human Rights to hear human rights cases arising in their districts; and that the High Courts should exercise supervisory jurisdiction over the Director Human Rights and ensure that human rights cases are addressed in a timely and expeditious manner.

The general consensus that emerged was that the causes of delay in access to justice are generally known to lawyer and litigant alike, but there is no empirical study in Pakistan from where the actual causes can be objectively identified and addressed. The Law and Justice Commission of Pakistan could therefore be directed to conduct a detailed conceptual and empirical study of this issue and give recommendations for the creation and implementation of a free legal aid system for the poor in Pakistan.

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that the Public Interest Constitution Petitions from the predominant part of this data.

[5] Data provided to the Human Rights Cell, Supreme Court of Pakistan.

[6] Suo Moto action regarding allegation of business deal between Malik Riaz Hussain and Dr.Arsalan Iftikhar attempting to influence the judicial process, P.L.D. 2012 S.C. 664, at 668.

The participants framed, and voted unanimously, to adopt the following recommendations as part of Group III's resolution for the International Judicial Conference, 2014:

- That an empirical study should be undertaken to examine the causes of maladministration in various jurisdictions of our judicial system. The study should be focused on identifying:
    - The leading causes of delay;
    - Means of supplementing the human resource and infrastructure capacity of courts at all levels of the judicial hierarchy;
    - Current public perception of fairness of the judicial process;
    - An ideal service structure for judges and court staff;
    - The average litigant's ability to pay for costs associated with the judicial process;
    - The sufficiency of the powers of the district judiciary for the purpose of providing proper/effective oversight of executive authorities;
    - Legislative, judicial and administrative measures which may be taken to provide greater access to justice.
- Following this study, suitable changes to the rules and culture of the Bar should be made to ensure that legal aid is provided to deserving litigants. Such measures could include revisiting the licensing procedures of advocates to promote compulsory *pro bono* work.
- That judges, lawyers, and legislators should all co-operate and take concrete steps towards ensuring that all laws and judgments should be either written, and if not written, then translated, into Urdu and made accessible to the public.
    - That at the very least a summary of all reported judgments should be published in Urdu and made accessible to the public;
    - In the meanwhile, until the ultimate objective of translating all judgments into Urdu is achieved, judges should strive to draft concise judgments in plain English.

Rapporteurs

Mr. Asher Qazi
Mr. Zeeshaan Hashmi
Mr. Osmaan Khan

Group – IV

"ROLE OF JUDICIARY IN PROMOTION OF CULTURE OF TOLERANCE"

Hon'ble Mr. Justice Mian Saqib Nisar, Judge Supreme Court of Pakistan Chairing the Session

Participants of the Session

Role of Judiciary in Promotion of Culture of Tolerance

The working session was chaired by the Hon'ble Mr. Justice Mian Saqib Nisar, Judge of the Supreme Court of Pakistan, who was joined by the Hon'ble Mr. Justice Asif Saeed Khan Khosa, Judge of the Supreme Court of Pakistan and the Hon'ble Mr. Justice Muhammad Azam Khan, Chief Justice of Azad Jammu & Kashmir.

This working group was well attended and the participants at the session included Hon'ble judges of the superior judiciary, eminent lawyers and celebrated brains of the legal world who brought together their ideas and thoughts on the topic being deliberated and put forward valuable recommendations aimed at improving a culture of tolerance.

Opening Remarks

In his opening remarks, the Chair of the session, Hon'ble Mr. Justice Mian Saqib Nisar offered his views observing that the concept of "rule of law" grounded a culture of tolerance in the society.

Mr. Justice Mian Saqib Nisar further remarked that the rule of law gives rise to a sense of security that rights of every member of the society shall be protected which element indoctrinates a culture of tolerance in the fabric of a society.

The Hon'ble Chair viewed the judiciary as the cornerstone towards the promotion of a culture of tolerance by ensuring the principles of equality and non-discrimination are enforced and independently adjudicated.

Summary of Speeches

Mr. John Clifford Wallace, a Federal Appeals Judge with the United States Court of Appeals for the Ninth Circuit based in San Francisco, was the first speaker at the session. Mr. Wallace's thoughts revolved around the concept of religious tolerance and, in particular, the guiding principles of the Constitution of the Islamic Republic of Pakistan which mandate tolerance in light of the teachings of Islam. Mr. Wallace also observed that judiciaries can only adjudicate independently and promote tolerance if strength is derived from the will of the people and not otherwise. Adding further, the Judge emphasized on development of the concept of alternative dispute resolutions such as mediation and remarked that such should be encouraged to avoid the lengthy procedures of court, which in turn lead to intolerance.

The next speaker at the session was **Mr. Justice (Retd.) Shaiq Usmani**, a former judge of the High Court of Sindh. While sharing his thoughts, Justice Usmani opined that the judiciary in Pakistan must transform its present culture which, he observed, is beset by procrastination and delays leading to frustration amongst the litigants who in their frustration revert to intolerance. Justice Usmani also emphasized on the need to make to shift to an inquisitorial system from the incumbent adversarial system and simplify court procedures.

Justice Shaiq Usmani was followed by Mr. Justice Mansoor Ali Shah, an incumbent judge of the Lahore High Court. Justice Shah's discourse focused on the need for judiciaries to embrace modern trends and inspire the confidence of the public. Incidental to this view, Justice Shah stressed the importance of employing competent, tolerant, liberal and impartial judges having the eagerness to improve the system by expeditiously and justly disposing of cases. He also urged the Pakistani judiciary to take steps towards dispelling the impression that litigation eats up generations with there being no end in sight to a litigant's plight.

Dr. Martin W. Lau, Professor at the School of Oriental & African Studies in London as also a practitioner based in London, was next to offer his thoughts. Dr. Lau primarily shed light on the major interactions between UK and Pakistani law and highlighted the comparison of connection between the two jurisdictions. In his critical analysis of the Pakistani Law, Dr. Lau observed that in the absence of clear rules and laws on certain subjects such as human rights and Family Laws, the curse of intolerance has crept into the society and judicial determination in this regards carries an important role.

Renowned human rights activist **Mr. I. A. Rehman** was of the view that the concept of tolerance in Pakistan was very narrow and significant steps had to be taken to rectify the situation. In so far as the role of the judiciary was concerned, Mr. Rehman advocated the necessity for the public to own the justice system for it to play an effective role in the promotion of a culture of tolerance.

Next to share thoughts were **Sheriff Tom Welsh**, the Director of the Judicial Institute for Scotland, and Sheriff Alistair Duff, the Deputy Director of the Judicial Institute for Scotland. Both Sheriffs presented their collective paper *inter alia* emphasizing on the Bench Book introduced in Scotland relating to equal treatment. While strongly recommending the judiciary in Pakistan to introduce an equal treatment Bench Book, the Sheriffs recommended imparting training to judges from all tiers allowing for better understanding of issues plaguing society in the form of intolerance. The Sheriffs also urged for stricter and harsher punishment for prejudicial crimes thereby making it clear to all and sundry that intolerance in any form or manner will not be tolerated.

Following the Sheriffs' discourse, **Mr. Babar Sattar**, noted lawyer and columnist, took the stage to deliver his thoughts on the subject. Mr. Sattar observed that traditionally in Pakistan morality and the law has been entangled and the required distinction between the two obliterated. In this regard, media trails should not be allowed to assert one sided morality and opinionated view points. He pressed the view that faith should not be held against anyone by the judiciary when adjudicating a matter before it. Mr. Sattar also commented on the lack of representative character of the Pakistani judiciary and believed that remedial actions to this effect must be taken. Mr. Sattar also underscored the role of underprivileged and minority classes of society in shaping a more tolerant society.

The Vice President of the United States' National Center for State Courts, **Mr. Jeffrey A. Apperson** was next to offer his perspective on the subject. He opined that the system of administration of justice needed structural improvement before it could truly play an effective role in the promotion of a culture of tolerance. Mr. Apperson enunciated that an efficient expeditious judicial system increases the level of satisfaction and correspondingly reduces the risk of uncertainty and intolerance in the society.

Mr. Humayun Ihsan, the Principal of the Lahore-based Pakistan Law College, was the next speaker at the session. In his discourse, Mr. Ihsan observed that the judiciary in Pakistan was over-burdened with heavy expectations of the public, particularly in the aftermath of the movement for the restoration of the judiciary heralded in 2007; hence correspondingly, with losing hope, intolerance is also on the increase. He suggested that such high expectations should be restored by providing speedy justice to the masses.

The last speaker at the session was **Dr. Raana Khan**, first woman doctorate of Law in Pakistan and an advocate of the Supreme Court of Pakistan. She imparted the need to educate and train the lawyers and judges in order to promote a culture of tolerance. In addition, Dr. Khan also remarked that the legal fraternity should play a positive role in quick and unbridled dispensation of justice.

General Discussion:

Upon the conclusion of the presentation of the papers, the Hon'ble Chair, Mr. Justice Mian Saqib Nisar, invited questions and comments from the floor. The participants of the session participated with great zeal by enlightening the session with their valuable suggestions and also posed questions from the panellists/speakers on their papers.

The discussion was summed up by the Hon'ble co-chair, Mr. Justice Asif Saeed Khan Khosa, who ceded to the requests of the Hon'ble chair and took the stage to share his thoughts.

Mr. Justice Khosa opined that the expectations of the people in so far as the role of a judge is concerned have evolved with changing times. Mr. Justice Khosa also commented on the suggestions put forth by the speakers and while appreciating the thought and vision of some of the recommendations, he felt that a separate Conference alone to deliberate and discuss the role of the judiciary towards embracing modern methods and adapting procedural changes was required.

Following the extensive discussion, the proposed draft of the recommendations, prepared by the Rapporteurs of the session, was put forward before the house and the floor was opened to discuss the same. After an animated and interesting debate, the following recommendations were unanimously approved by the session:

Recommendations:

1. The judiciary, as an independent pillar of the state, stands solely on its judgments and in an ideal world should derive its strength and satisfaction from the will of the people. Mediation and Alternate Dispute Resolution

should be resorted to so as to rebuild the confidence of public in the judiciary and to inculcate a culture of mutual understanding.

2. The power or jurisdiction must be aligned with the ability to administer such jurisdiction. Judiciary should have control of an adequate budget, hiring and training of personnel, space and facilities, discipline of attorneys, contempt power, and a living wage that deters corruption and provides incentives for good lawyers to become judges.

3. Expeditious, inexpensive and judicious dispensation of cases is the key through which the judiciary can promote a culture of tolerance in society. Issues regarding business and administration of trial courts can suitably be resolved by hiring court administrators, officials directly reporting to the Chief Judge of the jurisdiction to perform and manage the following functions: goal setting for the court in coordination with administrative judges; conducting research and measuring court performance; formulating and implementing management policies etc.

4. Effective, fair and speedy justice is the best cure for intolerance. Efficient Judicial systems, automated case and court management systems, level playing field, transparency, due process and independence of judges- promote confidence and encourage members of the society to approach a court of law. As against that the obvious response or reaction to injustice is either violence or corruption.

5. Judiciary can play a critical role in shaping a tolerant society by taking steps for effective management of jurisdiction including steps towards witness protection, providing security to judges and effectively enforcing court orders.

6. Minority rights prevalent in most countries should be meaningfully enforced since the failure of judicial system to safeguard minority rights facilitates hatred and subsequent crimes against humanity.

7. A Courtroom provides one of the alternatives in the market place of dispute resolution. The challenge for the judiciary is to showcase its product as the best dispute resolution mechanism so that an ordinary person does not resort to violent means for his rights. The courts of first instance, district judiciary, must be strengthened and empowered by appointing honest, liberal, unbigoted, unbiased and sympathetic judges.

8. Combined judicial trainings should be organized for junior and senior tiers of judiciary to enable them to set aside their prejudices and biases, as well as to make them understand the social conditions of litigants. In order to tackle the issue of intolerance, the training of judges must be organized in the following areas:

   Equal treatment, disability, domestic violence, treatment of children, sectarianism and, ethnic, religious and socio-economic diversity.

The session concluded with the Hon'ble Chair thanking the Hon'ble Co-chairs, the distinguished panellists and the participants for their enthusiastic participation, valuable input and significant contribution to the working session.

Rapporteurs

Barrister Adil Kahlon
Barrister Momin Ali Khan
Ms. Faryal Nazir

Concluding Session

Concluding Address by Hon'ble Mr. Justice Tassaduq Hussain Jillani, Chief Justice of Pakistan/Chairman, Law and Justice Commission of Pakistan

My brother Judges of the Supreme Court of Pakistan;
Hon'ble Chief Justice Supreme Court of Azad Jammu & Kashmir;
Hon'ble Chief Justices and Judges of the Federal Shariat Court, High Courts of Pakistan and the High Court of Azad Jammu & Kashmir;
Hon'ble Chief Judge Supreme Appellate Court Gilgit-Baltistan and Chief Judge, Gilgit-Baltistan;
Learned members of the District Judiciary;
Attorney General for Pakistan and Advocate Generals of Balochistan, Khyber Pakhtunkhwa, Punjab and Sindh;
Vice Chairman and Office Bearers of Pakistan Bar Council and the Provincial Bar Councils;
President and Office Bearers of the Supreme Court Bar Association;
Presidents and Office Bearers of the High Court and District Bar Associations;
Eminent International delegates;
Distinguished Guests;

Ladies and Gentlemen,

Assalam-o-Alaikum,

You have heard my brother judges presenting the recommendations for each of the working groups of this International Judicial Conference 2014. I now propose that a summary of these recommendations set out in the following terms, may be formally adopted by this gathering as the declaration of this Conference, namely the Islamabad Declaration 2014:

Declaration of the International Judicial Conference, 2014

In respect of the Judicial Review of Administrative Actions, it is hereby declared that Judiciary, not only in Pakistan but all over the world, particularly in developing countries, strives to establish 'constitutionalism' by

exercising the power of judicial review. This places a rational limit over the decisions and actions of other organs of the state and this spirit must be maintained and kept alive. Further, the power of judicial review may be exercised to preserve the Constitution as a living and organic text by recognizing and enforcing emerging contemporary human rights such as the right to health, food, shelter and other amenities of life. The power of judicial review may also be exercised for the eradication of rent seeking behaviour and encouragement of Foreign Direct Investment and other economic activities within the country. To complement the exercise of the power of judicial review by the superior courts, the district judiciary and other judicial forums may also be strengthened so that people have access to justice at their doorstep. The exercise of suo motu jurisdiction by the Supreme Court of Pakistan may be duly structured and regulated by the Court and the principle of trichotomy of powers enshrined in the Constitution be respected so that exercise of judicial powers neither hampers nor stunts executive policies. Finally, the sanctity of the people's trust in the legislature to legislate must be kept in mind while seeking judicial review of legislative instruments.

On the subject of Role of Judiciary in Protecting Human Rights, it is hereby declared that the superior courts may not exercise a roving and supervisory role to ensure that fundamental rights are complied with. They shall exercise their jurisdiction in such a way that they are not overburdened with civil and political claims. Accordingly, the district judiciary may also play a pivotal role in safeguarding the fundamental rights of citizens. It is suggested that the judiciary must ensure access of speedy justice and abridge the lengthy legal procedures and hurdles faced by litigants. It is further suggested that a Court of Sessions be designated as a Human Rights Court for a particular district. It is recommended that legal aid facilities may also be made available to the marginalized sections of society. It is further recommended that social, cultural and economic rights should be identified as inalienable to help foster social justice. It is also recommended that the legislature should identify structural issues resulting from social and economic disparities which pose an obstacle to the fulfilment of constitutionally guaranteed fundamental rights. It is also recommended that the judiciary should remain conversant with human rights challenges being raised and addressed all over the world. It is strongly recommended that the right of fair trial and due process of law be guaranteed.

On the subject of Access to Justice in the Context of Constitutional Requirements, it is hereby declared that an empirical study in order to examine the causes of maladministration in various jurisdictions of Pakistan's judicial system be conducted. This study should focus on identifying the primary causes of delay; means of supplementing human resource and infrastructural capacity of courts; current public perception of fairness of the judicial process; ideal service structure for judges and court staff; litigant's ability to pay for litigation costs; sufficiency of the powers of the district judiciary for the purpose of providing proper/effective oversight of executive authorities as well as legislative, judicial and administrative measures which may be taken to provide greater access to justice to the citizens of the country. Following this study, suitable changes to the rules and culture of the Bar may be introduced in order to ensure that legal aid is provided to deserving litigants.

On the subject of the Role of the Judiciary in Promotion of Culture of Tolerance, it is imperative that courts must promote tolerance and be sensitive to the social, ethnic, racial and gender background of the parties and demonstrate empathy towards these considerations. It is fundamental that honest and dedicated persons who share a strong commitment to the dispensation of justice be appointed as judges. It is suggested that judicial training be imparted to judicial officers to sensitize them to the biases and prejudices plaguing the society. Finally, it is recommended that rights for protection of minorities must be effectively and meaningfully enforced.

The declaration of this Conference is hereby formally adopted as the Islamabad Declaration 2014. In my capacity as the head of this Apex Court and Chairman of the Law and Justice Commission of Pakistan, I commend each and every one of you for contributing towards the ongoing journey of legal development and reform in Pakistan. I would once again like to express my profound gratitude to members of Pakistan's superior judiciary, lawyers, public functionaries, academics, representatives of the civil society for contributing whole-heartedly to the discussions and deliberations in each of the working groups earlier today. I assure you that your efforts have not only made this Conference successful and memorable for all but will also go a long way in promoting a culture of legal debate, discussion and progress in our country.

I would also like to take this opportunity to thank the Organizing Committee of this Conference comprising the Hon'ble Mr. Justice Nasir-ul-Mulk, Senior Puisne Judge, the Hon'ble Mr. Justice Jawwad S. Khawaja, the Hon'ble

Mr. Justice Anwar Zaheer Jamali, the Hon'ble Mr. Justice Mian Saqib Nisar and the Hon'ble Mr. Justice Khilji Arif Hussain for their unstinting guidance and support throughout the planning and execution of this Conference. I would also like to appreciate Raja Akhlaq Hussain, Secretary Law and Justice Commission of Pakistan and his team for their dedication, commitment of tireless efforts for the success of this Conference, the Registrar of the Supreme Court Mr. Tahir Shahbaz, who despite his recent appointment to this office, became an integral part of the team that allowed this Conference to come together. I would also be remiss if I did not express my gratitude for the staff members who worked behind the scenes and remained alert and helpful despite the long hours that the Conference necessitated, or if I did not appreciate the efforts of the rapporteurs and volunteers who provided cheerful and tireless support to our esteemed delegates throughout the Conference. Each one of these people were motivated by the desire to make their contribution to bolstering the system of justice in our country and for this I congratulate and commend each of you personally.

In particular, my brother judges of the Supreme Court and I would like to extend a most heartfelt thankfulness to our foreign delegates who have traveled long distances to participate in this Conference. This unique assemblage of judges and jurists from across the globe is a living testament that members of the legal profession throughout the world recognize and appreciate that the legal issues that plague a certain country and the trajectory that its laws may take is not a matter for that country alone but is of importance and concern to all others. The English poet John Donne had famously stated as long ago as the 16th century that, **'no man is an island, entire of himself, every man is a piece of the continent, a part of the main'.** The universality and interconnectedness of the world that Donne had alluded to, remains a valid reality to date, indeed more so in this world of globalization and advanced technology. We, the members of the legal profession, whether we may be on the bench or part of the bar, whether we have at our disposal the use of the finest resources and institutions of the developed world or whether we are still in the process of acquiring these resources or creating these institutions, are equally part of this world. We are all proceeding on the same journey—a journey whose destination, whose ultimate dream, is the attainment of rule of law and justice in our respective countries and spheres of influence—and the actions of each one on this journey reverberate in the lives of the others. This Conference is a testament to our dependence on each other for our progress and success. It is, therefore, imperative that we share in each others' concerns to make the world a better, more viable place for our future generations.

Before I part with you I have a dream and a thought to share. Dreams and hopes are a prelude to visions and resolves. These are engines and catalysts of all human progress and social change. Fifty years ago Dr. Martin Luther King, a visionary and a fighter for human rights had a dream that his nation will rise up and live up to the true meaning of its creed that all men are created equal. That dream changed the course of American history. The U.S. Supreme Court which declined to give equal status to Afro-Americans in Dred Scott's case (1857), in Brown v. Board of Education (1954) declared that black and white are equal and that there shall be no segregation in schools. There was a cultural sea change. The people elected a person of colour as their President. Let us for a change, shun individual dreams and let us instead dream as one people and for one race of humans. Let's dream together for a world we live in, a world of globalized interdependence.

Let's dream for a day when all the international and regional bodies forge a common goal of a universal desire of people across the globe to be governed by the rule of law;

Let's dream for a world which treats all people equally before the law;

Let's dream for a day when the walls of pride and prejudice, of race and colour, of caste and creed, of religion and gender, fall and people live as one race of humans;

Let's dream for a day when the nations of the world burry their hatchets and their nuclear arsenals;

Let's dream for a day when genocide or ethnic cleansing or waging of war becomes a distant memory;

Let's dream and pray for a day when we live by the true meaning of Quranic command, "*Let there be no compulsion in religion"; (2:256)*

Let's dream that there is a dawn when nations of the world do not ask for "whom the bell tolls" but believe that it tolls for every nation;

Let's dream for a day when the world is liberated by law and the people are not condemned by caprice;

Let's dream for a day when there is no midnight knock on the door or a sudden disappearance;

Let's dream for a day devoid of show trials, of subjugation of prisoners through genetic experiments and of confessions extracted by torture;

Let's dream for a day when people across the globe canalize their energies and resources for a better future, for peace and for prosperity;

Let's dream for a day when innocent men and women do not die of hunger, of disease or of infliction of terror;

Let's dream that our dreams come true, that they turn into passions, into oaths and resolves;

Let's unite for these dreams and these visions.

These dreams, these hopes, these aspirations and goals are the outcome of our common wounds and pains.

Let's pledge to live for and live by these aspirations and goals.

Let's defeat those who want to defeat us.

I thank you all.

Vote of Thanks by Raja Akhlaq Hussain, Secretary, Law and Justice Commission of Pakistan

Hon'ble Chief Justice of Pakistan;
Hon'ble judges of Supreme Court of Pakistan;
Hon'ble Chief Justice and Judges of Federal Shariat Court;
Hon'ble Chief Justices and Judges of the High Courts;
Hon'ble Chief Justices and Judges of the Supreme Court and High Court of Azad Jammu and Kashmir;
Hon'ble Chief Judge and Judges of the Supreme Appellate Court and Chief Court Gilgit-Baltistan;
Distinguished members of the District Judiciary;
Distinguished foreign delegates;
Worthy Office Bearers of the Bar Councils and Bar Associations;
Learned members of the Bar;
Distinguished guests;

Ladies and Gentlemen,

Assalam-o-Alaikum,

International Judicial Conference 2014 is reaching its conclusion. The participation in this Conference was not limited by any national or international frontiers. It would not be wrong to say that we have the whole world untied in one place. Delegates from every continent –Australia to America and all others in between i.e. Europe, Africa and Asia present here are the epitome of the rapidly globalizing world. Locally, we have participants from every corner of the country-representation from all the four provinces including Islamabad and also the members from Azad Jammu and Kashmir and Gilgit-Baltistan. The diverse representation of the Conference, I hope, has been extremely advantageous for the participants as the final declaration having incorporated discrete experiences and thoughtful discussions. I take this moment to express my deepest gratitude for all the participants of the conference especially the distinguished guests from abroad for joining us here, in Islamabad.

This event could not have been possible in the first place without the guidance and continuous support of the Hon'ble Chief Justice of Pakistan, Mr. Justice Tassaduq Hussain Jillani, who was ever there in the time of need and whose vision and leadership had been a guiding source throughout the organization of the event. Thank-you Sir!

The management and organizing of a massive event as this, is indeed an arduous task, and whatever you have seen in two days is actually the result of strenuous efforts, efficient co-ordination and sheer hard work of an exuberant team spanning over months with many a sleepless nights for some in between. But this task was made sufficiently easy by an equally supportive Organizing Committee under the chairmanship of Hon'ble Mr. Justice Nasir-ul-Mulk and other members of Organizing Committee Hon'ble Mr. Justice Anwar Zaheer Jamali, Hon'ble Mr. Justice Jawwad S. Khawaja, Hon'ble Mr. Justice Mian Saqib Nisar and Hon'ble Mr. Justice Khilji Arif Hussain, since retired. Let me say that the actualization of this event could have been elusive without their continual guidance and encouragement in the whole process of organizing this mega event and it is indeed a blessing for me to work under the team of such distinguished members.

I feel myself fortunate to lead a team of dedicated and committed staff of the Law and Justice Commission of Pakistan. It is indeed not possible for me to mention you all in my short speech but I will definitely take this opportunity to congratulate every one of you for your tiring efforts and contribution in making this event memorable and an astounding success. I would like to extend my special gratitude to the Hon'ble Judges of the Supreme Court of Pakistan, Hon'ble Chief Justices of the High Courts and Hon'ble Chief Justice of Azad Jammu and Kashmir for presiding the various working groups as Chairpersons and Co-chairpersons. We feel greatly honored by your presence and I thank-you all for gracing the event. I would also like to thank Rapporteurs for extending their invaluable services in the co-ordination of these various groups.

The favour and assistance of Barrister Amber Darr in the organization of this event must not go un-noticed. Being a part of the team of this event for the third consecutive year, her experiences, suggestions and co-operation in all phases of planning and execution had indeed been fruitful in the smooth organization of this event.

I feel that I owe my sincere gratitude to Registrar, Supreme Court of Pakistan, Syed Tahir Shahbaz for his sublime assistance in every step throughout the preparation for this event, especially in the procurement of conducting officers. I take this opportunity to thank the conducting officers as well, consisting of young officers of the Federal Government, for their valuable services in facilitating the foreign delegates.

I am grateful to the Hon'ble Judges of the High Courts and District Judiciary for their participation in the event. I am also thankful to the representatives of Bar Councils and representatives of Supreme Court, High Courts, District Bar Associations and other members of the legal fraternity who traveled from various parts of the country to grace the occasion.

It would be unfair not to mention the role of police, especially the SP security, for their unflinching support in providing us a secure and protective environment.

It would be equally unfair on my part not to appreciate the role of print and electronic media for their timely coverage of the events of the Conference. I thank all the media houses for publicizing the objects of the Conference in the shortest possible time.

Here, I would like to appreciate the extreme hard work of XEN and SDO Building, Supreme Court of Pakistan for providing as such elegant environment through their exquisite furnishing of the whole building.

Ladies and Gentlemen,

I once again thank you all for your participation in the Conference. I hope you had some memorable moments for your stay here, which I hope, you will cherish long. In the end, I wish you all a safe journey back to your homes.

Thank you

(Islamabad Declaration)

In respect of the Judicial Review of Administrative Actions, it is hereby declared that Judiciary, not only in Pakistan but all over the world, particularly in developing countries, strives to establish 'constitutionalism' by exercising the power of judicial review. This places a rational limit over the decisions and actions of other organs of the state and this spirit must be maintained and kept alive. Further, the power of judicial review may be exercised to preserve the Constitution as a living and organic text by recognizing and enforcing emerging contemporary human rights such as the right to health, food, shelter and other amenities of life. The power of judicial review may also be exercised for the eradication of rent seeking behaviour and encouragement of Foreign Direct Investment and other economic activities within the country. To complement the exercise of the power of judicial review by the superior courts, the district judiciary and other judicial forums may also be strengthened so that people have access to justice at their doorstep. The exercise of suo moto jurisdiction by the Supreme Court of Pakistan may be duly structured and regulated by the Court and the principle of trichotomy of powers enshrined in the Constitution be respected so that exercise of judicial powers neither hampers nor stunts executive policies. Finally, the sanctity of the people's trust in the legislature to legislate must be kept in mind while seeking judicial review of legislative instruments.

On the subject of Role of Judiciary in Protecting Human Rights, it is hereby declared that the superior courts may not exercise a roving and supervisory role to ensure fundamental rights are complied with. They shall exercise their jurisdiction in such a way that they are not overburdened with civil and political claims. Accordingly, the district judiciary may also play a pivotal role in safeguarding the fundamental rights of citizens. It is suggested that the judiciary must ensure access of speedy justice and abridge the lengthy legal procedures and hurdles faced by litigants. It is further suggested that a Court of Sessions be designated as a Human Rights Court for a particular district. It is recommended that legal aid facilities may also be made available to the marginalized sections of society. It is further recommended that social, cultural and economic rights should be identified as inalienable to help foster social justice. It is also recommended that the legislature should identify structural issues resulting from social and economic disparities which pose an obstacle to the fulfillment of constitutionally guaranteed fundamental rights. It is also recommended that the judiciary should remain conversant with human rights challenges being raised and addressed all over the world. It is strongly recommended that the right of fair trial and due process of law be guaranteed.

On the subject of Access to Justice in the Context of Constitutional Requirements, it is hereby declared that an empirical study in order to examine the causes of maladministration in various jurisdictions of Pakistan's judicial system be conducted. This study should focus on identifying the primary causes of delay; means of supplementing human resource and infrastructural capacity of courts; current public perception of fairness of the judicial process; ideal service structure for judges and court staff; litigant's ability to pay for litigation costs; sufficiency of the powers of the district judiciary for the purpose of providing proper/effective oversight of executive authorities as well as legislative, judicial and administrative measures which may be taken to provide greater access to justice to the citizens of the country. Following this study, suitable changes to the rules and culture of the Bar may be introduced in order to ensure that legal aid is provided to deserving litigants.

On the subject of the Role of the Judiciary in the Promotion of a Culture of Tolerance, it is imperative that courts must promote tolerance and be sensitive to the social, ethnic, racial and gender background of the parties and demonstrate empathy towards these considerations. It is fundamental that honest and dedicated persons who share a strong commitment to the dispensation of justice be appointed as judges. It is suggested that judicial training be imparted to judicial officers to sensitize them to the biases and prejudices plaguing the society. Finally, it is recommended that rights for protection of minorities must be effectively and meaningfully enforced.

Appendix - A

Presentations/text of papers presented in Group-I
"Judicial Review of Administrative Actions"

Judicial Review of Administrative Actions

Mr. Justice (R) Rana Bhagwandas
Former Judge
Supreme Court of Pakistan

It is a great honour and privilege for me to have been invited to share my thoughts with the luminaries attending this Conference. This International Judicial Conference by itself is milestone, as herein the role of Judiciary will be discussed from various aspects of human existence and its impact on a society in a state.

Days are gone when the concept of a decent living was only translated into the right to seek safety and security from the state. This was quintessentially the basis of the theory of social contract expounded by Rousseau. But much water has flown under the bridge. This right of decent living found in the theory of social contract has developed in geometric progression into what is called the fundamental right of life embedded in articles 9 and 14 of the Pakistani Constitution, Article 21 of the Indian Constitution, section 2 of the UK Human Rights Act, 1998, Article 2, of the European Convention on Human Rights, 1776 US Declaration of Independence, Article 6.1 of the International Covenants on Civil and Political Rights as adopted by UN General Assembly in 1966, and section 7 of Canadian Charter of Rights and Freedom.

These provisions pertaining to the "rights of life" were meaningfully interpreted by the superior courts of Pakistan, India and US. On "right of life", in Pakistan the leading judgment is ***Shehla Zia v. WAPDA (PLD 1994 SC 693) followed by Arshad Mehmood v. Govt. of Punjab (PLD 2005 SC 193),*** in India the leading judgment is ***Kharak Sindh v. State of UP (AIR 1963 SC 1295),*** followed by ***Francis Coralie v. Union Territory of Delhi (AIR 1981 SC 746***) ***Olga Tellis v. Bombay Municipal Corporation (AIR 1986 SC 180), State of HP v. Umed Ram Sharma (AIR 1986 SC 180), State of HP v. Umed Ram Sharma (AIR 1986 SC 847),*** Rural Litigation v. State of UP (AIR 1985 652), while from the USA, the leading case is ***Munn v. Illinois (1876) 94 US 113.*** The word ***"life"*** is very significant as it covers all facets of human existence. The word ***"life"*** has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity legally and constitutionally. The word ***"life"*** in the Constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life but to enjoy it.

There can be no progress without freedom; no freedom without virtue and no virtue without citizens. We ought to create an atmosphere of opportunities to enable the citizens to have everything they need. Furthermore, there must be an equitable distinction of wealth and availability of opportunities.

Actually, the right of a citizen to livelihood and the duty of the state to provide such opportunities with dignity is the essence of the present social order. We expect the Government to protect individual liberty and economic and physical security of each citizen. But such expectation becomes a farce without a vibrant judiciary to enforce such rights.

Rights and equality go together. To enjoy a right is to claim equality with other citizens and to recognize them as equals. But ultimate freedom is only a myth because no right is enforced without responsibility. When a person claims a right, duty falls upon him. "Rights of one citizen are the duties of another citizen." Rights cannot be enforced without responsibility. Thus the citizen is both, sovereign and subject.

The Constitution of Pakistan also recognizes that the people are the rulers and that certain rights are inalienable such as freedom of thought and expression, freedom from invasion of privacy, freedom from arbitrary confiscation of property, freedom from arrest without warrant, freedom of association and assembly, rights of the people to be secured in their person and houses and against unreasonable searches and seizure, the right to a speedy justice and open trial by an impartial judiciary etc. In substance, these rights mean a society in which there is unambiguous debate, a free media, a society where a person's home is respected; trials are fair and where all the citizens enjoy equal rights.

Originally the due process clause was embedded in our Constitution in terms of articles 3 and 4 but through the 18th Amendment article 10A has been introduced which has converted ***"due process and fair trial"*** into a

fundamental right. In theory article 10-A has virtually transformed the entire Constitutional jurisprudence of enforcement of fundamental rights.

The erosion of the public and common good and the emphasis on sectarian and ethnic factions has undermined the concept of common citizenship.

Judicial review by an independent judiciary is the key to retaining the balance of power between the citizen and the state. Pakistan today, needs not only guidance in the rights of private persons but also their responsibilities as public citizens. We need to understand the rights and duties of an individual and state, viz-a-viz the legislative, judicial and executive organs as also between the Federation, Provinces and Local Government. For this purpose devolution of powers and functions has been codified and maximum powers have been delegated to the provinces. In fact local government after the 18th Amendment, in terms of article 140-A of the Constitution, has become part of Constitutional law.

To appreciate the topic of judicial review, which is of current relevance, we have to appreciate not only what are "human rights" but also have to re-evaluate the role of the judiciary in the context of the protection of those rights. The development of the law as response of the judiciary to the needs of the society also requires to be examined. Judicial *"activism"* or *"adventurism"* being indulged in by the judiciary also needs to be critically assessed. First, what are *"human rights"* and how are those protected and enforced?

"Human rights" are those rights which inhere in every human being by virtue of being a person. These are nothing but the modern name of what had been traditionally known as "natural rights" i.e. rights bestowed upon human beings by nature. *"Human rights"* are based on mankind's increasing demand for a decent civilized life in which the inherent dignity of each human being is well respected and protected. Human rights are fundamental to our very existence without which we cannot live as human beings. The basic human rights constitute what might be called ***"sacrosanct rights"*** from which no derogation can be permitted in a civilized society. The bare necessities, the minimum and basic requirements, which are essential and unavoidable for a person, are the core to human rights' concept. Human rights are universal and cut across all national boundaries and political frontiers. However, even the most basic of the human rights are required to be regulated by law, in the public interest, and need not be absolute. John Rawlings and Ronald Dworkin are the current proponents of *'natural rights';* for them some rights are immutable and can never be derogated. But there is a lot of debate as to what are these rights.

Article 3 of the preamble to the Universal Declaration of Human Rights states:

> ***"... It is essential if man is not to be compelled to have recourse, as a last resort to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."***

Prof. Louis Henkin of the Columbia University in his article ***"Rights Here and There"*** 81 Columbia Law Review, 1582 (1981) explained human rights as:

> *"... Claims which every individual has, or should have, upon the society in which she or he lives. To call them human rights suggests that they are universal; they are the due of every human being in every human society. They do not differ with geography or history, culture or ideology, political or economic system or stage of development. They do not depend on gender or race, class or 'status'. To call them 'rights' implies that they are claims 'as of right' not merely appeals to grace, or charity or brotherhood or love; they need not be earned or deserved. They are more than aspirations or assertions of 'the good' but claims of entitlement and corresponding obligation in some political order under some applicable law, if only in a moral order under a moral law.*

When used carefully, *'human rights'* are not some abstract, inchoate 'good'. The rights are particular, defined, and familiar, reflecting respect for individual dignity and a substantial measure of individual autonomy, as well as a common sense of justice and injustice."

When we talk about a Constitution, it is important to bear in mind that the Constitution, though by itself an important document, is after all cold print on a piece of paper. What is important to remember is the system the Constitution seeks to introduce and the way that system works. The Constitution no matter how well crafted it is, will not be able to deliver unless there is a system of proper enforcement of such rights. When we talk of the

Constitution as a living law it is usually understood to refer to the doctrines and understandings that the courts have invented, developed, spread and applied to make the Constitution work in every situation. Unless life can be pumped into the cold print of the Constitution to keep it vibrant at all times it shall cease to be a living law. Generally speaking, this role of pumping life is assigned to the higher courts, more particularly under a Constitution which has separation of powers as its core. The Constitution of a state essentially reflects the aims and aspirations of the people who gave to themselves the Constitution. Therefore, to say that the Constitution should only reflect the aspirations of the founding fathers may not be an accurate statement for all times to come.

The function of the higher courts in this country has not been limited to exploring what the Constitution-makers meant when they wrote those words but also to develop and adapt the law so as to meet the challenges of contemporary problems of the society and respond to the needs of the society. The Constitution cannot be a living and dynamic instrument if it lives in the past only and does not address the present and the future. This exercise of jurisdiction by the courts has been criticized by some as *"judicial activism"* indulged by non-elected Judges who upset the decisions of the elected representatives of the people. They would like the courts to confine themselves to what the Constitution-makers *actually* or literally meant when the Constitution was drafted. But is it possible to say that the word or expression must mean the same thing at all times regardless of changing times and situations? After another fifty years will the Judges still be carrying out the exercise of digging out what meaning was assigned to a word a century back! That may be in my opinion the surest way to kill the Constitution and be wedded to the status quo. The world changes - should not the judiciary try to make the Constitution work in changed circumstances?

The growth of *judicial review* is the inevitable response of the judiciary to ensure proper check on the exercise of public power. Growing awareness of the rights in the people; the trend of judicial scrutiny of every significant governmental action and the readiness even of the executive to seek judicial determination of controversial issues, at times, may be, to avoid its accountability for the decision, have all resulted in the increasing significance of the role of the judiciary. There is a general perception that the judiciary in this country has been active in expansion of the field of judicial review into non-traditional areas, which earlier were considered beyond judicial purview. Some critics object to the enlargement of the scope of judicial power beyond its orthodox limits. But this criticism, notwithstanding the expanded role of the judiciary has received acceptability not only by the people but by other wings of the State as well. What may appear to be non-traditional at the time of the performance of such a task by the judiciary to be described as "*Judicial Activism*", when considered in proper perspective may turn out to be really the process of development of the law to respond to the needs of the society. Intervention into such areas is because of the peoples' perception that judicial intervention is perhaps the only feasible correctional remedy available. There is therefore no reason to treat this exercise as an attempt by the judiciary to "*clutch at jurisdiction*" or to *usurp* the function of any other organ of the state. In this context, let us not forget that the role of the judiciary commences only when its jurisdiction is invoked in a cause brought in a court of law, on the perception that the remedy to the aggrieved is not available elsewhere. In that event, should the judiciary express its helplessness, or should it make an attempt to give meaning and content to the law which provides a solution to the problem brought before it? To reaffirm the faith of the people in the rule of law, to preserve democracy and confirm the belief in the Latin maxim *ibi jus ibi remedium* - that there is a remedy under the law for every legal injury - the judiciary is under a *Constitutional obligation* to exercise its jurisdiction to meet the challenge because law abhors a vacuum. When a citizen is unable to get redress from the other branches of the Government, the courts do sometimes need to step in because if the courts also shut their doors to the citizen in that event, he is likely to take to the road which would be bad for the preservation of rule of law.

Lord Denning while concluding ***"Hamyln Lecture"*** under the title "Freedom under the Law" warned as far back as 1949 that;

> "***No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do: and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient; our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on***

> ***the case are not suitable for the winning freedom in the new age. They must be replaced by new and up-to-date machinery, by declarations, injunctions and actions for negligence.... This is not the task for Parliament ... the courts must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfare state; but abused they lead to a totalitarian state. None such must ever be allowed in this country."***

The legislature, when it enacts the law is naturally unable to visualize all the situations to which it would apply in future. In the myriad situations which arise thereafter there are some occasions when the existing law appears to be *deficient* to provide for the felt needs of the time. In such a situation the role of the judiciary is not only to interpret but also to expound the law to provide for those situations as well, though within the bounds of law, since rule of law which does not permit any vacuum, must prevail to respond to the needs of the society. However, the Courts while treading on the path of judicial activism should not usurp legislative or executive functions. A balance is required to be struck.

Even in Great Britain, which has no written Constitution and where Parliament is sovereign and is the source of all power, the trend of expansion of judicial review has been quite marked and the judiciary has been taking a much more active course. In his Article "Judges in Britain create a flutter" (Times of India Bombay edition of 7.11.1975) Anthony Lewis has cited the following reasons for exercise of judicial review.

> *"(1) The Judges realize that there is a vacuum since Parliament is virtually under the total control of the executive when it was supposed to correct any Government injustice to individual;*
>
> *(2) the modern legislation is loosely drafted and delegates large powers to the Government which tends often to be arbitrary in its exercise;*
>
> *(3) the new generation of Judges think of law not as fixed rules but as a set of values designed above all to protect democracy and human rights; and*
>
> *(4) the new judicial generation is more outward-looking and is influenced by the courts in Commonwealth countries, for example, India in the rigorous enforcement of individual rights."*

Author of the above article states further "The politicians, or many of them, will resist judicial review. But my guess is that the British public likes it when Judges stand up for them against the State - and that the public will demand more of the new Constitutionalism, not less."

More than 32 years ago Justice Bhagwati of Indian Supreme Court in Francis Coralie Mullin v Administrator Union Territory of Delhi (SSCpp.618-19 Para 8) held as under:

> *"The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights."*

It would, therefore, be wrong to call it as an act of ***"judicial activism"*** when the judiciary in discharge of its Constitutional powers seeks to protect the human rights of the citizens in case after case where a citizen has been deprived of his life or liberty otherwise than in accordance with the procedure prescribed by law or when the courts insist upon ***"transparency and accountability"*** in respect of the orders made or action taken by public servants. The requirement that every state action must satisfy the test of fairness and non-arbitrariness are judicially evolved principles which now form part of the Constitutional law. And now of course the test of "proportionality" and "improper purpose" are central to administrative law.

It must, however, be remembered that the Judges in exercise of their power of judicial review, are not expected to decide a dispute or controversy which is purely theoretical or for which there are no judicially manageable standards available with them. The courts do not generally speaking interfere with the policy matters of the executive unless the policy is either against the Constitution or some statute or is actuated by mala fides. Policy matters, fiscal or otherwise, is thus best left to the judgment of the executive. However, once it is conceded that right to life guaranteed by Article 9 includes the right to live decently, the interference by the courts to ensure the same by making attempts to prevent pollution of environment cannot but be considered as a legitimate exercise in discharge of the Constitutional obligation by the judiciary.

Having talked about human rights and the Constitutional obligations of the courts to protect the same, there is one important aspect which needs to be dealt with by me and that is the need of *"self-restraint"* by the Judges while expanding and expounding the law in response to the call and need of the society in exercise of their power of judicial review.

It is in fact stating the obvious to say that courts must while exercising the power of *judicial review* exercise restraint and base their decisions on the recognised doctrines or principles of law. Judicial *activism* and judicial *restraint* are two sides of the same coin. It is therefore essential to remember that judicial restraint in the exercise of its functions is of equal importance for the judiciary while discharging its judicial obligations under the Constitution. With a view to see that *judicial activism* does not become "*judicial adventurism*" and lead a Judge going in pursuits of his own notions of justice and beauty, ignoring the limits of law, the bounds of his jurisdiction and the binding precedents, it is necessary and essential that "*public interest litigation*" which is taken recourse to for reaching justice to those who are for variety of reasons unable to approach the court to protect their fundamental rights should develop on a consistent and firm path. The courts must be careful to see that by their overzealousness they do not cause any uncertainty or confusion either through their observations during the hearing of a case or through their written verdicts. If unmindful of the expected restraint, the courts make observations orally or through written decisions, one way or the other, under the cover of *judicial activism*, they may consciously or unconsciously cause uncertainty and confusion in the law. In that event, the law will not only develop along uncertain lines instead of straight and consistent path but the judiciary's image may also in the bargain get tarnished and its respectability eroded. That would be a sad day. Judicial authoritarianism cannot be permitted under any circumstances. The courts, therefore, have to be very careful to see that their exercise of *judicial creativity* for attaining social change is not allowed to run amuck and every court functions within the bounds of its own prescribed jurisdiction. The courts have the duty of implementing the Constitutional safeguards that protect individual rights but they cannot push back the limits of the Constitution to accommodate the challenged violation. All it means is that Judges are expected to be circumspect and self-disciplined in the discharge of their judicial functions.

The virtue of humility in the Judges, a constant awareness that the investment of power in them is meant for use in public interest and to uphold the majesty of rule of law and the realization that Judges are not infallible even if final, would ensure the requisite self-restraint in discharge of all judicial functions because all actions of a Judge must be *judicious* in character. As Justice Michael Kirby of the High Court of Australia rightly said, not too long ago, while addressing Banglore Advocates Association on 13-1-1997, ***"of Judges, the community expects honesty, integrity and learning".***

The society has placed Judges on a high pedestal. We must justify that position in the society remembering for ever that the Constitution does not give unlimited powers to anyone including the Judges of all levels.

But having said what I have, the judgment of the Supreme Court of the USA in Marbury v Madison 5 US 137 (1803) marks the beginning of judicial review in modern times. The American Courts are also responsible to eradicate school segregation ***[Brown v. Board of Education 347 US 483 1954].***

Ladies and Gentlemen! I now take your leave but before doing so, I thank you for your patience.

Finally, I find myself duty bound to acknowledge with deeper sense of gratitude for the assistance received from the speech of Dr. AS Anand former Judge Supreme Court of India delivered at Justice ND Krishna Rao Memorial Lecture on Protection of Human Rights—Judicial obligation or Judicial activism.

Restraint to Responsibility: The Supreme Court and the Consolidation of Democracy in Nigeria

Hon'ble Mr. Justice Kashim Zannah
Chief Judge of the High Court of Justice in Borno State
Nigeria

Courts are as critical to the sustenance of constitutional democracies as are the executive and legislative arms. That judges are unelected is not a deficit in their power or capacity to play their roles, if need be, to the chagrin of the elected arms. The need is often practically felt, particularly in emerging democracies, for institutions that are above the partisan fray, to intervene and maintain the polity on an even keel. The power of judicial review inures for that purpose, but courts may be forced to challenge its limits where dominant realities permit or, indeed, demand it.

This may have played out in Nigeria. The exercise of the power of judicial review over the administrative actions of the Independent National Electoral Commission (INEC), may have drawn out the courts, led by the Supreme Court, and set them on a course that may appear to have challenged the frontiers of legal and constitutional theory.

Nigeria attained independence from British colonial rule in 1960. But the military ended the attempt at democratic governance in 1966. Public pressure and demand for democracy forced the military out by 1979 but it returned in 1984. The military again exited in 1999, handing over to an elected government to govern under the 1999 Constitution.

Prior to 1999, Nigerian courts–fairly active in other spheres[1]–have been much more restrained in the exercise of the power of judicial review in matters related to elections. By restraint is here meant deference to decisions of other institutions. Under the current 1999 Constitution, the courts appear to have felt a responsibility, a state of being as well charged, if not more so than other institutions, with ensuring the desired outcome of democratic governance.

The Power of Judicial Review

Section 6 of the Constitution[2] vests judicial powers in the courts, that the powers *"shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law"* and to *"all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person".* It therefore, did not take long in the political process for such powers to be called-in.

Expanding Participation: Review of Party Registration

Judicial intervention in the electoral process started at the inception. Exercising the powers conferred on it by the Constitution[3] to register political parties in accordance with its provisions and an Act of the National Assembly, the INEC issued guidelines setting out conditions for the registration of political parties, parts of which were based on the Electoral Act. Some of the requirements were considered onerous and enabling only the rich to form political parties, for example, requirement which prescribed that an association seeking registration as political party must submit the addresses of its offices, list of its staff, list of its operational equipment and furniture in at least 24 of the 36 States of the Federation.

Only registered parties could field candidates and independent candidacy was not recognized. Judicial power was invoked to review INEC's guidelines. In a decision widely acclaimed as opening up the political space to parties with ideological bent as opposed to collections of rich individuals seeking political power, the Supreme Court substantially agreed with the High Court and the Court of Appeal, to strike out most of the conditions set by INEC. The court distinguished between those guidelines that were merely administrative, procedural or evidential and those that were substantial.

[1] Zannah, K "*Judicial Activism in an Emerging Democracy: Beyond the Sound and the Fury*" (Washington, World Jurist Association, 2001)
[2] Constitution of the Federal Republic of Nigeria, 1999
[3] 3rd Schedule, Part 1F of the Constitution.

> *"Where the requirements for registration stated in any guideline or in the Act are not purely administrative or procedural or evidential, but are substantive conditions for eligibility beyond the conditions prescribed by section 222[of the Constitution], such guidelines or provisions would have enlarged the conditions of eligibility in section 222 and be consequently void, notwithstanding that they may have been described as requirements for registration."*[4]

The court nullified most of the conditions in the guidelines and also provisions of the Act of the National Assembly for the same reason. The impact of the decision is better appreciated against the background that since the military took over in 1966, all attempts at returning to democracy involved vetting and registering political parties subject to onerous criteria. Registration was 'awarded' based on other considerations too. It was a fact of political life.

At least two parties that benefited from the effect of this decision have formed state governments and several candidates made it to the legislative houses from such parties. Persons with fundamental differences within their existing parties too now break away to form their own or join other parties, instead of being forced to choose between compromising their principles or being squeezed out of the democratic process.

Making the Votes Count: Review of Declared Results

Where the declaration of election results by the electoral commission are challenged, the courts started from the presumption that the declaration was rightly made and required the losing party to strictly comply with all rules and procedures for challenging the returns.

One illustrative example is the requirement that[5]:

> *At the foot of the election petition there shall also be stated an address of the petitioner for service within five kilometers of a post office in the judicial division and the name of its occupier at which address documents intended for the petitioner may be left.*

Failure to name the "occupier" resulted in the dismissal of petitions. Thus in one case[6]"c/o Amana Law Chambers, No 33 Murtala Muhammed Road, Birnin Kebbi" was found to be insufficient compliance and the challenge failed.

Much as the power to review the actions of the commission in returning candidates was not in dispute, the courts appeared to have thought it prudent to limit them, albeit by resort to technicalities. One of the signals that the courts now felt a responsibility to resolve these election petitions on merit was when the Court of Appeal overlooked such error and the Supreme Court, albeit orbiter, agreed without mincing words, declaring that:

> The heydays of technicality are now over because the weight of judicial authorities has today shifted from undue reliance on technicalities to doing substantial justice even-handedly to the parties to the case. In the light of what I have said, the two authorities of Ngelizana v. Hindi (supra) and Dada v. Ayo Fasanmi (supra) have not been shown to command current judicial respect or acceptance.[6]

With the departure from technicalities, it became possible for losing candidates to successfully petition against the return by the electoral commission. Starting with a few instances in the review of the election results for the general elections in the year 2003, courts and tribunals now routinely review the actions of the commission on merit. Numerous returns were nullified and fresh elections ordered. Several petitioners successfully proved that they ought to have been returned and were duly declared winners and put in office by the courts and tribunals.

Review of the Disqualification of Candidates

Prior to the year 2007, the Independent National Electoral Commission (INEC), on the receipt of the list of candidates nominated by political parties, screened them, verified their documents and disqualified those failing to meet the qualifications for the offices or on conditions stated in the Constitution.

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[4] *INEC v* Musa (2003) LPELR-1515 (SC) per Ayoola, JSC. (Pp.40-41, Paras. D-C)
[5] Decree No.3 of 199, Schedule 6 paragraph 5 (4)
[6] *Kaliel v Aliero(1999) LPELR-6591 (CA) is one.*
[6] *Achike, JSC in the case of Egolum v. Obasanjo (1999) 7 NWLR (611) 355 at 413.*

A case that gripped national attention was when, in the run-up to the 2007 general elections, the Vice President, Alhaji Atiku Abubakar, fell out with the President, Chief Olusegun Obasanjo and left his party, the Peoples Democratic Party (PDP) and secured the nomination of another party, the Action Congress (AC) to seek the presidency. Meanwhile, an administrative tribunal set up by the Federal Government, controlled by his former party, found the Vice President culpable of conducting himself in a manner unbefitting his office. INEC, relying on that finding, which accorded with one of the conditions for disqualification stated in the Constitution, disqualified Atiku Abubakar from contesting.

The Action Congress and Abu Bakar, partly successfully, challenged the disqualification at the High Court. The Court of Appeal, however, effectively held that INEC acted within the scope of its discretionary powers and refused to review INEC's action. That INEC *"has the power and authority not only to screen candidates sent to it by political parties, but to also remove the name of any candidate that failed to meet the criteria set out by the Constitution without having to go to court."*[7]

The Supreme Court decided otherwise, that INEC no longer had the *vires* it had under the 2002 Electoral Act, when the provisions of the 2006 Act are read in the context of the relevant constitutional provisions.[8] Holding that the power to disqualify candidates based on constitutional provisions now rested exclusively with the courts.

Review Upsets Political Parties: Nomination of candidates

One road the courts have avoided treading on is the route to becoming the candidate sponsored by a political party. Where the electoral commission accepted whomever a party fielded, the courts usually let that be.[9] That was the policy of the Supreme Court during what is called the 2nd Republic (1979-1984). The Court maintained the policy when the military exited again in 1999.

However, the reality of the practice of politics was such that the party apparatchik could ignore party rules and the choice of party members and field any person as candidate. A public so besotted with democracy generally resented this, but appeared helpless. It was like the top party officials held democracy to ransom and no one could do anything about it.

It was therefore not a surprise when a High Court judge failed to follow the Supreme Court's policy and indeed suggested that it review "its position on the internal affairs of political parties."[10] The Supreme Court, predictably, came down hard on the judge, and reaffirmed its position of non-interference in the selection of a party's candidate.[11] Not for long.

The case of *Ugwu & PDP v. Ararume & INEC*[12]is quite illustrative. The appellant contested the party primaries for the Governorship of his state. He scored 36 votes, taking the 12th position against the 1st respondent who placed first with 2061. The party initially forwarded the name of the winner, the 1st respondent, to the electoral commission (2nd respondent) as its candidate but later contended that that was "in error" and forwarded the name of the appellant, who scored 36 votes and placed 12th.

The 1st respondent sued and lost. The trial judge, in line with the then position of the Supreme Court, held that "a political party has the power to change its nominated candidate for another any time before 60 days to election." That the political party "submitted the name of the plaintiff as its governorship candidate informed INEC of its change of candidate and gave INEC a reason for the change. It is left for INEC to verify the reason or not."

But the Court of Appeal upturned the decision.[13] The elections for that year were conducted under an Electoral Act that contained a provision not in the earlier ones. Section 34(1) and (2) of the Electoral Act, 2006 reads as follows: -

[7] *INEC v AC & Anor.* (2007) LPELR-9028 (CA)
[8] *AC & Anor v INEC* (2007) LPELR-66 (SC)
[9] *Onuoha v. Okafor & Ors* (1983) 2 SCNLR 244
[10] Bello, J in *Dalhatu v Turaki* (2003) LPELR-917 (SC)
[11] Dalhatu v Turaki, supra
[12] (2007) 12 NWLR (Pt.1048) 365
[13] *Ararume v INEC & Ors* (2007) LPELR-8910 (CA)

> ***A political party intending to change any of its candidates for any election shall inform the commission of such change in writing not later than 60 days to the election.***
>
> ***Any application made pursuant to subsection (1) of this section shall give cogent and verifiable reasons.***[14]

That enabled the Court of Appeal hold that the *"section does not welcome any form of non-challenge on the part of INEC. The reasons given for the substitution are supposed to be cogent and verifiable read conjunctively."*

The Supreme Court agreed, discountenancing the submission that the new section of the Electoral Act is not justiciable, holding that while the duty is on the Independent National Electoral Commission to interpret what is cogent and verifiable:

> Where INEC is convinced or satisfied with the cogency of the reason, section 6 of the Constitution vests in the Judiciary the power to interpret the sub-section at the instance of a party aggrieved with the interpretation of INEC.[15]

The Supreme Court, in effect, rejected the argument that INEC's action was within the scope of the discretion granted to it and so should not be subjected to judicial review. The court ordered INEC to recognize Mr. Ararume as his party's candidate.

Judicial Power: Pushing the Limits

It is clear from section 6 of the Constitution that the power of judicial review vested in the courts of Nigeria is massive. It may be safe to say the earlier position of the courts in these matters was a function of prudential limitations. The courts probably did not need the Electoral Act 2006 to enable them do what they now do. It perhaps rather made it no longer prudent to be restrained.

> *The court cannot but take judicial notice, informed by the plethora of authorities in our law reports on how the processes of sponsorship, nomination and substitution of candidates were abused by indiscriminate and arbitrary changes in the past electoral exercise.*[16]

Indeed, with matters relating to questioning election returns, there was no material change in the enabling laws. It was a shift in judicial policy.

Did the political parties roll over and behave well? Mr. Ararume got his mandate to contest on the platform of his party, which was the ruling party at the centre, but lost in the general election. It was widely seen as a lose that went against the trend and was actively aided by his own party, to teach a lesson to all, perhaps including the courts. The number one party man, the President of the Republic, is reported to have declared that the party did not have a gubernatorial candidate Imo state, seen as a clear signal to the party to work against its own candidate.[17]

The saga continued in the case of *Amaechi v INEC*,[18] seen as the ultimate assertion of judicial power. Mr. Amaechi won his party's primaries to be fielded as its Governorship candidate for Rivers State in the April 2007 general elections. His name was forwarded to the electoral commission in December 2006. The party, in February 2007 forwarded the name of Mr. Omehia to replace Mr. Amaechi. Mr. Amaechi sued the commission and his party. He lost at first instance but appealed to the Court of Appeal. On the date of hearing the appeal, the respondent objected to the hearing because the party had subsequently expelled Mr. Amaechi. The court upheld the objection and dismissed the appeal, relying on the constitutional provision that a person is only *"qualified for election to the office of Governor of a State if he is a member of a political party and is sponsored by that political party"*.[19]Mr. Amaechi appealed to the Supreme Court, which allowed his appeal, that defendants' subsequent conduct cannot

[14] Electoral Act, 2006, Cap
[15] *Ugwu & PDP v Ararume & INEC*(2007) LPELR-3329 (SC)
[16] Adekeye, JCA in *Ararume v INEC & Ors* (2007) LPELR-8910
[17] http://www.theheartlander.com/as-senator-ifeanyi-ararume-returns-to-pdp-matters-arising/
[18] *Amaechi v INEC & Ors* (2008) LPELR-446 (SC)
[19] Section 177 (3) of the Constitution

rob the court of jurisdiction it already had.[20] The appeal court was ordered to hear the appeal and it did but dismissed it and upheld the substitution as validly done.[21]

Mr. Amaechi appealed to the Supreme Court. The election was already concluded, even before the Court of Appeal's judgment. Mr. Omehia, who took Mr. Amaechi's position as candidate, contested, won and was functioning as the Governor when the Supreme Court heard the appeal and delivered judgment that Mr. Amaechi was the rightful candidate. It ordered Mr. Omehia to vacate the office and that Mr. Amaechi is sworn-in immediately. It was done.

The Push backs

Perhaps only a few would have followed the foregoing decisions or subsequently read of them without thinking that the courts in Nigeria, led by the Supreme Court, really challenged the frontiers of appropriate judicial review of the administrative actions of the electoral body, extending it to the realm of political party prerogatives and ultimately the democratic rights of the citizens to vote for and elect the leaders of their choice.

Indeed, these decisions did meet with the expected pushback's from those politicians who wielded the unbridled power reined in by the decisions.

Perhaps the decision that gripped national attention[22] and decisively heralded the end of judicial reticence in reviewing the actions of INEC was the one that reviewed the declaration of the Governor of Adamawa State as the winner in the general elections conducted in 2003. On the 24th day of March 2004, this writer, heading a panel sitting as the Election Petitions Tribunal for Adamawa State, nullified the election results. The Vice President of the Federal Republic of Nigeria, who hails from Adamawa State, reacted:

> *I have seen various judgments in the political history of Nigeria, but I have never seen any judgment so designed to disgrace one, exhibit lack of respect and aimed at snatching a mandate in order to award it to another person… therefore, if the worst comes to the worst, I will insult any judge… It may not be only insults, but as well as beating up such a judge.*[23]

Yes, that was the same Vice President who, three years later, out of favour and an underdog, sought and obtained the courts' *"lack of respect"* to enable him escape disqualification and assert his right to seek office in a democratic election.[24]

We have already seen that when the Supreme Court's decision prevented the ruling party from taking away the mandate of its member who won its party primaries, the President of the Republic, Chief Olusegun Obasanjo, elected on the platform of the party, declared that the party had no candidate in the state and the candidate lost the general election in what was seen as the party's way of teaching lessons to all concerned.[25]

Furthermore, as a result of the verdicts in these cases, particularly the *Amaechi* cases, where the Supreme Court was also seen as teaching lessons to all concerned, perhaps some lessons were learned, but not without some protest, albeit much more refined, civil and perhaps appropriately nuanced.

The then President of the Republic, elected on the same party's platform, Alhaji Umaru Musa Yar Adua declared open the Biennial All Nigeria Judges Conference, 2007. In his speech, the president was full of praise and encomiums for the judiciary, but also said this:

> *The rule of law must be for all, the law makers, the executors of the law, the interpreters of the law, and the society in general.*

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[20] *Amaechi v INEC* (74) (2007) LPELR-449 (SC)
[21] *Amaechi v INEC & Ors* (2007) LPELR-9039 (CA)
[22] All Daily Newspapers, without a single exception, led with the story.
[23] The NEWS, April 12, 2004, p.23
[24] *AC & Anor v INEC* (2007) LPELR-66 (SC)
[25] http://www.theheartlander.com/as-senator-ifeanyi-ararume-returns-to-pdp-matters-arising/

> *It is important that the judiciary does not fall into the temptation of delivering decisions merely because it appears to be the popular one at that point in time. A decision may be apparently popular because it accords with the sensitivity of the people at a given time but may be wrong according to law. We should have in mind that the effect of this apparently popular decision is usually not confined or limited to the case at hand. …The situation is more far-reaching when the decision is that of a higher court in the judicial ladder…*
>
> *As a corollary to the extensive powers now enjoyed by the Courts under the 1999 Constitution and by extension under this administration, it is important to stress that power and responsibility go together. While upholding the Rule of Law is a sine qua non to the creation of a great Nigeria, judicial responsibility is also germane to the sustenance of the Rule of Law.*[26]

The President's words were understood by many as a *'veiled warning… that the Supreme Court rightly ignored."*[27]

Shades of Responsibility

There may not be any dispute as to the virtues of responsibility. But the perceptions and takes on the responsible course of action usually differ and may be diametrically opposed, even on similar sets of facts and circumstances.

Confronted with evidence of 100% voter turnout, where even the dead turned out to vote[28]–and, perhaps even more incredibly, returned to their graves– some may still think it responsible of the courts to refuse to use their powers of judicial review to nullify such results. But many more would regard such reticence as irresponsible, if not downright complicit.

However, the choices may be harder where effective judicial review must needs encroach on spheres usually conceded as internal affairs of political parties. But then, the limitations have always been substantially prudential, informed by a felt need for the courts to avoid political questions. Where the usual political brinkmanship portends a nation inexorably heading to the abyss, is discretion the better part of valour? Would shirking responsibility amount to a responsible decision? The Supreme Court did not conceal the concerns:

> *An observer of the Nigerian political scene today easily discovers that the failure of the parties to ensure intra-party democracy and live by the provisions of their constitutions as to the emergence of candidates for elections is one of the major causes of the serious problems hindering the enthronement of a representative government in the country.*[29]

Yet, the convergence of democratic and legal theory that justifies the declaration of a person whose name was not on the ballot as having won an election may be a harder sell to many. Such persons would surely be baffled by the fact that the electorate greeted such a declaration with widespread jubilation.

The nature of politics in many emerging democracies is such that organisation, resources and access to the coercive instruments of state intermingle with other variables to create situations where access to the platform of a political party assures victory at the polls. The elections, in many instances, are practically won or lost at the party primaries or other processes of selecting the parties' candidates. In such situations, safeguarding the rights of the electorate may begin and end with ensuring that those party men momentarily controlling the levers of party power do not trample upon the choices made at the party level.

Thus, to many, "the judiciary weighed against the corrupt practices of politicians… which helped to put a fence around the criminal conduct of the Nigerian professional politician with a crooked bent of mind."[30]

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[26] Proceedings of the 2007 All Nigeria Judges' Conference, National Judicial Institute, 2010, Abuja.

[27] http://www.thenationonlineng.net/archive2/tblnews_Detail.php?id=41751

[28] In the Adamawa elections, the unit where a deceased member of the State House of Assembly, Mr. Alexander Shombi had his name on the Voters Register recorded 100% votes cast.

[29] Per Oguntade, JSC in *Amaechi v INEC & Ors* (2008) LPELR-446 (SC)

[30] http://www.m.nigeriavillagesquare.com/articles/reuben-abati/nuhu-ribadu-the-anti-corruption-cop-they-feared.html

Whichever, way the courts interpret their roles and decide, when their exercise of the power of judicial review engages with political questions, controversy is inevitable. Nigeria and many other emerging constitutional democracies borrowed greatly from the United States of America, where such controversies still rage on.

Where Dworkin reminded his countrymen:

> Our great experiment as a nation, our country's most fundamental contribution to political morality, is a great idea triangulated by the following propositions. First, democracy is not simple majority rule, but a partnership in self-government. Second, that partnership is structured and made possible by a moral constitution guaranteeing to individuals one by one the prerequisites of full membership. Third, we are committed by our history to an institutional strategy of asking judges–men and women trained in the law–to enforce those guarantees of equal citizenship.[31]

Nevertheless, the issues raised by, and the drawbacks of, a decisive role for courts in democracies through the power of judicial review, will continue to resonate with many, and for good reasons.[32]Indeed, as acknowledged by Dworkin, there are "many risks in that political adventure, as there are in any great political ambition".[33]

It is the sound judgment of the judges in appreciating the prevailing objective conditions, the dominant realities, with a keen sense of foundational history and aspirational disposition that may determine not just the success and efficacy but the legitimacy of judicial review of all governmental actions, bureaucratic, legislative or seemingly purely political actions.

For the judges in the United Kingdom, it was said:

> *Collectively, in their function and by their nature, they are neither Tories nor Socialists nor Liberals. They are protectors and conservators of what has been, of the relationships and interests on which, in their view [their] society is founded. They do not regard their role as radical or even reformist, only (on occasion) corrective.*[34]

For Nigerian judges, whatever the challenges to legal or democratic theory, they appear to have properly discerned their roles when it came to reviewing the actions of the Independent National Electoral Commission (INEC). The courts have been accredited with sustaining the democratic endeavour that commenced in 1999, the longest lasting in the nation's history. The verdict has been the same, from the media to the academia and indeed the politicians–when in the underdog position–groups that have otherwise never spared the courts.

Commenting on the Adamawa decision that was seen as heralding the departure from judicial reticence, the cerebral Analysis Magazine said:

> *"That judgment was indeed an earthquake from both political and judicial points of view. From the judicial point, it was one of the most important attempts made to declare the independence of the judiciary from the machinations and manipulations of the executive arm of government. In fact, this tribunal went into history as the only one that had the courage to nullify the declaration by INEC of a sitting Governor as the winner of the 2003 gubernatorial election. Prior to this, tribunal after tribunal had used mere technical grounds to validate the massive rigging of elections by State Governors and their agents".*[35]

More similar judicial reviews followed, particularly in the next circle of general elections in the year 2007.Newspapers and columnists declared the judiciary–as an institution–Man of the Year. The Nation Newspaper in the year 2011 reflected the general verdict of the media, that:

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[31] Dworkin, Ronald, JUSTICE IN ROBES, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, 2006, pages 138-139.

[32] See Tushnet, Mark, WEAK COURTS, STRONG RIGHTS: Judicial Review and Social Welfare Rights in Comparative Constitutional Law, Princeton University Press, Princeton and Oxford, 2008.

[33] Ibid.

[34] Griffith, J.A.G., the POLITICS OF THE JUDICIARY, 5th edition, Fontana Press, London 1997, pages 7-8.

[35] Analysis, Vol.4, No 3, August 2004.

> *"Since the return to democratic rule in 1999, one institution has continued to play a vital role in making things work. That institution is the judiciary".*[36]

Professor Its Sagay, probably the foremost active constitutional lawyer in Nigeria today, put it this way:

> *"The confidence reposed by Nigerians in the Judiciary has paid off, with the present harvest of nullifications of fraudulent or illegal results, in Adamawa, Kogi, Kebbi, Anambra, and Rivers States.*
>
> *When the history of the sustenance of democracy in Nigeria in the first decades of 2000 will come to be written, the Nigerian Judiciary will be given a front seat for their rescue of the Nation from disintegration. Never in the history of Africa, has the judicial arm of government played such a positive, courageous and leading role in the sustenance of democracy and the rule of law".* [37]

Conclusion

The power of judicial review, and its extent, is a function of the role assigned to courts in the polity. The role may be dynamic, varying with time, place and circumstance. The power is usually exercised when triggered by a challenge to administrative actions, but the effect of its proper exercise may transcend into other spheres.

In whatever forms the demands for courts to play their assigned roles manifest, courts must be true to them, appreciating the practical demands of society. The demands of effective adjudication in certain climes may challenge conventional frontiers. Yet courts cannot take refuge in abstraction, the fog of theories, and escape the charge of shirking responsibility, if not of cold complicity.

It is in the nature of scales to move and shift in order to maintain equilibrium. Constitutional democracies, secured on checks and balances, may therefore, experience movements and shifts in the weight required of the balancing factors and actors. Nigerian courts were entrusted with the responsibility, not of maintaining the stability of an established democracy, but of actually participating in building democracy. That impelled a movement from restraint to responsibility.

[36] http://www.nigeria70.com/nigerian_news_paper/man_of_the_year/303415

[37] Sagay, I.E. (SAN) *Election Tribunals and the Survival of Democracy in Nigeria*, Lecture delivered at the launching Ceremony of the Osun Defender, Muson Centre, Lagos, 26th February, 2008.

Judicial Review of Administrative Actions

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Hon'ble Judges of the Supreme Court of Pakistan, Hon'ble Chief Justices and Judges of Federal Shariat Court, High Courts of Pakistan. Member and leaders of Bar, eminent International delegates, distinguish guests and ladies and gentlemen.

At the outset I would like to thank Mr. Justice Tassaduq Hussain Jillani, Hon'ble Chief Justice of Pakistan, Mr. Justice Nasir-ul-Mulk and Mr. Justice Mohammad Ather Saeed for inviting me to participate and address this august gathering in the International Judicial Conference.

The theme chosen for this discussion pertains to ***"Judicial Review over administrative actions".*** The Speakers before me have already presented a fairly comprehensive view of the theme and I would like to add a few comments of the same. The field of administrative law is broadly indentified as the law relating to control of executive powers. It cannot be readily studied in water tight compartments and needs a working knowledge of any principles, precedents and statutes.

The main premise of course is that the functioning of various agencies and instrumentalities of the state should demonstrate a clear commitment to fairness, impartiality and proportionality while maintaining effective checks against the arbitrariness and discrimination.

Judicial Review has been defined in the Black's Law Dictionary as follows:

> *"A Court's power to review the actions of other branches of Government, especially the Court's power to invalidate legislative and executive action as being unconstitutional"*

The Concept of judicial review traces its origin from the Latin maxim ***"ubi jus ibi remediium"*** *(Where there is a right, there is a remedy)* which has been held by the Supreme Court to be one of the basic principles of Jurisprudence.

The most significant, fascinating but complex segment of administrative law is pertaining to judicial control of administrative action. Two important aspects of administrative law, among others, are the control-mechanism over the administration, and the remedies and reliefs which a person can secure against it when his legal right is infringed by any of its actions, from both these points of view courts play a much more meaningful role than does either the legislature or the administration by itself. It is an accepted axiom that the real kernel of democracy lies in the courts enjoying the ultimate authority to restrain the exercise of absolute and arbitrary power. Without some kind of judicial power to control administrative authorities, there is a danger that they may commit excesses and degenerate into arbitrary bodies and such a development would be inimical to a democratic Constitution and the concept of rule of law. It is the function of the courts to instill the working of officials and expert administrative bodies the fundamental values inherent in the country's legal order. These bodies may tend to ignore these values. Also between the individual and the state, the courts offer as good a guarantee of neutrality as one could expect in India in common with other democratic countries of the world. The courts have been given the pride of place and they do enjoy a good deal of power to control and review administrative action. It is no exaggeration to say that the courts in India have played a very creative role in relation to the growth and development of administrative law. To properly assess the value and significance of the achievements of the courts in this area, it need to be remembered that when India shed the status of a British colony and became an independent country in 1947, there was not much of administrative law in existence in the country, and whatever principles were operative in

the area were very much coloured and influenced by the exigencies of the colonial era when Government functioned more on the basis of a "law and order" state. Since independence, it has become necessary to re-condition and develop the principles of administrative law, so as to meet the needs of a democratic, independent society and also to harmonize them with the demands made on a country to develop fast in the socio-economic sphere. Keeping in view the inherent limitations of the judicial process, one could say that, on the whole, the courts have stood very well to the challenging task thrown on them during the last over six decades. [1]

Origins and Evolution of Judicial Review

In India, judicial review is not an event of sudden emergence but its gradual evolution has depended on the constitutional ideas in different stages of Indian constitutional history. The Supreme Court at Calcutta was established by the Charter of 1774, which was issued under the Regulating Act, 1773. The powers of the judges of that Court were same as those of the judges of the Court of Kings Bench in England.

The Indian legislature from 1858 to the enforcement of the Government of India Act, 1935 was like a subordinate body and had no plenary power of legislation. Nevertheless, the power of judicial review existed. The law court had power to examine the constitutionality of legislative Act on the ground of legislative incompetence of legislative powers. The Government of India Act, 1858 put certain restrictions upon the law-making power. Positive restrictions were imposed by the Indian Council Act, 1861. Section 22 of the Indian Council Act, 1861 lays down constitutional restrictions in framing laws, as follows:

> ***"Provided always that the said Governor General in Council shall not have to power of making any law or regulation which shall repeal or in any way affect any of the provisions of this Act"***

In India Articles 32 and 226 of the Indian Constitution make provisions for the system of writs in the country. Art. 32(1) guarantees the right to move the Supreme Court, by appropriate proceedings, for the enforcement of Fundamental Rights enumerated in the Constitution. For this purpose the Supreme Court has, under Art. 32(2), power to issue appropriated directions or orders or writs, including writs in the nature of *habeas corpus, quo warranto, mandamus, prohibition* and *certiorari.* Art. 226(1) empowers every High Court, notwithstanding anything in Art. 32, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any government within those territories, directions, order or writs including writs in the nature of *habeas corpus, mandamus, quo warranto, prohibition* and *certiorari* for the enforcement of fundamental rights or for any other purpose.

Art. 32 and Art. 226 are expressed in broad language. The Supreme Court, nevertheless, ruled that in reviewing administrative actions, the courts would keep to broad and fundamental principles underlying the prerogative writs in the English law without however, importing all its technicalities[2]. The result of this approach has been that by and large the scope of judicial review in India under Arts. 32 and 226 is similar to what it is in England under the prerogative writs. But there are a number of cases where the Supreme Court has deviated from the English approach[3]. Under Arts. 32 and 226, the Courts enjoy a broad discretion in the matter of giving proper relief if warranted by the circumstances of case before them. In *M. Nagaraj V. Union of India*[4], it is held that parliament while enacting a law does not provide content to a right. Content of a right is defined by courts and Final Word on content of a right is of Supreme Court. The courts may not only issue a writ but also make any order, or give any direction, as it may consider appropriate in the circumstances, to give proper relief to the petitioner[5]. It can grant declaration or injunction as well if that be that proper relief[6]. It would not throw out the petitioner's petition simply on the ground that the proper writ or direction has not been prayed for[7]. In practice, it has become customary not to pray for any particular writ in the petition filed before the court, but merely to make a general

[1] Principles of Administrative Law- M.P. Jain, Sixth Edition
[2] Basappa v. Nagappa, AIR 1954 SC 440: (1955) 1 SCR 250.
[3] For example, see Gujarat Steel Tubes v. Mazdoor Sabha, AIR 1980 SC 1896: (1980) 2 SCC 593
[4] M. Nagaraj v. Union of India, (2006) 8 SCC 2012: AIR 2007 SC 71
[5] KK. Kochunni v. State of Madras, AIR 1959 SC 725: 1959 SC 725: 1959 Supp (2) SCR 316; P.J. Irani v. State of Madras, AIR 1961 SC 1731: (1962) 2 SCR 169.
[6] Kachunni v. State of Madras, AIR 1959 SC 725 : 1959 Supp (2) SCR 316, But see Sudarshan Kumar Kalra v. Union of India , AIR 1974 Del 119.
[7] Charanjit Lai v. Union of India, AIR 1951 SC 41: 1950 SCR 869.

request to the court to issue appropriate order, direction or writ. In making the final order, the court may not mention any specific writ but merely quash, or pass declaratory order or give any other appropriate order.

Besides, the above provision article 136 of the Constitution empowers the Supreme Court with the power of judicial review.

Article 13(2) of the Constitution of India reads as under:

> ***"The State shall not make any law which takes away or abridges the rights conferred by Part III of the Constitution containing fundamental rights and any law made in contravention of this clause shall, to the extent of the contravention be void"***

The courts in India are thus under a constitutional duty to interpret the Constitution and declare the law as unconstitutional if found to be contrary to any constitutional provision.

The main premise of course is that the functioning of the various 'agencies and instrumentalities of the state' should demonstrate a clear commitment to fairness, impartiality and proportionality while maintaining effective checks against arbitrariness and discrimination.

While these theoretical premises may lend an air of uncertainty, the courts are frequently called in to give them practical shape when they exercise *"judicial review"* over the decisions of government departments, administrative agencies, statutory corporations, regulatory authorities and quasi-judicial authorities among others. The phrase *"judicial review"* has of course gained prominence since it has been exercised in many different forms. Black's Law Dictionary defines judicial review as *"court's power to review the actions of other branches of government, especially the court's power to invalidate legislative and executive action as being unconstitutional*[8]*"*

At a theoretical level the power of the courts to examine legislative and administrative acts can be discussed under two conceptual categories. The first inquiry is that of examining the competence of a particular body to create laws, rules, regulations and guidelines among others. In constitutional adjudication, the higher courts are often called on to examine the legislative competence of either the parliament or State Legislatures by deciding whether a particular legislation was within their designated law-making powers, as per the scheme of the Seventh Schedule of the Constitution. In the domain of administrative law, the inquiry shifts to whether administrative bodies had the authority to create rules and regulations or to pass orders on a particular subject.

However, the much broader inquiry relates to the second form of *'judicial review'* which involves the protection of fundamental rights. This empowers the higher judiciary to examine administrative acts as well as legislations and decide whether they are compatible with the fundamental rights guaranteed to all citizens under Part III of our Constitution. It is the court's role of protecting fundamental rights, which has lead to the evolution of some innovative remedies that have been created by harmoniously reading long-established principles of administrative law.

In mediating the relationship between the state and its citizens, the courts have given due weightage to principle such as proportionality, reasonableness and fairness. Furthermore, the principle of natural justice have also been recognized as dimensions of '*personal liberty;* and thereby applied to a wide variety of administrative settings. For example, the role of *audi alterem partem;* i.e. *'no man should be condemned unheard'* had historically evolved in the context of criminal proceedings, wherein it was recognized that the accused should be given a fair hearing which would give an opportunity to contest charges and rebut the prosecution's submissions. However, with the passage of time the *'right to a fair hearing'* has also been allowed in the context of administrative proceedings where parties are likely to face adverse civil consequences. In *State of Orissa* V. *Dr. Bianapanii Dei, AIR 1967 SC 1269,* it was held that administrative orders which involve civil consequences have to be passed consistently with the rules of natural justice. Irrespective of the fact that any statute provides the option of a hearing or not, ordinarily such an opportunity must be given to the party unless the same is expressly excluded by the applicable statute. In fact, the various dimensions of 'audi alterem partem' such as the right to receive adequate notice of a proceeding that may result in adverse consequences, the opportunity to file responses in support of one's

[8] Black's Law Dictionary, 8th Edn. At p. 864

positions and the right to be informed of all relevant materials have become essential features in most administrative processes. Through decisions such as *Maneka Gandhi's case (19780 AND Brojo Nath Ganguly's case, (1986) 3 SCC 156,* the Supreme Court had taken the lead in strengthening the 'right to a fair hearing Any exceptions to this norm need to be backed up by statutory provisions that clearly show a *'compelling state interest'* which justifies the denial of a person's right to be heard in an administrative proceeding.

In the course of tackling litigation against government departments and agencies, we frequently come across cases where parties are aggrieved because there was an apprehension of bias with respect to the decision-makers. For example in service disputes, personnel at a lower level frequently apprehend bias on part of their superiors who exercise disciplinary or supervisory authority over them. In most of these cases, there may have actually been no intention on part of the decision-makers to target an individual or show undue prejudice. However, the mere fact of their supervisory status creates an apparent conflict of interest and it is better to have personnel from other departments and backgrounds to supervise disciplinary proceedings. It is extremely important for those who exercise supervisory authority in government departments to be familiar with the idea that no man should be a judge in his own cause. Hence, in the event there are disputes and grievances arising out of routine administrative functions, the persons who are assigned to resolve them should not have any interest in the subject matter. This may not be possible in all settings, but adherence to this principle should be the norm rather than the exception.

In many administrative decisions and orders, proper reasons are not adduced for a given course of action, for instance action such as those relating to dismissals from service, the awarding of a contract of the selection of a bidder from among several competitors. The absence of reasoned orders and the proper maintenance of records add to the burden of courts that are later called on to examine such decisions. Sometimes, considerations of expediency may only permit the decision-makers to produce a brief record of reasons for choosing a particular course of action. However, the promotion of such practices is an effective check against arbitrariness and it makes it easier to resolve grievances that might arise in the future. *In Siemens Engg. & Mfg. Co. of India Ltd. V. Union of India, AIR 1976 SC 1785,* it was noted that a reasoned order is an essential requirement for the delivery of justice. I must emphasize here that judges and lawyers do not have a monopoly over the use of the principles of natural justice. These principles should be followed in all forms of governmental actions and diligent adherence to the same will hopefully reduce the scope for challenging them before the courts.

It must be stressed here that while exercising *'judicial review'* the courts do not exercise ordinary appellate powers. The intention is not to take away the powers and discretion that is properly vested with administrative authorities by law and to substitute the same with judicial determinations on specific facts. Judicial review is a protection and not an instrument for undue interference in executive functions. Any administrative action can only be set aside when it is arbitrary irrational, unreasonable or perverse. *In Delhi Development Authority V. M/s UEE Electricals Engg. Pvt. Ltd. (2004) 11 SCC 2013,* the Supreme Court made the following observations.

> *'One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is "illegality" the second "irrationality" and the third "procedural impropriety". Courts are slow to interfere in matters relating to administrative functions unless decision is tainted by any vulnerability such as, lack of fairness in the procedure, illegality and irrationality. Whether action falls in any of the categories has to be established. Mere assertion in this regard would not be sufficient. The law is settled that in considering challenge to administrative decisions courts will not interfere as if they are sitting in appeal over the decision. He who seeks to invalidate or nullify any act or order must establish. The law is settled that in considering challenge to administrative decisions courts will not interfere as if they are setting in appeal over the decision. He who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. It cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made that proved, and the very seriousness of such allegations demands proof of a high order of credibility'*

Now, I shall turn to the *Wednesbury* standard of reasonableness. Up to 1947 the law in England was that the courts could interfere only with judicial or quasi-judicial decisions and not with administrative decisions. This legal

position changed after the famous decision of *Lord Greene* in *Associated Provincial Picture Houses Ltd. V. Wednesbury Corpn. (1947) 2 all ER 680* which recognized that courts could indeed examine the process by which administrative decisions were arrived. The *Wednesbury* standard has often been misunderstood to mean that any administrative decision which is regarded by the Court as unreasonable can be struck down. However, the court's primary concern should be with the fairness of the process by which an administrative decision is made and not necessarily with the substantive outcome of the same. A decision is unreasonable in the Wednesbury sense if:

- Firstly, it is based on wholly irrelevant material or on wholly irrelevant considerations,
- Secondly, it has ignored relevant materials which should have been taken into consideration
- Lastly, it is so irrelevant that no reasonable man could ever have arrived at the same.

This test made it clear that ordinarily an administrative action cannot be struck down merely because the judge disagrees with the final outcome of the administrative act. There must be a substantial outcome of the administrative act. There must be a substantial degree of unreasonableness in the manner in which such an act took place. However, the application of the Wednesbury standard has been haphazard and there are competing views on its proper application.

The *'doctrine of proportionality'* is another important basis for exercising judicial review. This entails that administrative measures desired result. The doctrine operates both in procedural and substantive matters. This principle contemplates scrutiny of whether the power that has been conferred on an executive agency is being exercised in proportion to the purpose for which it has been conferred. Thus, any administrative authority while exercising a discretionary power will have to necessarily establish that its decision is balanced and in proportion to the object of the power conferred.

The doctrine of *'legitimate expectations'* which has traditionally been used in litigation between private parties, has also been recognized in the public law setting. In U.K., this conception made its appearance in *Schmidt. V. Secy. of State, (1969) 1 All IR 904,* where it was held that an alien who had been granted permission to enter U.K. for a limited period had a legitimate expectation for being allowed to stay for the permitted period. This doctrine is based on the premise that a person may have an expectation of being treated in certain way by an administrative authority even though he has no legally protected right to receive such treatment. In this respect, Wade has emphasized the importance of this doctrine in the following words[9]:

> *"In many cases legal rights are affected, as where property is taken by compulsory purchase or someone is dismissed from a public office. But in other cases, the person affected may have no more than an interest, a liberty or an expectation … a 'legitimate expectation' which means reasonable expectation, can equally well be invoked in any of many situations where fairness and good a administration justify the right to be heard."*

However, it must be kept in mind that the legitimacy of a particular expectation and the related claim is a question of fact which can be decided in light of larger public policy related concerns. It is open to the government to frame and reframe its policies, which may result in denying certain individuals or a class of persons the benefits which they had been preciously receiving.

Conclusion:-

"The judge infuses life and blood into the dry skeleton provided by the legislature and creates a living organism appropriate and adequate to meet the needs of society". These words of the former Chief Justice Mr. P.N Bhagwati are worth mentioning because the role of judges is not strictly interpreting the Constitution but also is to give the true meaning to the Legislation. Judicial review has generated its power under the Constitution in India and the scope is very well defined by the Supreme Court of India from time to time. If we strictly look on to the meaning of judicial review it is the check and balance of the acts or laws made by the legislation by the judiciary on account of its being contrary to the Constitution.

The Supreme Court of India is no doubt the final interpreter of the Constitution. It is playing a significant role of a protector and working at its best since the commencement of the Constitution. With its intellect and time, our

[9] Wade and Forsyth, Administrative Law, 7th edn. (Oxford University Press, 1994)

Supreme Court has achieved a lot more than rigid law interpreter made by the legislation. The Supreme Court has rendered thousands of decisions expounding various provisions of the Constitution, and, thus a distinct Constitutional jurisprudence has come into existence. Now with its power of judicial review and judicial activism this Court is doing a lot for the social welfare. It has become the last resort for the weak sections of the society.

But on the other hand this law making power in the hands of the judiciary is posing a threat to the state constitutionalism. India is following Constitution and its spirit is to establish constitutionalism in the country. But this power of the Supreme Court can lead to the country where judiciary will be the head. It is synonymous of creating a third chamber of legislation, which is against the principle of constitutionalism i.e. idea of limited government where an organ of the government can be checked on the ground of being arbitrary. Thus this power requires sense causation while exercising. Court should not act arbitrarily. ***"Great powers bring great responsibilities"*** this quotation of some scholar can guide the Court while using its powers. But in spite of all the hurdles the doctrine of judicial review has a vibrancy of its own and has even declared as the basic feature of the Constitution.

The Indian Judiciary played a remarkable role by the way of judicial review to maintain the supremacy of the Constitution. As said by Holmes that life of law is not logic but experience. *Hamilton,* one of the framers of the Constitution of United States of America says that "if there is conflict between Constitution and the law, the judges should prefer Constitution" In India it is reflected 100%.[10]

[10] Justice S.B. Sinha

Judicial Review of Administrative Actions

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The powers of Superior Courts to review the Administrative actions has been a debatable area in Pakistan in the past two decades and came to critical analysis (favour and against) after 2007 when the superior judiciary emerged as more powerful and deeply determined to jealously guard the fundamental rights of the citizens of Pakistan.

In 19th, century the issue of extension of constitutional power of superior courts to review the administrative actions came under a 'hard & tension line discourse' among the legal fraternity and political spheres of U.S. and the European countries.

The long and protracted exchange of judicial orders and government responses especially between Chief Justice John Marshal and the then government of U.S finally paved the way for judicial review of the administrative actions of the executive.

In 1803, in the case of ***Marbury V Madison*****,** John Marshall, the Chief Justice of United states of America had established the court's power to review laws of Congress and the states and to determine whether an act of Congress violates the Constitution. Seven years later, in *Fletcher V Peck,* the court also extended its powers of judicial review to state laws.

The Supreme Court of United States did not stop here. It further extended its powers of judicial review for the protection of marginalized aboriginal people who were referred as 'Savages' even by the U.S President Andrew Jackson.

Chief justice John Marshall in ***Cherokee Nation V Georgia State,*** **(1831)** described Indians as *'Wards' of Federal government*. Later on in 1832 in *Worcester V Georgia State,* the Court held that the Indian nations were distinguished people with the right to maintain a separate political identity.

Unfortunately, President Jackson refused to recognize the validity of the ruling by saying "John Marshall has made his decision, now let him enforce it."

Beside all the hurdles, the Supreme Court of United States continued its journey of judicial review. More than a century later, although the civil rights revolution of 1960's began in the streets of United States but it achieved its constitutional legitimacy through the Supreme Court. Under the guidance of Chief Justice Earl Warren, the Court vastly expanded the rights enjoyed by all Americans and placed them beyond the clutches of legislative and local authorities.

(Ref: Eric Foner. Give Me Liberty. Norton & Company, Inc, N.Y.2005)

Pakistan took no exception in benefiting from the experience of U.S Judiciary as well as from the judgments of British and European courts in this direction.

In a civilized society, the democracy, as a principle, runs into all the institutions, functionaries and authorities of the state like the blood circulating throughout all the organs of the body. To meet this sacred goal, the Constitution puts the state to work through three main organs: Legislature, executive and Judiciary. The legislature gives birth to the laws both substantial as well as procedural for determining and implementing the rights of the citizens within the framework of the fundamental rights as envisaged in the Constitution whereas, executive functionaries are entrusted with powers of governance and implementing the rights provided in the Constitution and the legislation. The judiciary oversees the executive and even the legislature to ensure that these organs work within the ambit and vires of the law and the Constitution in its true letter and spirit. The subordinate judiciary mainly deals with the disputes between the individuals and the groups while the superior judiciary in exercise of its constitutional powers to protect the rights of the citizens of Pakistan scrutinizes the actions and decisions of the executive authorities through the lens of the Constitution and law. In exercise of its power, the judiciary does not

feel fettered by the letter of law but feels free to review any act of executive or administration if found against transparency, fairness and natural justice to check their arbitrary exercise of powers. In such scope and scenario, the superior courts do not feel confined to the interpretation of the law, but also set out the guidelines which have the force and authority of law, named as 'case laws'. In discharge of such duties, the judiciary has to pass through very sensitive and pain bearing stages. The famous Chief Justice of U.S. Lord Marshal remarked on this sensitivity, I quote.

> *"Advert, sir, to the duties of a Judge, he has to pass between the government and the man whom that government is prosecuting: between the most powerful individual in the community, and the poorest and most unpopular. It is of the last importance that, in the exercise of these duties, he should observe the utmost fairness."*

Unlike in a secular state, working under a Constitution of Islamic republic of Pakistan fully loaded with Islamic provisions, the role of judiciary becomes more demanding. The duty of the 'judiciary' in a religious state, under religious Constitution and in a religions society becomes a challenge. The judge is not only accountable before the law but also before Allah Almighty. He is the prisoner of his conscience more than of the law. The judges have not only to protect the fundamental rights of the citizens as envisaged in the Constitution but also to protect the human rights of the people of all casts, regions and religions as elucidated in Islamic injunctions.

The jurisdiction and the vires of powers of superior courts to protect the rights of the people of Pakistan have been envisaged in the Constitution of Pakistan as well as in state legislation while the jurisdiction of High Courts in protecting the rights of the people is elaborately envisaged in;

(a) Article 199 of the Constitution of Islamic Republic of Pakistan 1973
(b) Section 151 of C.P.C and Section 561-A of Cr. P.C providing for the inherent power of High Court.

As far the jurisdiction of Apex Court is concerned, its vires of functions are clearly provided in the Constitution by which it has three main role jurisdictions:

a) Article 184 - Original jurisdiction.
b) Article 185 – Appeal Jurisdiction.
c) Article 186 – Advisory jurisdiction.

The Supreme Court as well as High Courts of Pakistan have been discharging their legal and constitutional duties right from their formation & constitution. However, after 2007, the Supreme Court of Pakistan came up with new vision of aggressively rather jealously guarding the rights of citizens of Pakistan by overriding (and sometimes by ignoring) the limitations on its powers to fetter the misuse of powers by executive in its functions. The courts took their sacred duty of safeguarding the Constitution in its letter and spirit which is the source of rights and a pedestal on which the state is established to procure justice. The Apex Court generously interpreted and stretched the inflexible provisions of the Constitution and those of the law in the direction of fundamental rights of the people. The scope of *'suo motu'* notice as under Article 184(3) was largely enlarged while responding and addressing the atrocities of the marginalized people of Pakistan. Few judgments are briefly quoted as reminding only and not for minding please.

1. In Tariq Aziz case while dealing with the discriminatory and arbitrary exercise of discretionary power by the Prime Minister in promoting the senior bureaucrats from grade 21 to 22, the Apex Court held as under:-

   > "Action must be based upon on fair, open and just consideration to decide matters more particularly when such powers are to be exercised on discretion"

   (2010 SCMR – P. 1301)

2. While dealing with the case of unjust and arbitrary distribution of development funds by the Ex-Prime Minister of Pakistan, the Apex Court struck down the said allocation of 22 billion for the development of the areas falling in the electoral constituency of the said Prime Minister. The Court observed: Prime

Minister was a person who represented the government and the citizens, therefore, in sanctioning allocated funds for the schemes, he was bound to follow a high standards of transparency and for such purpose, a system had to be institutionalized following the recognized principle of exercising discretion judiciously.

(Constitutional Petition No. 20/2013)
(2013 SCMR P. 1017)

3. In case regarding putting of two government officers (husband and wife) as OSD, a case of political victimization, the Apex Court declared it a case of violation of discretion and a malafide act.

(C. M. No. 4918 of 2012 and C. M. No. 8/2013
in Constitutional Petition . No. 23/2012)
(2013 SCMR – P. 1150)

4. Similarly was to the case of Anita Turab Vs Federation of Pakistan.

(2013 SCMR- P. 1150)

5. Massive Corruption Scams: *In the past few years, the Supreme Court has taken serious notice of massive high level corruption which has resulted in the loss of billions of rupees to the public exchequer. These include the corruption in Punjab Bank, Steel Mills, Hajj Quotas, E-11 Northern Strip and join of Multi Professional Co-operative Society and CDA, Rental Powers Plants and N.R.O.*

In the Rental Power projects scam, the Supreme Court declared in March 2012, the rental power projects were a fraud designed to steal from the public exchequer around Rs. 455 bn. The Court has also directed N.A.B to register criminal cases against the culprits including the then ministers, secretaries and other government officials involved in the fraudulent deal.

6. *Encouraged by the bold decisions of the valiant judges of Supreme Court under their veteran Commander-in-Chief, Iftikhar Muhammad Chaudhry, the Hon'ble Judges of High Courts have also taken serious notices of human rights violations on applications or suo-motu. There have subsequently been hundreds of historical judgments and orders of the High Courts in this direction.*

However, in the preceding couple of years and the generous and frequent exercise of such powers by superior courts under article 184(3) and article 199 have been subjected to critical analysis. A group of legal fraternity as well as a small section of civil society has frankly expressed their serious reservations in this regard. The main arguments of opponents of the judicial review is the separation of jurisdiction and powers of the legislature, executive and the judiciary while the proponents of power of judicial review hold that it is not the case of encroachment of judicial jurisdiction to executive jurisdiction. The executive has full power and discretion in taking administrative actions but are bound to take every action and decision in accordance with law and in public interest. The judiciary exercises its power not in taking administrative decisions or actions rather it securitizes the administrative actions through lens of Constitution, law and the public interest, hence there is neither overlapping of powers nor encroachment.

Some arguments are given here in after:

Arguments for Judicial Review of Administration Actions.

For	Against
1. Under the Constitution, judiciary including the Apex Court has the duty and role of administration of justice to protect the citizens from injustices caused to them in any form, by any forum and in any style.	1. Constitution provides separate scope and functions for three organs of the state. Judicial review is the encroachment over the jurisdiction and functions of the executive.
2. All the organs of the state and the public functionaries are bound to act in public interest in exercise of their discretion in discharge of their administrative duties.	2. Executive authorities are close to the ground realities and the limitations, so is the best judge in its circumstances for the validity or otherwise of its administrative actions.
3. Normally the public functionaries work directly or indirectly under the influence of the government and not in dependently. Their administrative actions are not devoid of political influences.	3. The administration of justice is carried out through a hierarchy of the judicial system. The role of Supreme Court is at top and apex by sitting as final appellate authority and not as trial court. By judicial reviewing of administrative actions by Supreme Court judicial pyramid seems to be inverted.
4. No doubt judicial hierarchy or pyramid provides various foras for challenging the unlawful actions of any form including the administrative actions like civil courts, Service Tribunal or Election Tribunal. However, when the normal fora cannot administer justice officiously and in effective manner, the superior courts have the right rather duty to interfere providing the citizens effective and efficacious remedy e.g. in case of fake degrees of the parliamentarians, the normal judicial proceedings take a long time even longer than the tenure of their membership of the parliament with the result that the tenure of the member with fake degree challenged at lower forum expires fully while the case is at Tribunal or High Court stage.	4. By direct intervention of Superior or Apex Court in cases at the initial stage of trial, the parties to the case get deprived of their right of production of their evidence and cross examination in accordance with the provisions of Qanoon-e-Shahadat Order and that of C.P.C or Cr.P.C as the case may be.
5. Justice delayed is justice denied.	5. The said direct intervention of Apex Court also deprives the party to avail the remedy of trial and appeals as provided in judicial pyramid. Even otherwise after some proceedings before the Apex Court, if the case is sent by Apex Court to the Trial Court, the Trial Court is influenced by the observations or proceedings before the Supreme Court. 6. Justice hurried is justice buried.

It is pertinent to mention that even the retirement of Iftikhar Muhammad Chaudhry as Chief Justice of Pakistan, the Apex Court as well as the High Courts did not relax in exercising their powers of judicial review or taking suo motu notices in cases of human rights violations.

Economic Consequences of Judicial Actions[1]

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Economic development literature and empirical evidence over last five decades have clearly established the link between growth and poverty alleviation with good governance. Good governance has now been very much become synonymous with rule of law, Property rights and enforcement of contracts, accountability, and transparency. It has also become evident that there are some key institutions which are critical for ensuring good governance. Judiciary and quasi-judicial institutions do form part of this core group of key institutions.

Growth rates in Pakistan since 2008 have declined to almost half of the level achieved in the preceding four years. Investment ratio in 2010-11 has been the lowest in the history of Pakistan. Most of the discussion on the stagnation and decline of the economy has rightly focused on fiscal deficits, energy shortages, inflation and high interest rates. But the relationship between the rule of law and investment and business development is not much talked about in popular discourse. In absence of a conducive legal environment uncertainties created by other factors such as political instability, security, law and order, energy, etc., would make matters worse. But a well-functioning judicial system can reassure the investor and act as a countervailing force to these other negative attributes. An investor will part with his financial savings and share his expertise and experience only when he is assured that the firm will make profits. For profitability, the arbitrariness and discretionary behavior of the state actors would have to be kept at bay. To achieve this, non-discriminatory and impartial application of law, enforcement of contracts, protection of property rights and speedy disposal of cases are necessary and perceived to be happening.

The recent judicial activism and suo-motu actions by the Supreme Court and High Courts have done a great deal of good in establishing a new equilibrium between the Executive, Parliament and the Judiciary. This movement while commendable, should not distract the attention from the more mundane tasks of (i) ensuring broad based access to justice; (ii) revision of outdated procedures and laws; (iii) use of modern technology in case management; (iv) encouragement of Alternative Dispute Resolution (ADR) mechanisms, (v) tracking and enforcement of National Judicial Policy 2009; (vi) directing the Special Courts and Tribunals to abide by the deadlines for disposal of cases. These measures will have more lasting and fundamental impact on the economic governance of the country and help remove some of the obstacles in the way of investment and equitable economic growth.

Despite these achievements of the judiciary the economy had to bear certain costs and I will illustrate this with the help of four recent examples.

With all due apologies, the country risk profile of Pakistan that was already quite high has been elevated with the addition of Litigation Risk. Even if the investors and businesses cross all the different hurdles imposed by the Federal, Provincial and Local Governances they are now faced with an additional constraint that adds to uncertainty and unpredictability of investing and doing business in Pakistan. After all the approvals are obtained there is the fear that the Supreme Court or High Courts may take suo motu cognizance of the transaction, issue stay order and order lengthy time consuming proceedings to decide the case. Alternatively, some other party not pleased with the outcome of the Executive decision may file a petition that is admitted by the courts. A large number of frivolous petitions are filed every year that have dire economic consequences but the penalty of such filings is insignificant. But the cost to the economy is enormous. There are very few countries which will scare away potential $3 billion investment by world's leading mining companies for exploring our mining resources in a difficult part of the country. We have not earned a bad name in the international investor community but have to spend millions of dollars in international tribunals to defend our actions. In the meanwhile the mining operations are at a standstill and whatever little foreign exchange we were earning through exports are not accruing at a time when we need it badly. We do not acknowledge that we don't have the technical knowhow, financial resources,

[1] A paper prepared for the International Judicial Conference 2014, April 18-19, Islamabad

[2] The presenter is former Chairman of National Commission on Government Reforms(NCGR) and the Author of the book "Reforming the Government in Pakistan".

and organizational ability in the public sector to run such a sophisticated operation but we take pride in making false and misplaced assertions. The second blatant example is that of LNG project. Any country facing acute shortage of energy and particularly natural gas would take exceptional measures in order to find sources of supply for overcoming these shortages. But for the last four years we have several tenders biddings and awards but they could not proceed further due to the intervention of the courts. Ladies and gentlemen, we would bow to the courts if they ensure that the process has been transparent and no favors have been done in the award of contracts but what we need is expeditious disposal of these suo motu cases or petitions so that the projects can be implemented and the economic costs in terms of foregone production, missed export orders, laying down of employees can be avoided. The third example is that of privatization of Pakistan Steel Mills. Since that historic decision, we have not carried out a single transaction of privatization. We have incurred losses of Rs. 100 billion or more in Steel Mills but its production is hardly in single digit of its installed capacity. We have to import the products which the Mill used to fabricate and spend valuable foreign exchange. But we are obligated to pay the salaries and wages of the employees who are at present rendering no productive services and also bearing other fixed costs. The more pernicious fall out of this decision has been a sense of fear among the Civil Servants and political leaders for putting out any public assets for sale or transfer to the private sector to avoid the wrath of the judiciary.

The fourth example of judicial activism that is hurting the smooth operations of the Civil Services is the interference in the appointments, promotions, terminations by the Executive branch. While I warmly welcome Anita Turab case judgment whereby the security of tenure of Civil Servants has been made a justifiable right I would humbly submit that invoking the fundamental rights ambit to review validity of individual decisions and staying the decisions taken has weakened the powers of the Executive branch and resulted in unnecessary inordinate delays in the process of filling in these key positions. As a result there is a state of paralysis in these bodies at present. Many of the petitions filed by those who are superseded are frivolous but they linger on for long in the courts. The judiciary should certainly ensure that the rules, procedures and processes are in place and have been observed but the application of these rules and processes should be left to the Executive branch. These are only few examples which in all good intentions and honest motives have together affected the economy and governance structure adversely.

What can be done to improve the effectiveness of the judiciary to have positive impact on the economy? Let me submit with all the humility at my command and without sounding arrogant or offending the sensibilities of any one that economic decision making is highly complex and its repercussions are interlinked both in time as well as space. For example prices are determined by interactions among hundreds of thousands of economic agents and no administrator, planner, economist or judge can ever do a better job than the market mechanism. Tampering with this natural way of determining prices seriously distorts the allocation of resources as no individual or group can ever have the enormous information that is needed for deciding what the prices level should be. Administered or prices fixed by any other means result in winners and losers and have distributional consequences.

For example, producer prices of Wheat form the incomes of the farmers in the rural areas while the consumer prices of Atta form the main expenditures of an urban family. If the Government decides to increase the prices of Wheat much above international levels the farmers would be the beneficiaries along with smugglers who will earn windfall gains by selling it across the border. There will consequently be shortage of Wheat supply in the urban areas leading to hoarding by the middle men and flour mills. The prices of Atta paid by urban consumers will consequently be much higher than the increase in prices received by the farmers. Inflation will then raise its ugly head. The unintended consequences of this decision due to changes in economic incentives are so widespread and severe that their impact on various classes could not be fully anticipated. Central planning in the Soviet Union, India and Africa collapsed precisely because of this reason. We should learn from these lessons and avoid making the same mistakes.

Private sector and Profit making are not dirty words. They form the backbone of market-based economy, growth and poverty alleviation. What is undesirable and the judiciary has every right to intervene in Rent seeking through collusion among the private players, favors bestowed by the Executive branch, deviations from the laid down rules and processes, tenders and contracts awarded in non-transparent manner. In other words, if there is any attempt made to dilute or weaken the forces of competition the judiciary has every right to take the offenders to task. But

simply opposing Privatization on sentimental, ideological or subjective grounds those family silver i.e. public assets will be sold to private profit makers without taking into account the larger economic impact does more than good to the economy.

I would now turn to more specific proposal for your consideration. First, Access to judiciary is limited to only those who can afford good lawyers and pay their enormous fees and expenses. An ordinary litigant, however genuine his claim may be, therefore, bows before the influential or seeks the help of non-conventional methods of dispute resolution. Unequal access to justice is one of the main factors that perpetuates the patronage capacity of politicians and, in turn, leads to poor economic governance. Feudalistic ethos that pervades our governance structure cannot be altered until all citizens are treated equally by law. Today, it is only the rich who can manipulate the system to their advantage.

Second, the laws governing economic transactions such as the Contract Act, the Evidence Act, the Registration Act, the Transfer of Property Act, the Stamp Act, were made in the 19th or 20th century. They are not only deficient, defective, outdated but in some instances their applicability is limited. The most important law that needs updating is the Land Revenue Act to make it more germane to the modern demands of agriculture, agro-business, industry, commerce and infrastructure, etc. Land use for industrial, commercial and agricultural purposes is critical to production of goods and service. Land disputes on title and possession both in the urban and rural areas form the bulk of civil litigation at the local levels with appeals escalating all the way to the Supreme Court. The process of adjudication is not only tedious, cumbersome, expensive but time consuming. Transparency of land sales through clear land titles and market based transactions would reduce the volume of litigation and promote efficient use of land – both urban and rural.

Third, the capacity of Judges in the substance and content of economic related processes and that of lawyers engaged in this line of specialization should be built and continuously upgraded. A large number of defective decisions are delivered because of the inability to grasp the intricacies of the principles underpinning the transaction. The entry and standards of Legal Education, in general, have to be exalted to the same level as other professions such as Medicine, Engineering and Accountancy. Expert witnesses as Amicus-Curae should be invited more frequently in order to clarify the concepts and aid the courts.

Fourth, case load management in our courts particularly at the lower level is ridden with discretion, corruption, delays and inefficiencies. For the last decade an attempt is being made to manage the load through a transparent computerized system but the results have been sporadic. Unless the top judicial leadership assigns strict deadline there is little chance that it will be completed. Rigorous supervision of the lower courts and taking penal actions against non-performers and rewarding those who are quick and fair in disposal of cases should be institutionalized.

Fifth, while we all rightly criticize the informal jirgas, sardari practices and Qazi Courts, the fact remains that we have been unable to extract the essential ingredients of these informal systems and enrich the formal legal systems. The uprising in Malakand Division was inspired by the Mullahs who contrasted the speedy and expeditious justice of the Shariah Courts in the days of Wali of Swat with the established judicial system applied in the area since the merger of Malakand in the province of NWFP .Federal Board of Revenue (FBR) had implemented an Alternative Dispute Resolution mechanism until 2008. As soon as the new government took power it abolished the mechanism rather than fixing its defects and weaknesses and making it more effective. Small Causes Courts and properly functioning village level Musalihat Committees and other means of ADR can take a lot of load off the present congestion in our courts and also provide access to justice at very little cost.

Sixth, a ray of hope appeared in 2009 when the National Judicial Policy was announced. The policy made some very radical pronouncements such as cases relating to banking and different taxes and duties such as income tax, property tax, etc., should be decided within six months. All stay matters should be decided within 15 days of grant of interim injunction. Rent cases should be decided within four months in trial courts and appeals within two months. Cases regarding suits upon bill of exchange, hundies or promissory notes, should be decided through summary procedure within 90 days.

Seventh, the Banking system cannot simply work if willful defaulters can obtain stay orders from the courts and hundreds of billions of rupees of Bank loans remains stuck. Even where the courts have decided cases in favor of the lenders the execution of decree takes a long time. The unscrupulous borrowers are happy that they can use

the borrowed money for decades or years without servicing the loans. The same is the case with the income tax, sales tax, customs pendency. Special Courts are either without judges or some of the judges do not have full competence over the specialized laws and regulations. The cases are adjourned and remain undecided for decades. The NJP should involve a more proactive monitoring mechanism. According to the Annual Report of 2012 the disposal by the Banking Courts was 23694 out of 68973 cases outstanding i.e. 34 percent disposal lower than 42 percent disposal by all Special Courts and Administrative Tribunals. Conviction rates for insider trading, tax evasion, loan default and other economic crimes are quite low. The deterrent effect of the laws on the books is then almost absent and the behavioral change towards better observance and compliance is almost non-existent.

As one of the leading Pakistani lawyers has so aptly commented that the English model on which the Code of Civil Procedures (CPC) 1908 was based was discarded even in England a long time ago. The English model *"preferred form over substance on account of this fundamental flaw, litigations continue in Pakistan for decades while lawyers squabble over issues of virtually no consequence. In each litigation there is a lawyer seeking justice for his client and an opposing lawyer who will very successfully prolong and delay the litigation while liberally drawing upon various dilatory provisions of CPC. Knock outs on the basis of hyper-technicalities and the causing of abnormal delays are in fact appreciated and considered 'assets' and 'qualities' of astute lawyers."*To conclude, the National Judicial Policy has very pertinent elements which if implemented can make judiciary a major contributor towards good governance. The problem as usual in Pakistan is the lack of implementation. The Hon'ble members of the Committee overseeing the Policy will do a great service to this nation if they regularly monitor and ensure that the Policy is being implemented both in letter and spirit. This single outcome will be hundred times more potent than hundred disparate cases of judicial activism.

Table 1: Performance of Special Courts and Administrative Tribunals

S #	Title of Tribunals/ Special Courts	Number of Courts	Pendency on 1-1-2012	Total offer Institution and Transfer	Disposal during the year	Balance on 31-12-202
1.	Accountability Courts	22	451	566	180	386
2.	Anti-Dumping Appellate Tribune	1	2	9	7	2
3.	Appellate Tribunal Inland Revenue	4	6755	17307	7860	9447
4.	Custom Appellate Tribunals	8	2700	4265	1553	2712
5.	Drug Courts	9	2333	4983	2510	2473
6.	Environmental Protection Tribunals	4	1131	377	98	279
7.	Foreign Exchange Regulation Appellate Boards	2	52	54	15	39
8.	Special Courts (Central)	8	5877	11693	5647	6046
9.	Special Courts (CNS)	6	1335	2622	1613	1009
10.	Special Courts (Customs, Taxation and Anti-Smuggling)	4	553	827	151	676
11.	Special Courts (Offences in Banks)	3	964	1354	139	1215
12.	Insurance Appellate Tribunal	1	42	57	4	53
13.	Banking Courts	29	45021	68973	23694	45279
14.	Commercial Courts	2	23	25	2	23
15.	Federal Service Tribunals	3	1912	6648	3092	3556
16.	Provincial Services Tribunals	4	6452	14711	6066	8125
17.	Anti-Corruption Courts (Provincial)	17	4883	7771	2374	5408
18.	Anti-Terrorism Courts	49	2238	5048	2743	2237
19.	Consumer Courts	11	2017	6926	4430	2566
20.	Labour Courts	26	14988	29172	17540	11771
21.	Labour Appellate Tribunals	7	5902	10246	2815	7294
Grand Total		**220**	**105631**	**193634**	**82533**	**110596**

Source: Law and Justice Commission of Pakistan (2013)

Judicial Review of Administrative Actions

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The judicial review of administrative actions is an established doctrine ever since the US Supreme Court introduced it in *Marbury v. Madison* in 1803 [5 U.S.137(1803)]. This doctrine has gained worldwide acceptability ever since the independence of large number of countries throughout the world after the Second World War. Nearly every democratic Constitution in the world provides for a guarantee to its citizens that administrative acts or actions would not violate their fundamental rights enshrined in the Constitution. However, the superior courts everywhere in various countries of the world have so structured and empowered for the exercise of such jurisdiction with a view to lend uniformity in the enforcement of principles of judicial review.

The case of Pakistan and India is no different to those of the other democratic countries in the matter of exercise of power of judicial review over the administrative actions of the government and its officials. However, such exercise of jurisdiction is related to various pre-requisites and safeguards like availability of departmental appeal and review, requirement of aggrieved parties and furnishing of proper notice to the administrative authorities concerned. The superior courts have also shown judicial restraint in exercise of such power wherever possible particularly when alternative remedies are shown to be available or the conduct of the party approaching the court is found to be not aboveboard. Thus the requirement of *locus standi* and availability of alternative remedies has been strictly enforced by the courts in Pakistan and India.

The debate over ***'judicial activism'*** and ***'judicial restraint'*** has been going on in Pakistan and India for a long time. It has also brought a division amongst the ranks of judiciary with some judges identified as conservative, strict constructionists or believers in judicial restraint. On the other hand, certain other judges are considered activists, liberal interpreters and believer in widening their jurisdiction. It generally depends upon the leadership of the judiciary for the time being that sets the direction either in favour of judicial activism or judicial restraint.

The important question has always been about determining the scope of judicial review and the extent to which the same could be extended or expanded. Many legal scholars believe that the judiciary being the third organ of the state should defer to the other organs of the state particularly in their respective domains. The advocates of strict separation of power doctrine emphasize that the judiciary should not venture into the occupied fields of the legislature and the executive and stay within the parameters set for the judiciary under the Constitution. In the first place, it is difficult to define or articulate such parameters in the modern world particularly where the functions of the governments have become manifold and multifarious after the Second World War. The governments are no longer limited to the basic functions of defence against external aggression and maintaining law and order internally. The emphasis have shifted to the establishment of welfare state which should provide social and other services to its citizens. When a state is called upon to look after the sectors of education, public health, communication, environment and employment of its citizens, the government functions expand manifold in order to perform such complex functions. The state has to lay down extensive regulations and comprehensive machinery for the performance of such functions. The regulatory bodies created by the administration in this behalf themselves need regulation and oversight. This gives rise to the question whether the administrative branch of the government should provide its own machinery for oversight and regulation of the regulatory bodies or their functions. Whether the judiciary has to be a watchdog over administrative bodies and agencies? The expansion in this area for judicial review is the focus of ongoing debate.

There is another aspect which cannot be lost sight of particularly in a country like Pakistan where predominant perception of the citizens is that administrative bodies and agencies are prone to misuse and abuse of their powers. The ordinary citizens therefore, look up to the judiciary to protect them from such abuse.

It is the malfunctioning of the executive and the legislative bodies that create the space for the courts to fill the gap. If an abuse of authority becomes the order of the day, some institution has to come forward to prevent such abuse and violation of the rights of the citizens. Exercising restraint in the face of such a situation would be abdication of jurisdiction on the part of the judiciary. The judicial review in such circumstances becomes the

instrument for preventing or correcting the abuses, excesses and corruption on the part of the administration and its officials. It should not be surprising to anyone that it is perverse exercise of authority on the part of the administration and wide spread corruption in making administrative decisions has led the judiciary to expand its jurisdiction in order to redress the grievances of the people against corrupt administrative machinery.

The Supreme Court of Pakistan, while exercising its jurisdiction *suo motu* and in human rights cases, has uncovered mega scams and scandals of public money. Had the Supreme Court not taken notice of such mega scandals, billions of rupees stolen or squandered from the public exchequer would not have been recovered. The nation owes a debt of gratitude to the Supreme Court under the leadership of Justice Iftikhar Muhammad Chaudhry for judgments in the following cases in particular:

Bank of Punjab vs Haris Steel Industries (Pvt) Ltd: ***PLD 2010 S.C. 1109;***
Alleged corruption in Rental Power Plants etc: ***2012 SCMR 773;***
Air Marshall (Retd) Muhammad Asghar Khan vs General ® Mirza Aslam Baig: ***2012 SCMR 2008;***
Suo motu case no. 15/2009 (Corruption in Pakistan Steel Mills Croporation): ***PLD 2012 S.C. 610;***
Suo motu case No. 7 of 2011- Non Transparent Procedure of purchase of 150 Locomotives by Ministry of Railways: ***2012 SCMR 226:***

The Supreme Court of Pakistan had rendered certain extraordinary decisions in exercise of its power of judicial review which had nationwide impact and established primacy of the judiciary as ultimate arbiter of the Constitution. Such judgments include the following:

Suo motu case No. 4 of 2010 (Contempt proceedings against and conviction of the Prime Minister Syed Yousaf Raza Gillani): ***PLD 2012 S.C. 553;***

Muhammad Azhar Siddique vs Federation of Pakistan (Case of removal/Disqualification of Prime Minister Syed Yousaf Raza Gillani): ***PLD 2012 S.C. 774;***

Shahid Orakzai vs Pakistan (Appointment of Chairman NAB declared invalid|): ***PLD 2011 S.C. 365;***

Ch. Nisar Ali Khan vs Federation of Pakistan (Appointment of Chairman NAB declared invalid) ***PLD 2013 S.C. 568:***

These and similar judgments have established the Supreme Court of Pakistan as one of the most independent Courts in the world under the Chief Justice Iftikhar Muhammad Chaudhry. It will be difficult for the successors of Justice Chaudhry to fill in his big shoes. However, here lies the challenge which the future Supreme Court has to meet. The leadership may keep changing but every institution has to maintain its high traditions and exalted image and prestige.

It may just be too early to judge on what future course the Supreme Court will adopt in the matter of judicial review of administrative actions but the wisdom lies in maintaining a steady course. The expectations of the common citizens of Pakistan from the judiciary over the past five or six years have risen very high. Any discontinuity from the recent past would lead people to serious disappointment and dismay.

Nevertheless, the indicators over the past four months, after the retirement of the former Chief Justice of Pakistan, are strengthening a general perception that the Supreme Court may be breaking away from its recent past of judicial activism and might be relapsing into the distant past of inactivity, judicial restraint and indifference.

A Question of *Quo Warranto*

Mr. Ashtar Ausaf Ali
Senior Advocate
Supreme Court of Pakistan

There is, in my estimation, a wonderful phrase that cuts to the essence of everything we do; as both practitioners and overseers of the law. It was said by a theorist from France who lived around 300 years ago, but even after all this time, and so many miles away, his words apply to us more and more with each passing day.

He said, 'The wickedness of mankind makes it necessary for the law to suppose them better than they really are.'[1] That was Montesquieu, and it was a statement that chimed with his beliefs and, in my humble opinion, should inform ours. He was that rare legal theorist who also understood the tide of history, and how it swept away humankind despite our own best intentions.

Montesquieu felt that the moment made the man, rather than the man making the moment. He said once, '*It is not chance that rules the world. Ask the Romans, who had a continuous sequence of successes when they were guided by a certain plan, and an uninterrupted sequence of reverses when they followed another.*'[2]

Montesquieu understood the power of institutions, long before our young democracy began building them. He knew human affairs were a messy business – prone to arbitrary decisions and, not infrequently, personal prejudices. What was needed, in those circumstances, was a plan. An overarching set of guidelines that was bigger than the individual. A system of review that ensured checks and balances, that would prevent any single body from growing swollen with authority.

To know Montesquieu is to know the separation of powers, a concept that he introduced so long ago, but one that has travelled time and oceans to make it into a core foundation of our system. Back then, France was under the thumb of the Bourbon kings, and Louis XIV was said to have declared, *'I am the state.'*[3] I am sure we in Pakistan, who have been graced with our own local Louises, can relate. And it is what makes the need to guard against them so immediate.

Today, the beauty of the separation of powers is everywhere we look. It not only goes hand in hand with modern democracy, but also in a subtler way, with the rule of law. Back then, as now, the separation of powers meant breaking power into three branches – a separation we are well-aware of, but are sometimes liable to forget: the executive, the parliament, and the judiciary.

What makes judicial review so significant is that it is a means of one branch to check the other, but in doing so, must reaffirm the judiciary's independence without trampling the executive's.

Over the past five years, there has been a sea change in how the legal fraternity regards judicial review and accordingly, a sea change in the functioning of that review itself. And its momentum has only grown. It is a uniquely Pakistani situation that judicial review of administrative action has captured the popular imagination as it has. And it is a unique situation that judicial review should enjoy goodwill across such a wide cross-section of society.

This is a gift, but also a curse: it burdens that same legal fraternity with a heavy responsibility – to interpret judicial review in a manner that is ethical, unadventurous, and most of all, procedurally sound. As lawyers, judges, and students of the law, we have a duty to condition the national conversation. And to plug out all the white noise, it would be best to go back to the basics.

What purpose does judicial review serve? Desmith's latest edition on Judicial Review puts it simply: it is but *'one way to control the abuse of public power.'*[4] Professor de Smith's famous phrase has been repeated many times,

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1 Montesquieu, Charles de: *De l'Espirit des Lois*, (1748), Book VI, Chapter 16
2 Montesquieu, Charles de: *Considerations on the Causes of the Greatness of the Romans and their Decline,* (1734), Chapter XVIII
3 Blanning, Tim: *The Pursuit of Glory: The Five Revolutions That Made Modern Europe* (2008) p.286
4 Woolf, Harry; Jowell, Jeffrey; Le Sueur, Andrew: *De Smith's Judicial Review*, 6th Edition, (2007) p.5

that 'judicial review provides just one of a number of legal controls of administrative action, and its role is inevitably *sporadic* and *peripheral*.'

Even so, an authority no less than Lord Woolf – one of three editors of the same edition – thought fit to balance this with a caveat, *'Public authorities,' he conceded, are set up to govern and administer, and if their every actor decision were to be reviewable by the courts, the business of administration could be brought to a standstill. Today, however, the principles developed through judicial review have become central to all of public administration in-so-far as those principles seek to enhance both the way decisions are reached and the quality of the decisions made.'*[5] It is pertinent then, that we grasp judicial review's evolution – in both degree and detail – from what De Smith described, to what Lord Woolf expanded upon; it is a story that mirrors Pakistan's own. Rarely was the question asked, '*to what extent should a duty of fairness be subsumed within the grant of official power?'*[6] Before, such thorny questions facing the fate of judicial review were resolved in one direction: the public good. And knowing how best to achieve the public good rested with, of course, the public authority. For individual rights to interfere with this end-goal was unheard of. Lord Parker, a justice world different from Lord Woolf, went as far as to say the courts were but *'handmaidens of public officials.'*[7] That thinking has thankfully changed, both there and in Pakistan, and there is a fresh awareness that individual rights must be held sacred, to be protected from the whims of an arbitrary public authority. So there's no doubt that the courts must be able to set down the public interest themselves, to best guard the individual from the excesses of the state. Ironically, the social contract between the state and the individual demands as much.

But here, again, I would like to emphasize the road less taken: it is only by understanding the other institution, that we may allow it to grow. The press finds it easier to emphasise only the adversarial: this is a mistake. It is only when the judiciary honors the state's mandate, that the state will in turn respect the rule of law – a synthesis that can only benefit the two. There is a plethora of English judgments that propound the same principle: *'that there is a need to establish a soft partnership between the courts and the administration based on a common aim, namely the maintenance of the highest standards of public administration.'*[8] This is a noble principle, and one to keep in mind.

Regardless, it is crucial to demarcate the limits of both in the absence of such lofty attitudes. The Indian Supreme Court in its ***Narmada Bachao*** judgment held:

> *'The Court has come down heavily whenever the executive has sought to impinge upon the Court's jurisdiction. At the same time, in exercise of its enormous power the Court should not be called upon or undertake governmental duties or functions. The Courts cannot run the Government nor the administrations indulge in abuse or non-use of power and get away with it.*
>
> *'It is precisely for this reason that it has been consistently held by this Court that in matters of policy the Court will not interfere. When there is a valid law requiring the Government to act in a particular manner the Court ought not to, without striking down the law, give any direction which is not in accordance with law. In other words the Court itself is not above the law.'*[9]

For our purposes, it is Article 199 of the Constitution that confers upon the High Court the powers that are the subject of our discussion. Specifically, clause (1)(b)(ii) reads, *'the High Court may, if it is satisfied that no other adequate remedy is provided by law (…) make an order—requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office.'*

Our Supreme Court too has similar powers under Article 184 (despite distinct differences in scope). It is from these articles that the power of judicial review of administrative actions flows. And it is the same articles that, via their

[5] Ibid.
[6] Ibid.
[7] Williams, G.: *The Donoughmore Report in Retropsect*(1982), p. 273, 291
[8] *R v Lancashire CC Ex p. Huddleston* [1986] 2 All E.R. 941 at 945;
[9] *Narmada BachaoAndolan v. Union of India and others* (AIR 2000 SC 3751)

wording, manage to ensure that our judicial review rather ingeniously relates to a review of the process employed by the executive authority – as opposed to the merits of the decision itself.

Thus we arrive at *quo warranto*, which quite literally means 'by what authority?' And it is in exploring the concept of *quo warranto* as interpreted in recent case law, that we may come to understand the kind of judicial review of administrative actions taking shape over the past several years.

Put in its simplest and oft-repeated terms, 'the procedure of *quo warranto* confers authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions. Before a citizen can claim a writ of quo warranto he must satisfy the court inter alia that the office in question is a public office and it is held by a person without legal authority. That leads to the inquiry as to whether the appointment of the said person has been in accordance with law or not?[10]

And in writs of *quo warranto*, the major question the courts are availed to answer, is whether appointments have been in accordance with the law or not, and whether the appointing authority has acted beyond the powers granted to it via statute? If there has been no violation of statutory provision whatsoever, it follows that there is no ground for judicial review. By invoking the jurisdiction of the Court, one would have to be proved that the act of appointment was done without lawful authority or in an unlawful manner.

This interplay safeguards our three branches from each other as well – the judiciary must heed the authority of the executive in deciding procedurally spotless appointments; meanwhile the executive is bound by the language and intent of the legislature, and to not incorporate any other criteria for appointment that has not been provided for by our lawmakers. The purpose of the legislature while passing the Act is manifold and must be delved into each time: Acts that ostensibly allow the administration a free hand in choosing their appointees are so drawn up with reason – if the legislature thought it necessary to govern such matters, it would have provided specific provisions to that effect. In any case, all necessary elements have to be found within the four corners of the Act.

But it is also testament to the tunnel vision of before that we find ourselves to certain dogmas. The fact that ours is a hard-fought democracy should be celebrated with as much vibrancy as democracy itself. To continue restricting ourselves to just technocrats as political appointees is no longer current with the times we live in, or with the sheer colour of a democracy as diverse as ours.

Pakistan has a rich political spectrum, and with each government that is voted in, there is a nationwide acknowledgment of that government's mandate. But mandates no longer end with the men and women in parliament; they extend to the ideas and beliefs contained in each party's manifesto. A manifesto that stems from politics, but also encapsulates economics, welfare, and social philosophies. And it is only right that those ideas find form in the nature of our political appointees.

One need not be a civil servant to be Governor of the State Bank, anymore than one need be a civil servant to drive macroeconomic policy. Similarly, while Pakistan has an excellent civil service, it need hardly be the baseline requirement to be Chairman Ogra or head of Pakistan Steel, in a country of millions of talented strivers with fresh ideas of their own. That *quo warranto* acts as a stumbling block to a more inclusive political setup is unfortunate, and we should try our best to avoid it.

But to return to the actual crossroads between the law and the executive, in *Muhammad Ashfaq Ahmed v. Ali Arshad Hakeem*,[11] the appointment of the Chairman of the FBR was challenged on the ground that it had been made without advertisement, and contrary to competition. Yet the appointment of the FBR Chairman is made pursuant to the provision contained in section 3 (3) of the Federal Board of Revenue Act, 2007, which prescribes that the Federal Government is empowered to appoint the Chairman of FBR on such terms and conditions as it may determine.

[10] *University of Mysore vsGovindaRao*, 1965 AIR 491

[11] *Muhammad Ashfaq Ahmed v. Ali Arshad Hakeem*, 2013 PLC (C.S) 1463 [Islamabad High Court]

The appointment was instead held by the Court to be a result of '*colorable exercise of authority':* that not only was it not transparent, it cut against the grain of open and healthy competition. The appointment was thus set aside by the Court, citing *Tariq Azizuddin, Anita Turab,* the Ogra case, and the Hajj corruption case among others.[12]

The crucial aspect that went overlooked was that there was actually no violation of the relevant statutory provision i.e. section 3 of the Act itself and that in such circumstances, no ground for judicial review existed in the first place. The hard fact was that the appointing authority i.e. the Federal Government, could not be said to have acted *'in an unlawful manner'* with regard to the appointment.

That said, the judgments relied upon spelled out a worthy principle: that appointing authorities '*cannot be allowed to exercise discretion at their whims, sweet will or in an arbitrary manner; rather they are bound to act fairly, evenly and justly*[13].

But with the exception of the Ogra case, all judgments relied upon related to matters of appointments, postings, transfers and promotions of civil servants, and the underlying principles that governed such appointments. The flaw that lay within making this comparison was the failure to appreciate the fine distinction existing between appointments of civil servants, and the appointments by the Federal Government to the posts of such autonomous bodies, i.e. the FBR, SECP and Ogra. The chairmen are not civil servants: they are employed on a contractual basis. By the same coin, the criteria applicable for the appointment of civil servants – based on merit and seniority – should not apply in the strictest sense to appointments made by the Government on a contractual basis.

Despite this, it is testament both to the learned bench, and the progress that Pakistan's legal sphere has made, that we enjoy a process by which judicial review of administrative action has found more or less firm footing, and firmer parameters with it. In the same *Muhammad Yasin* case, which dealt with the Ogra Chairman's appointment, it was held that the power to make appointments in bodies such as Oil and Gas Regulatory Authority was by and large, the province of the Executive, and the Courts would defer to the Executive's discretion in exercise of such power, if the commands of the Legislature have been complied with: by all means a mutual respect between each of the three branches.

The Hon'ble Justice even held, *'The Court will not engage in any exhaustive or full-fledged assessment of the merits of the appointee nor will it seek to substitute its own opinion for that of the Executive. The Court will, however, be duty-bound to examine the integrity of the selection process and to see if it was such as would ensure compliance'*[14]with the relevant provision.

And to *'inform their adjudication',* the courts adopted a test:

a) Whether an objective selection procedure was prescribed?

b) if such a selection procedure was made, did it have a reasonable nexus with the object of the whole exercise i.e. selection of the sort of candidate envisaged in section 3 of the Ordinance;

c) and if such a reasonable selection procedure was indeed prescribed, was it adopted and followed with rigour, objectivity, transparency and due diligence to ensure obedience to the law?

Judicial review at its most constructive and, dare I say, purest. It gives me no small measure of happiness that Pakistan is approaching not only the days of uninterrupted democracy, but also one that may claim strength from a clean separation of powers.

And it is on this point that I would like to quote a judgment from which I'm sure no small number are familiar: a heart-stirring one that, I can safely say after 31 years of practice, is a sign of the self-awareness we enjoy only today and never before, and a tribute to the progress Pakistan has made and, Insha' Allah, will continue making, in providing substantive justice to the people. Held the Hon'ble Chief Justice of Pakistan, Mr. Tassaduq Hussain Jillani:

[12] *Tariq Aziz ud Din v.Federation ofPakistan* 2010 *SCMR* 1301;
[13] *Tariq Azizuddin*
[14] Justice Jawwad S. Khawaja, *Muhammad Yasin*

> *'One of the seminal principles of the Constitution of Islamic Republic of Pakistan is the concept of trichotomy of powers between the Legislature, Executive and the Judiciary. This principle underpins the rationale that framing of a government policy is to be undertaken by the Executive, which is in a better position to decide on account of its mandate, experience, wisdom and sagacity which are acquired through diverse skills. The Legislature which represents the people enacts the law, and the law so enacted acquires legitimacy.*
>
> *The judiciary on the other hand, is entrusted with the task of interpreting the law and to play the role of an arbiter in cases of disputes between the individuals inter se and between individual and the State. We may remind ourselves that the judiciary neither has sword nor purse. The legitimacy and respect of its judgments is dependent on peoples' confidence in its strict adherence to the Constitution, its integrity, impartiality and independence. In changing times and judicialization of political issues, a certain degree of judicial activism by a fearless and impartial judiciary is also essential for maintaining its integrity and people's trust.*
>
> *In most of the modern democracies, judiciaries have been called upon to provide wider meanings to various provisions of the Constitution so as to meet the challenges of modern times and to fill the gap between the law and the requirements of substantive justice. Every institution has to play its role in enforcing the Constitution and the law. It is a multi-disciplinary exercise.*
>
> *However, implementation of rule of law is the primary function of the judiciary. This role is multi-dimensional and the most challenging facet of this role is to keep various institutions and the judiciary itself within the limits of their respective powers laid down in the Constitution and the law. The legitimacy of its judgments does not arise from the beauty of the language or the use of populist rhetoric. Rather it radiates from the dynamism reflected in interpreting the Constitution and in particular its Fundamental Rights provisions, in judicial restraint displayed in deference to the principle of trichotomy of powers, and in an impersonal and impartial application of law.'*[15]

Truer words, and I say this with experience, have never been spoken. Our times were informed by the ad-hoc, by man over institution, by a dissolved legislature, an arbitrary executive, and a shackled judiciary. The very concept of separation of powers was a mirage in the desert: attractive but unattainable.

It gives me hope for the future that we leave behind, that coming generations will find a different country, and Pakistan will no doubt be a better place for it.

[15] The Hon'ble Justice Tassaduq Hussain Jilani, *Dossani Travels among others vs M/s Travels Shop*, Civil Appeal No.s 800-L, 801-L and 802-L of 2013, SC: http://www.supremecourt.gov.pk/

Judicial Review of Administrative Actions

Mr. Naseer Ahmed Bhutta
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The topic *"Judicial Review of Administrative Actions"* by the very nature of the subject focuses on the role of the judiciary in reviewing administrative actions, in addition to any other forum, e.g. Administrative Tribunals that might be involved in reviewing administrative actions. The power of judicial review is expressly stated in the Constitution of the Islamic Republic of Pakistan, but such power has to be available wherever a state is governed by the principles of *"rule of law".* The basic theme of rule of law is emphatically set out in Article 4 of the Constitution that reads as follows:-

> "Right of individuals to be dealt with in accordance with law etc.-
>
> *(1) To enjoy the protection of law and to treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.*
>
> *(2) In particular…*
>
> *(a) No action detrimental to the life, liberty, body reputation or property of any person shall be taken except in accordance with law;*
>
> *(b) No person shall be prevented from or be hindered in doing that which is not prohibited by law; and*
>
> *(c) No person shall be compelled to do that which the law does not require him to do."*

The machinery through which the administrative can be forced through the High Courts to follow the dictates of law in any matter that might affect the interest of any person are set-out in Article 199 of the Constitution and, where fundamental rights are also involved, in Article 184(3) of the Constitution relating to the powers of the Supreme Court of Pakistan.

Articles 199 and 184(3) represent a very significant structural aspect of the Constitution that places the superior courts of Pakistan in a very powerful position in controlling administrative actions. Un-like the structure in some European countries, Pakistan does not have a system of multiple hierarchies having their own apex courts. For example in France there is a separate judicial set-up for administrative matters with the Consil D Etat as the apex court for administrative matters, Consil Constitutional as the apex court for constitutional matters, and another apex court over the ordinary (judicial) courts. In Pakistan, the judiciary has a pyramid structure with the Supreme Court at the top.

Un-like the minimal role of the state under the *"Laissez Faire"* theory of 19th century with state exercising minimal powers restricted to maintenance of law and order leaving welfare state with the government playing active role affecting the life and welfare of the people. There has also been an increase in creation of regulatory bodies to control the affairs of organizations that provide services or exercise powers having effect on the general public.

Where there is a greater intrusion based on powers derived from various laws to have effect on the life of ordinary persons, it become very important, that in addition to administrative redressal facilities available within the administrative set-up, there be independent institutional remedies available through an independent judiciary to ensure that the citizen enjoy the rights available to them under the law or that their rights were not denied. In essence these remedial functions are discharged by the superior judiciary under Article 199 and Article 184(3).

While exercising powers under Article 199, the superior judiciary essentially provides a check against wrongful exercise of power or failure to act where exercise of power is required. The courts, in essence, review that action taken and does not supplant the same or substitute its own decisions with those of the administrator. This was the principle high-lighted in the case of *Syed Abul-ala Maudoodi vs. Government of West Pakistan (PLD 1964 S.C 673)*. The grounds on which a review may be sought from the High Courts in Pakistan are similar to those which have

been very precisely delineated in section 5 of the Australian Administrative Decisions (Judicial Review Act) 1977. They are as follows:-

1. (a) That a breach of the rules of natural justice occurred in connection with the making of the decision.

   (b) That procedures that were required by law to be observed in connection with the making of the decision were not observed;

   (c) That the person who purported to make the decision did not have jurisdiction to make the decision;

   (d) That decision was not authorized by the enactment in pursuance of which it was purported to be made;

   (f) That the decision involved an error of law, whether or not the error appears on the record of the decision;

   (g) That the decision was induced or affected by fraud;

   (h) That there was no evidence or other material to justify the making of the decision;

   (i) That the decision was otherwise contrary to law.

2. The reference in paragraph (i)(e) to an improper exercise of a power shall be construed as including a reference to:

   (a) Taking an irrelevant consideration into account in the exercise of a power;

   (b) Failing to take a relevant consideration into account in the exercise of a power;

   (c) Exercise of a power for a purpose other than a purpose for which the power is conferred;

   (d) An exercise of a discretionary power in bad faith;

   (e) An exercise of a personal discretionary power at the direction or behest of another person.

   (f) An exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

   (g) An exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;

   (h) An exercise of a power in such a way that the result of the exercise of the power is uncertain; and

   (i) Any other exercise of a power in a way that constitute abuse of the power.

The comments made earlier that in exercise of judicial review the courts only pronounce a judgment on the correctness of an action taken or failure to take the same or they issue necessary directions (e.g. by issue of a writ of mandamus) only emphasize an aspect of the rule of separation of powers. The court make judicial pronouncement but do not take over the decision making power of the executive itself. However, we saw a more intrusive form of judicial review under Article 184(3) during the incumbency of the last Hon'ble Chief justice. During his tenure the court closely oversaw the decision making process and also supervised investigations and inquiries. In fact, in cases such as the Rental Power Case, the court inquired into the factual aspects of the contract awarding process and set aside, as *void ab initio* the contracts that had been awarded. In the *Haris Steel case of Bank of Punjab* and in the *National Insurance Corporation Ltd.* fraud case the court oversaw the investigation process. This has been quite a unique development in exercise of the powers of judicial review. The previously somewhat detached approach towards judicial review moved into the arena of aggressive judicial activism.

Appendix - B

Presentations/text of papers presented in Group- II
"Role of Judiciary in Protecting Human Rights"

Role of Judiciary in Protecting Human Rights

Hon'ble Mr. Justice Mohan Peiris, PC
Chief Justice of the Supreme Court of Sri Lanka

I feel honored that I have this opportunity of speaking to you on one of the most topical of themes that engages all our attention day in day out- the Role of the Judiciary in the Protection of Fundamental Rights and how its frontiers must be promoted and expanded. How its canvas must expand further.

I would call it axiomatic that, we judges apply the constitutional standards which are peculiar to our own jurisdictions, where the problems and solutions may differ from that elsewhere. But in asking and answering the right question, it helps us, the judiciary, to consider how foreign courts have addressed similar issues.

What we indulge in today is a foray into comparative experience. I recall what Lord Goff of Cheievely spoke of the importance of crossing beyond passport control in search of comparative jurisprudence-I quote

> *"I welcome unreservedly the study of comparative Law. In my own work, I have done and continue to do my limited best to promote it in every possible way…….. We encourage the study of other systems of law in our universities and independent Institutes; we promote exchanges of professors and students between universities in different European countries; we hold meetings between senior judges …….. We even attempt to take advantage of principles from other systems of law in our judgments, though I have learned from experience that nobody should underestimate the difficulties facing such an enterprise."*

The difficulties that Lord Goff refers to in accessing foreign jurisprudence is today redressed by cyberspace but one cannot just discount the dividends one can reap from colloquia of this nature.

Mr. Chairman,

The foreign moods, fads or fashions that Justice Scalia was averse to in his memorable dissent come to my mind. As opposed to Lord Goff's open-minded approach to jurisprudence emerging from overseas jurisdictions, we should acknowledge at the outset the existence of a body of opinion which regards such law as at best irrelevant and at worst dangerous. Such was the view vividly expressed by Justice Scalia in the United States Supreme Court in a human rights context when he dismissed the majority's discussion of foreign authorities as meaningless dicta and ruled that the Court should not impose foreign moods, fads or fashions on Americans-You will see this comment in *Lawrence et al v Texas 539 US 558 (2005).*

Much water has flowed down under the bridges on this xenophobic skepticism and today those of us who see, and would wish to see, our individual legal systems as *"an island, entire of it"* face two problems. The first is that, much as we may care to think of our law as a pure-bred, home-grown product of our national genius, the truth is otherwise. It is a mongrel, gaining in vigour and intelligence what it has lost in purity of pedigree. As trading nations, we have not over the years been immune to foreign influences, but have responded to them when it appeared that a little borrowing would improve our law. That great judge of England Tom Bingham dwells so beautifully on the fruits of borrowing from each other in his beautiful book, *The Business of Judging.*

It is in the context and background that I would be focusing on this topic by making allusions to Sri Lankan judicial role in the protection and promotion of fundamental rights. Before, I do that; let me make some preliminary remarks to contextualize my presentation.

Since independence in 1948 Sri Lanka has had three Constitutions. The 1948 Constitution upon independence was an instrument that the British gave us after having enacted it in Westminster. This Constitution had no Bill of Rights as you probably know that the British thinking at that time, which was quite influenced by Dicey, was that the common law would look after fundamental rights better than a separate chapter on Bill of Rights. We became a republic in 1972 and the representatives of the people gathered as a constituent assembly in 1972 to draft a first Republican Constitution. This was a legal revolution in that its enactment had no reference to the 1948 Constitution. I call it a legal revolution because, even though the independence Constitution had specified a procedure for its repeal, the representatives of the people chose not to follow the procedure in enacting the first

Republican Constitution in 1972. This Constitution had a separate Bill of Rights but the fundamental rights were non justiciable. It is only a Bill of Rights on paper.

It is only in 1978 that we included a chapter of justiciable Bill of Rights when we enacted the second Republican Constitution. It is this Constitution that obtains today in the country and the Supreme Court which I preside over is vested with the sole and exclusive jurisdiction to investigate infringement of fundamental rights and grant what the Constitution calls "just and equitable" remedies. Since 1978 the Sri Lankan judiciary has interpreted the Bill of Rights in a generous and purposive manner and in so construing chapter III of the Constitution in a liberal manner, the Supreme Court has striven hard to be a bulwark against injustices in the exercise of vast discretionary power vested by law in the state and its agencies.

There is a core article in the Constitution (Article 3) which declares that sovereignty is in the people and is inalienable. By this declaration we moved away from parliamentary sovereignty and vested it in the people. Parliament just became one of the organs through which popular sovereignty is exercised. Article 4 of the Constitution makes other important declarations-sovereignty includes fundamental rights.

Moreover, the same Article states that the fundamental rights declared and recognized by the Constitution shall be respected, secured and advanced by all the organs of government. In other words the judiciary which is an important organ of government has to respect, secure and advance the fundamental rights. Thus, there is a constitutional role placed on the Supreme Court to be the conscience keeper of fundamental rights. How has that role been executed over the years?

Before I deal with some salient aspects of the role, let me catalogue but a few of the fundamental rights that are set out in Chapter III of the Constitution.

Freedom of thought, conscience and religion.

Freedom from torture or cruel, inhuman or degrading treatment.

Right to equality before the law and equal protection of the law.

Right to nondiscrimination on grounds of race, religion, language, caste, sex, political opinion or place of birth.

Right not to be arrested except according to procedure established by law, and to be informed of the reason for the arrest.

Right not to be kept in custody without a judicial order for longer than the period prescribed by law.

Right not to be punished with death or imprisonment except by order of a competent court.

Right to be presumed innocent until proven guilty.

Freedom of speech and expression including publication.

Freedom of Association.

Freedom to form and join a trade union.

Freedom to manifest one's religion by observance, practice and teaching.

Freedom of movement and of choosing one's residence within Sri Lanka.

UDHR

Of course the provenance of these rights, you would recognize, is the Universal Declaration of Human Rights (UDHR) as the Bill of Rights in modern Constitutions owe their parentage to this great instrument of 1948 and Sri Lanka was no exception in borrowing such edifying rights as dignity of mankind and equality from that instrument.

Let me at this stage digress and refer to a pre-UDHR declaration of pristine glory which recognized equality as a human right long before we enthroned it in our Constitution.

I recall the last sermon Prophet Mohammed (Peace Be Upon Him) delivered at Mount Arafa. Pilgrims flock to Mount Arafa just to visualize that great sermon. It's beautiful rendition highlights to us the notion of universalism and equality. Let me quote the Farewell Sermon.

> *"Ye people! Listen unto my words, for I know not whether another year will be vouchsafed to me after this year to find myself amongst you in this place.*
>
> *The aristocracy of yore is trampled under my feet. The Arab has no superiority over the non-Arab and the non-Arab has no superiority over the Arab. The fair skinned is not superior to the dark skinned nor the dark skinned to the fair skinned. All are children of Adam and Adam was made of earth".*

You would see that equality and fraternity ran as the underlying themes in these indelible words of Prophet Muhammad (Peace Be Upon Him). Long before equality and universalism were enshrined in the modern Constitutions of the world, the Prophet (Peace be upon Him) encapsulated it in his last sermon.

Be that at it may; Let me pick out some areas where you would observe the judicial activism of the Sri Lankan Supreme Court in the enforcement of the Bill of Rights.

Right to Life

A highly controversial issue is whether a Court can in construing a Bill of Rights deduce fundamental rights which are not expressly set out in the Constitution. In the United States rights of privacy and parenthood have been reduced on the basis that the specific guarantees in the Bill of Rights have *"penumbras formed by emanations from those guarantees that help give them life and substance."*

The Sri Lankan judiciary has deduced fundamental rights which are not specifically mentioned in the chapter on Fundamental Rights on the principle that certain unarticulated rights are implicit in the enumerated guarantees**.** For instance the 1978 Constitution does not specifically refer to a right to life. But in 2003 in a case called *Sriyani Silva v Iddamalgoda and others (2005) 2 Sri.LR 63,* the widow and child of a man who had been assaulted to death in police custody were given monetary compensation by the Supreme Court. The Supreme Court expressed the view that the right to life was implicitly guaranteed under certain provisions of the fundamental rights chapter, most notably Article 13 (4) which states that no person shall be punished with death or imprisonment except by order of a competent court.

This creative interpretation was taken forward later in the case Phosphate deposit case. The Court invoked the doctrine of public trust to make orders in favour of petitioners who were facing the threat of large scale pollution.

Public Trust Doctrine-Another Flank of Expansion

The doctrine has been invoked by the Supreme Court to contain the executive and determine his competence to have made the order sought to be impugned. It is a doctrine that limits the exercise of discretionary power. Today environmental Law has evolved several concepts and one such concept is human rights and environmental justice. Long before this concept evolved in environmental law, I must say that the Supreme Court was alive to the nexus between human rights and environmental justice. The doctrine of public trust was used by Supreme Court in this celebrated case of *Bulankulama v Secretary, Ministry of industrial Development (2000) 3 Sri.LR 243* which is known as the *Eppawela case*.

Facts of Eppawela

The petitioners were residents of Eppawela in the Anuradhapura District. They owned lands and carried out cultivation in the area. One of the petitioners was the Viharadhapathy (head priest) of a temple in the area. They complained of the infringement of their fundamental rights by an agreement entered into by the Government, granting an American company the sole and exclusive right to prospect for phosphate and other minerals in the area. Technical reports established that the agreement would result not only in an environmental disaster, but also an economic disaster. Justice Amerasinghe in his judgment adopted the notion of trusteeship of natural resources. He referred to the state as having the role of a trustee and holding resources in trust for the citizens. He held that equal protection of the law under Article 12 (1) of the Constitution was inseparable from the duty of every person

in Sri Lanka to protect nature and conserve its riches. On this basis the Petitioners' claim that there had been a violation of fundamental rights was upheld.
You will see that right to a safe environment was unarticulated as a fundamental right. But the Court invoked the articulated *"equal protection of the law"* clause to read into the Chapter on Fundamental Rights a right not to be threatened by a large scale pollution.

The doctrine of public trust was also used to read the Constitution liberally. Executives whilst entering into agreements to exploit natural resources hold those resources in trust for the people.

Public Trust Doctrine in the trilogy of cases

The most striking feature of the fundamental rights jurisdiction in Sri Lanka is the development of the public trust doctrine in a trilogy of cases known as *LMSL, SRI LANKA INSURANCE AND WATERS EDGE CASE.*

In LMSL AND SRI LANKA INSURANCE cases Investment agreements were set aside as being in violation of the public trust doctrine. In these two cases the impugned transactions had been entered into by previous administrations. The most noticeable aspect of the two cases is that the Court expanded *locus standi* and the Petitioner (Vasudeva Nanayakkara a Member of Parliament at that time) was held to have *locus standi* and filed the petition in the public interest. The objection on the basis of time bar of one month was rejected.

Thus, you will see how the canvas has expanded. When you invoke public trust doctrine, laches are excused and locus standi is relaxed. Courts go on the basis that if a violation infringes the doctrine of public trust, it is a continuing violation and there is time left for you to toll the bells for justice at any time.

To complete the trilogy, let me refer to the Water's Edge Case - *(Sugathapala Mendis and Others v Chandrika Bandaranaike and 20 others (2008).* You will care to note that the 1st Respondent in the case was the former President of the country.

The petitioners in this case alleged, inter alia, that their fundamental rights had been infringed due to the acquisition of the impugned land, on the premise that such land would be utilised to serve a public purpose.

Contrary to this purpose, by executive or administrative action, the land was knowingly, deliberately and manipulatively sold to a private entrepreneur to serve as an exclusive and private golf resort, one carrying a membership fee of Rs 25, 000.

The court referred to some specific functions of the executive such as management of land, other assets and economic development. Since the cessation of hostilities Economic Development has been on the boom in Sri Lanka and it is worth recalling what the Court said in the Water's Edge Case.

> *"It is to be noted for our purposes that all facets of the country-its land, economic opportunities or other assets-are to be handled and administered under the stringent limitations of the trusteeship posed by the public trust doctrine, and must be used in a manner for economic growth and always for the benefit of the entirety of the citizenry of the country, and, we repeat, not for the benefit of granting gracious favours to a privileged few, their family and/or friends…"*

So you can see that the public trust doctrine operated not only in the interests of good governance but also for *"sustainable economic development of a nation and all of the people, especially the economically challenged, the disadvantaged and the marginalized".*

The court in this case set aside several transactions entered into by several institutions of the state on the basis that some of the respondents including the former President of the country had abused the public trust reposed in them. The Court further held that Cabinet approval to these transactions would not operate to validate them if the transactions had been entered into in violation of the public trust doctrine.

To fully understand the operation of this doctrine, it is best to refer to Heather Mundy which linked infrastructure developments such a High Way which intruded on ownership of property.

Facts of Heather Mundy

Our nation in a virtual transformation of our travel infrastructure witnessed a revolution through the Southern Expressway. But it was not without its teething problems. Petitioners whose lands were being acquired for the purpose filed applications for judicial review challenging the proposed route of the Southern Expressway. The appeal was finally heard in the Supreme Court which articulated the public trust doctrine vis-a-vis economic development. I would like to quote the pertinent words of Late Justice Mark Fernando-

> *"While development activity is necessary and inevitable for the sustainable development of a nation, unfortunately, it impacts and affects the rights of private individuals, but such is the inevitable sad sacrifice that has to be made for the progress of a nation… The obligation to the society as a whole must predominate over the obligation to a group of individuals, who are so unfortunately, affected by the construction of the Expressway."*

You can see that the Supreme Court has had its say-the obligation to the society prevails over the obligation to a group of individuals.

Sustainable development may prevail over property rights of individuals.

Individuals who would lose their lands for sustainable development would be generously compensated for it because the fundamental rights jurisdiction of Sri Lanka has developed the concept of monetary compensation under its wide just and equitable jurisdiction.

I must tell you another story to this case. The trajectory of this case from the Court of Appeal to the Supreme Court took such a long time that Sri Lanka was not able to hand over the construction site to the Japanese contractor who had brought all his equipments to Sri Lanka in all earnest to begin work. He had to wait till Heather Mundy was decided finally by the Apex Court. After having completed and handed over the Southern Expressway to us, the Japanese contractor sued us at a costly arbitration that went on for months. Sri Lanka ended up having to pay billions of money for the delay in handing over the site to the contractor-thanks to the long journey of Heather Mundy.

Should we be burdened with cases of this nature and commit Sri Lanka to such a costly affair of an ICC arbitration which ends up in billions of tax payers money being defrayed to pay contractors?

If the obligation to the society prevails over the obligation to group of individuals, should not we apply this gladsome jurisprudence to some unmeritorious causes that are being filed in the name of fundamental rights applications? These are the thoughts that prevail today in Sri Lanka because at times every intrusion becomes a violation of fundamental rights in our nation and we today bear in mind the jurisprudence in Heather Mundy and the costly arbitration that followed mandates us to nip in the bud unmeritorious causes that virtually amount to abuse of process.

I have dealt with the trilogy of cases and Heather Mundy. All these cases and their pregnant dicta show us the way forward. The Supreme Court has been pro-active in its fundamental rights jurisdiction and the trend must continue.

Let me also not forget the epistolary jurisdiction cases whereby an application for fundamental rights can be triggered with a letter written to me or to the Supreme Court of Sri Lanka by an impecunious petitioner who is later given legal aid to pursue his grievance.

Public Interest Litigation

We've also introduced public interest litigation into the FR jurisdiction on the basis that under the Constitution sovereignty vests in the people, and therefore, the people have a legitimate interest in the manner in which the country's assets are dealt with by public authorities. I have already referred to the LMS case which was filed by a member of Parliament as representing the people and this is the kind of local standby expansion that the Sri Lankan Court has fashioned for the effective redress of fundamental rights violations.

I can go on with a series of cases where the judges have been alive and robust enough to expanding the frontiers and certain strands of constitutional trends pervade these developments.

All this has been possible in Sri Lanka because the role of the judiciary has to be understood as the sentinel of our rights under the Constitution.

We have to bear in mind that neither the Constitution nor the Bill of Rights is a self-executing instrument. It is what the judges say it is. The protection of our rights depends upon the interpretation of the Constitution and in particular, of the Bill of Rights.

A most generous Bill of Rights can be reduced to a parchment of promises by narrow and insensitive judicial interpretation.

It is well to remember that the Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs.

Therefore, a purposive rather than a strictly liberal approach to the interpretation should be adopted. This principle of interpretation is particularly apposite to the interpretation of a Bill of Rights. It is a fallacy to regard a Bill of Rights as a gift from the state to its citizens.

The Bill of Rights does not confer fundamental human rights. It confirms their existence and accords them protection.

If only we'd had in mind these gladsome principles, we, as the conscience keepers of the Constitution, would help the promotion and protection of human rights so that we would not only redress the grievances of citizens but have a salutary effect on Administration which knows that it has to conform to the discipline of fundamental rights.

Above all, a Bill of Rights is a constant reminder that the powers of the state are not untrammeled and that human personality is priceless

Thank You

Role of Judiciary in protecting Human Rights

Mr. Justice (R) Fasih ul Mulk
Former Chief Justice of Peshawar High Court

I would like to talk about two points but given the time constraint I would be brief. The two points I want to talk about are the following:

1. The role of judiciary in the protection of human rights; and
2. How the judiciary in Pakistan protects human rights?

Let me start with the role of judiciary in the protection of human rights. A state is required to make sure that people enjoy their human rights. This means that all institutions of the state have a duty to promote and protect the human rights of everyone. Non-state organizations and individuals performing functions of a public nature are also bound to protect the human rights of the public. The judiciary as one of the main pillars of the state is responsible for the protection of human rights in two ways, first, human rights be taken into consideration in the way the judiciary govern itself, e.g. appointment and promotion of judicial officers, disciplinary proceedings involving judicial and administrative staff etc. Second, it is the constitutional duty of the judiciary to protect the rights of individuals as provided by law. This brings me to my second point: how the judiciary in Pakistan protects the rights of people.

Pakistan has a mature and established judiciary system. I make this claim for many reasons but I will mention two only. First, the judiciary is well-structured and physically present and up and running in every part of the country. Second, the judiciary has a robust legal framework to rely on the legal framework consists of the Constitution, Islamic law and other laws. Within the scheme of the Constitution, fundamental rights are given supremacy. That is, any law or custom conflicting with fundamental rights is deemed void. In addition, Pakistan has acceded to seven core human rights conventions of the United Nations. However, having a well-structured judiciary or robust legal framework does not mean that people are actually enjoying their human rights. We need evidence of consistent and robust application of law to actual cases in order to be able to assess whether in reality people enjoy their rights. Consistent and robust application of law demands an independent and impartial judiciary.

The judiciary in Pakistan has decided many cases involving human rights but within the time allowed to me it is not possible to discuss all of them. Therefore, I refer to a limited number of cases touching on the following human rights;

- Human equality
- Gender equality
- The right to a fair trial
- The right to privacy and dignity of home
- Women's right to marry with their free consent only
- Rights to liberty
- The binding nature of the 1948 Universal Declaration of Human Rights of the United Nations

1. The case of Nusrat Mirza reported as *PLD 1992 Federal Shariat Court 412* touches on human equality. The Federal Shariat Court held that:

> *"All Humanity belongs to one human family, without any inherent superiority of one over the other and all racial, national or tribal prejudices stood condemned by Islam".*

2. The case of Muhammad Yusuf reported as *PLD 2007 Karachi 405* is related to the privacy and dignity of home. In this case the police raided a house on apparently false allegation of sale and buying women for prostitution. The High Court found the allegation baseless and held that:

> *"Article 14 of the Constitution of Islamic Republic of Pakistan provides inviolable right to dignity of the man. Indeed injunctions of Islam and law of the land are intended to protect and preserve fundamental right of dignity of man and privacy of home. Violation of privacy of home*

> *through arbitrary intrusion by the police, without authority of law is absolutely unwarranted being repugnant to the concept of human rights relatable to the dignity of man and privacy of home".*

3. The case of Roshan Deen reported as *PLD 2008 Supreme Court 132* is related to the right to liberty and compensation of unlawful detention. In this case Niaz Muhammad was detained under the Security of Pakistan-Act, 1952 for a period of three months but was not released even after the expiry of said period or its extension under directions from the Federal Review Board. The High Court asked the concerned authorities to pay Rs. 5000 per day for the illegal detention. Upholding the decision of the High Court, the Supreme Court said;

> "Indeed the Constitution of Islamic Republic of Pakistan categorically and candidly guarantees that a citizen cannot be deprived of his liberty except in accordance with law".

4. Suo motu case No. 4 of 2010 reported as *PLD 2012 Supreme Court 553* is related to the right to a fair trial. In this case, the Supreme Court of Pakistan held that:

> The principle of the right to 'fair trial' has been acknowledged and recognized by our Courts since long and is by now well entrenched in our jurisprudence…{but} the inclusion of the principle of rights to a 'fair trial' is now a constitutionally guaranteed fundamental right and has been raised to a higher pedestal; consequently a law, or custom or usage having the force of law, which is inconsistent with the right to a 'fair trial' would be void.

5. Suo motu Case No. 1 of 2006 reported as ***PLD 2008 Federal Shariat Court 1*** is related to gender equality. In this case the Federal Shariat Court took a suo motu notice of the discriminatory nature of the Citizenship Act 1951 as published in one of Pakistani newspaper. It was held that ;

> *Section 10 of the Citizenship Act is discriminatory, negates gender equality and is in violation of Articles 2-A and 25 of the Constitution if Islamic Republic of Pakistan and also against International commitments of Pakistan and most importantly is repugnant to Holy Qur'an and Sunnah.*

6. The case of Abdul Waheed reported *as PLD 2004 Supreme Court 219* is related to women's to marry without taking permission from their parents or guardian. The Supreme Court held that;

> *Consent of wali is not required and a sui juris Muslim female can enter into valid marriage of her own free will. Marriage is not invalid on account of the alleged absences of consent of Wali.*

In all the above cases the superior courts relied on fundamental rights guaranteed by the Constitution of Pakistan, Islamic law and international human rights law. Chapter II of the Constitution of Pakistan contains a list of fundamental rights resembling the list of human rights recognized by the 1948 Universal Declaration of Human Rights of the United Nations. Interesting, the Supreme Court of Pakistan, in the case of Pakistan Muslim League reposted as *PLD 2007 Supreme Court 64,* said that the Universal Declaration of Human Rights is customary law and binding on Pakistani courts. The Supreme Court held;

> *Although the Human Rights Declaration is not a legally binding treaty, its provisions are considered customary international law and binding, as such, on all member states of the United Nations and therefore on Pakistan.*

The case I mentioned provides some evidence and a glimpse of as to how the judiciary is able to protect the human rights of people by relying on municipal law and international human rights law.

As I said the Pakistani judiciary plays an important role in the protection of human rights but at the same time I do not want to paint a rosy picture of the judiciary. There is some evidence suggesting that the judiciary has not always been able to protect human rights. There is a room, in my view, for sensitizing the judiciary especially the district judiciary to human rights standards. When I was a Chief Justice of the Peshawar High Court, in February

2014, the Judicial Academy in Khyber Pakhtunkhawa started a comprehensive human rights training called 'Human Rights in the Administration of justice, for the district judiciary of Khyber Pakhtunkhawa. I do hope that training like this will help in sensitizing judges to human rights standards.

Let me conclude by stating that an independent and impartial judiciary plays a pivotal role in the protection of human rights. The judiciary in Pakistan has become an independent institution and plays a key role in the protection of human rights.

Thank you very much

Role of Justice to Protect Human Rights

Ms. Birgül Yiğit
Rapporteur Judge
Court of Jurisdictional Disputes, Turkey

Before beginning my presentation; representing my delegation, I want to thank Law and Justice Commission of Pakistan, because of very kind invitation and hospitality, from our travel until now. As Pakistan Supreme Court Judge Asif Khosa said, last year while attending our Conference which was about National and International Dimensions of Court of Jurisdictional Disputes and Duty Disputes, we are very pleased to be a brother country too. Representing my delegation, I want to point out that, we hope sincere relationship of these two brother countries will continue in social, judicial and political areas as our past dark days. Thank you again for giving us an opportunity to share these hopes here with you.

In this presentation, after describing international meaning and varieties of human rights, I will try to explain regulations and applications of human rights in Turkey.

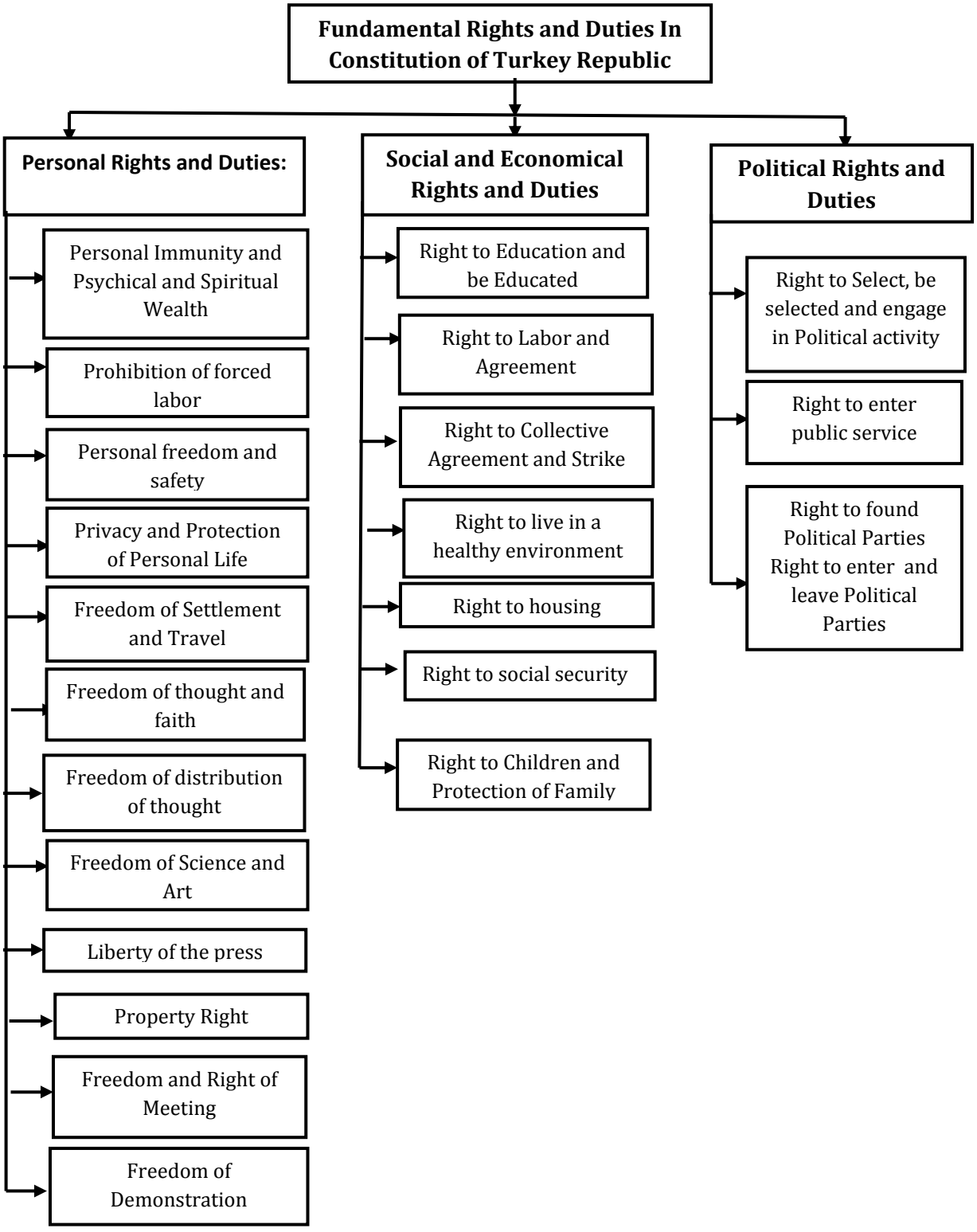
As you know, Human Right refers to some kind of rights which are acquired by birth. These rights include all people, regardless of any religion, nation, language, sex or something else. It was not easy to carry human rights from philosophical dimension to judicial dimension and protect them with legislative regulations. Unfortunately, after many wars of history of humanity and many losses of humans; nations agreed to rally on universal common points and United Nations raised from the ruins of these dark days. Hereafter, United Nations published United Nations Universal Declaration of Human Rights. According to this Declaration; everyone can benefit from rights which are in this Declaration; regardless of any religion, region, nation, language, race or other discrimination. In addition citizens of every country, whether independent or not can benefit from this rights too.

Some kinds of these rights, which are tightly linked to people , are right to life, right to health, right to education, right to property,, right to travel, right to communication, right to defense, right to legal remedies, right to elect and be elected, right to privacy of personal life and right to equality before justice,

The protection method of human rights of each country changes according to its judicial systems. In Continental European Legal System, countries especially use legislative regulations to protect human rights. In Anglo-Saxon Legal System, countries prefer to created common jurisprudences which are based on problems and cases rather than legislative regulations.

In Turkey, which is a member of Continental European Legal System, legislative regulations method has already been preferred to protect human rights. This protection is provided by international agreements as well as with national regulations.

The main legislative regulation in our Law System is our Constitution numbered 2709. Human Rights are created under the title of *"Fundamental Rights and Duties"* in second part of Constitution. With this Constitution, Fundamental Rights and Duties are arranged in three groups. There are; Personal Rights and Duties; Social and Economical Rights and Duties, and lastly Political Rights and Duties.

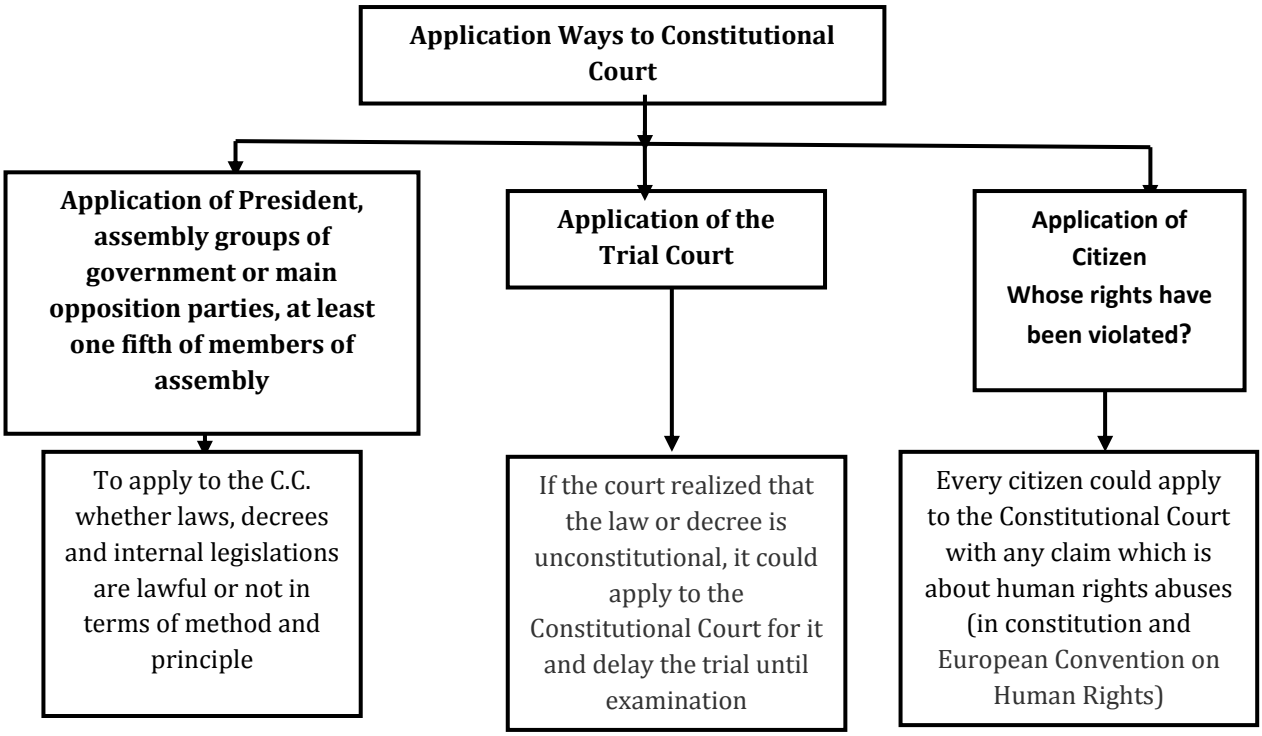


Article 11 in our Constitution says; Constitutional articles are fundamental orders that bind legislative assembly, government, judicial bodies and every administrative status. Laws cannot be unconstitutional.

Legislative Regulations are very important way to protect human rights but not enough to prevent human right violations at all. Therefore, in our country, Constitutional Court was established under article 46 of our

Constitution, to ensure and examine whether administrative procedures and activities are lawful or not. Before referendum on Constitution in 2010, Constitutional Court's duties are; to examine whether laws, decrees and internal legislations are lawful or not; to do financial audits of political parties, to hear closure cases of political parties, to hear Prime Minister and minister because of misconduct. After referendum in 2010, Constitutional Court has undertaken the duty of individual applications which are about violations of fundamental rights.

In Turkey's Law System, we have got three ways of application to the Constitutional Court.

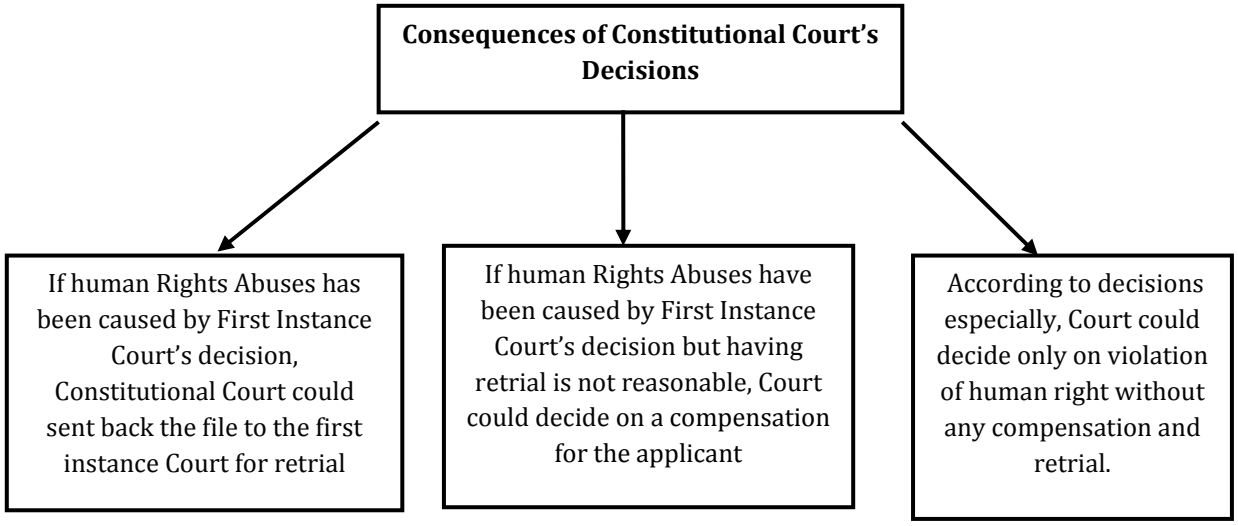


With these ways; administrative procedures and laws could be examined whether they are constitutional or not and human rights violations could be detected and also could be avoidable by trials and legislative regulations. As we see in this scheme, application authority has been given to the natural person, legal person or any first instance or second instance court for the protection of human rights and prevention of human rights violations. Especially, since individual application way was adopted on 23.09.2012, more than 14000 applications which are mostly about human rights violations have been received. These figures show the importance of Constitutional Court in human rights protection.

I think we can explain this important issue by giving an example which is about unreasonable period of detention. The citizen, who has been imprisoned for a long time, applied to the first instance court for release. The first instance court rejected the application. Afterwards he applied to the Constitutional Court and claimed that due to unreasonable period of detention, his right to personal freedom and safety was violated. As a result of evaluation, Constitutional Court decided that applicant's right to personal freedom and safety had been violated , with decision on 21.11.2013 and application number 2012/1303. The Court declared that, first instance court's decision didn't have enough justification to reject the application of release, thus the decision was unconstitutional and compensation should be paid to the applicant

In law numbered 6216 and article 50 the consequences of Constitutional Court's decisions regulated have been. According to this article; Constitutional Court decides whether human rights are violated or not after principle examination, if any human right violation is detected, Court may rule on requirements, which must be fulfilled.

With this article, audit mandate and determination authority were given to the Constitutional Court for preventing human rights violations.



Explaining the topic by giving examples will be more appropriate in order to improve comprehension.

The citizen, who has been imprisoned for a long time, applied to the first instance court for release. The first instance court rejected the application. Afterwards he applied to the Constitutional Court and claimed that due to unreasonable period of detention, his Personal freedom and safety right was violated. As a result of Constitutional Court's evaluation, it was decided that applicant's right to personal freedom and safety was violated with decision on 06.03.2014 and application number 2014/912 . The Court declared that, first instance court's decision's justification has not been disclosed for a long time, so that decision could not be appealed and Court of Appeal couldn't evaluate whether he was imprisoned lawfully or not, thus Constitutional Court decided that applicant's personal freedom and safety was violated, and the file must be sent back to the court for retrial.

In another case, the citizen applied to the Constitutional Court and claimed that due to very long trial period, his freedom to seek remedy was violated. As a result of evaluation Constitutional Court decided that applicant's freedom to seek remedy was violated with decision on 09.01.2014 and application number 20143/695. The Court declared that, 1 year and 2 months elapsed from detention date to first instance court's first decision. After that decision, decision was appealed four times and was reversed three times. Totally all these procedures have taken 10 years and 1 month. The workload on the judicial system and lack of organization capability had a very big role of this very long trial period. Constitutional Court evaluated Constitution's article 36 and *European Convention on Human Rights* article 6 together and decided that, due to very long trial period, applicant's right to due process was violated and 9200.00 Turkish Liras compensation should be paid to the applicant.

Once again, an applicant applied to the Constitutional Court and claimed that his right to seek remedy and right to privacy of personal life were violated with evidence which was used during the trial, although it couldn't be used because of privacy. Constitutional Court evaluated the application and decided that the evidence which was disclosed during the trial did not have any legal validity and could not be used against the applicant. So disclosing this report (evidence) during the trial against the applicant which couldn't be justified before the court because of his duty , was a violation of right to privacy of personal life, which was written in article 20 At the end Constitutional Court declared that, decision provided legal satisfaction in itself , therefore, there was no need to pay any compensation.

As you see, in our country Constitutional Court has undertaken the duty of detection of human rights violations and decides what must be done if any decision or administrative procedure violates human rights .But this should not be misunderstood that only Constitutional Court undertakes these duties. First instance and second instance

courts also have the same duties during hearing, but Constitutional Court has a very important status that detects all of these courts decisions according to national and international human rights regulations. This importance has increased after recognition of individual application system.

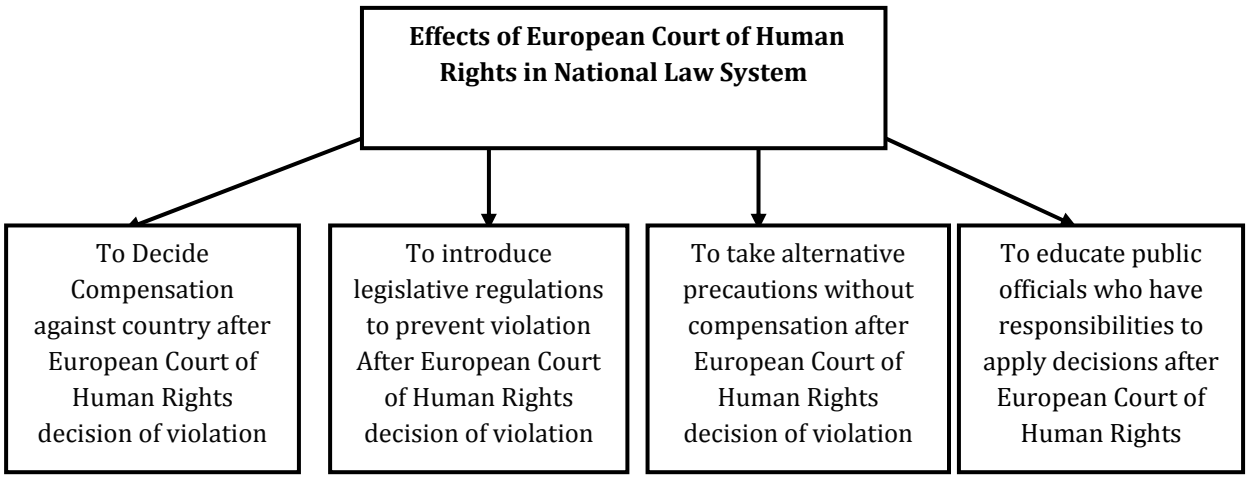
In international area, our country signed European Convention of Human Rights on 18.05.1954 and has taken a big step to protect human rights. Turkey accepted right to individual application to Court of Human Rights in 1987. Thus, protection of human rights was provided in international and national areas. And Turkey accepted European Court of Human Rights mandatory jurisdiction in 1990.

Under article 90 of Constitution, the agreements which are duly approved have the force of law and are part of the national law system. In fact, international agreements could not be sent to Constitutional Court because of unconstitutionality. Therefore, we can say that international agreements which are duly approved are more effective and powerful rather than national laws in national law system.

If we give an example to clarify the explanation, in a case which was about confiscation without expropriating , applicants applied to the Constitutional Court claiming that their right to property and right to due process have been violated due to court's long trial period. Constitutional Court evaluated the claims and declared that, principles emerging from European Convention of Human Rights (EUCHR) and European Court of Human Rights (ECHR) decisions were part of article 36 of Constitution which regulated right to due process, therefore, article 36 of Constitution must be evaluated with EUCHR regulations and ECHR decisions. Thus Constitutional Court points out that, EUCHR and ECHR decisions must be applied in national law directly.

Another example about this topic is a case which was about a married woman who wanted to use her maiden name although she was married. First instance court rejected her application and Court of Appeal approved the decision. Afterward, the applicant applied to the Constitutional Court and claimed that applicant's constitutional rights had been violated with this decision. Constitutional Court declared that decision was unconstitutional and violated the right to respect personal and family life and prohibition of sexual apartheid. Additionally, Constitutional Court indicated that, according to article 23 of International Covenant on Civil and Political Rights; signatory countries must undertake all responsibilities to provide equal rights to couples, in every step of marriage and continued that, according to article 16 of Convention on the Elimination of All Forms of Discrimination Against Women, signatories must undertake all responsibilities to provide equal rights to women based on family name, free choice of employment and similar issues. At last Constitutional Court decided, with first instance court's decision these conventions had been violated and sent back the file back to the first instance court for retrial.

European Court of Human Rights affects our national law system in three ways.



If we explain the issue by giving examples; an applicant who is from Iceland, applied to the European Court of Human Rights and claimed that, his ex-husband who had kidnapped their common children from Iceland to

Turkey, couldn't have any opportunity to see her children freely because of unlawful decisions of Turkish court. Thus she claimed, her right to privacy of personal life and protection of family life were violated. European Court of Human Rights accepted her application and decided that, applicant's right to privacy of personal life and protection of Family life were violated by decisions of Turkish Court and continued that, for this reason Turkey should pay compensation to the applicant.

Another example to clarify the issue is about a citizen of Denmark. In this case, Denmark applied European Court of Human Rights against Turkey and claimed that, a citizen of Denmark's right to prohibition of persecution was violated, due to unlawful behaviors of Turkish Police Forces. During the evaluation, these two countries reached a consensus on common points and resolved the disputes by signing an agreement. According to this agreement, Turkey undertook the responsibility of legislative regulations, indemnication of applicant's damages and education of public officials.

In the time allocated to me, I tried to describe the role of justice to protect human rights in Turkey and which protection ways are chosen in Turkish Law System. While finishing my presentation, I want to share distinguished Muhammad Ali Jinnah's words which were about two countries fellowship with you. He said to Turkey's ambassador who was assigned in Pakistan, Pakistan People knew your politicians achievements in political areas, commanders victories in the battlefields, reforms which were rooted day by day and also Mustafa Kemal Atatürk's birth, struggles, heavenly leadership and all victories. And continued, Pakistan Muslims watching Turkey with very big sympathy and interest until political awareness had been raised among Muslims in southern part of continental. Therefore, I assure you that Pakistan Muslims had felt very big admiration towards your nation and hope that fellowship between two brother countries would continue rising and getting powerful in the future. Representing Turkey's delegation, I want to say that, we are sharing these powerful expectations and believe that our political, economical and judicial fellowship will increase beyond hopes. I want to thank you again for your very kind invitation.

Fixation of time period for Litigation and its impact on Justice*

Mr. Abdul Basit Mufta Al- Ashaal
Special Prosecutor, Libya

All praises be for Allah, the Lord of Universe and Salatu Wassalam our Holy Prophet Rehmatulil Alameen and on his family and his companions and his followers till the Day of Judgment.

No doubt that majority of world organizations and particularly judiciary work for protection of human rights and its freedom. One of the most important human rights is right to justice at individual as well as at collective level. The preservance of this right is the duty of judiciary. The Courts perform this duty while deciding cases/suites placed before it. Therefore, justice is the only mean for preservation of religion, wealth, honor and dignity of the human body. The Supreme Court of Libya declared that Judiciary is the important organ and strong fort which protects every citizen may be the ruler or his subject from all injustice. This institution played its role in the past and will play in future. The judicial activism in preserving rights and freedom of individuals through establishing justice which became weak due to slow and delaying judicial procedure and there is no doubt that justice delayed is justice denied. This is considered as crime against general rights and lawful interests of the people. When we study history of judicial system of Islam starting from the era of Holy Prophet (S.A.W) and then his rightly guided Caliphs (R.A.), we may conclude that the judicial system of this flourishing periods spread justice all over the world. No delay in disposal of cases has been reported because the basic rule is laid down in the Holy Quran in the words that:

> "***Allah rules and there is none to revise His decrees and He is swift at His reckoning*" (Surah Ar Raad Verse-41).**
>
> **"*Then all are brought back to Allah, their real master. Beware of it that the sole authority of passing judgment rests with Him alone and He is the swiftest at reckoning*" (Surah Al Anam Verse-62)**

His Prophets also followed this methodology in disposing cases of people. Our Holy Prophet (S.A.W) used to decide cases in one and the same session and did not adjourn it to another date as he decided between Zubair (R) and an Ansari in the case of water of Shiraj Al Harra. It is narrated from Urwa bin Zubair that an Ansari man quarreled with Az-Zubair in the presence of the Prophet about the Harra Canals which were used for irrigating the date-palms. The Ansari man said to Az-Zubair, *"Let the water pass"* but Az-Zubair refused to do so. So, the case was brought before the Prophet who said to Az-Zubair, *"O Zubair! Irrigate (your land) and then let the water pass to your neighbor."* On that the Ansari got angry and said to the Prophet. *"Is it because he (i.e. Zubair) is your aunt's son?"* On that the color of the face of Allah's Apostle changed (because of anger) and he said. *"O Zubair! Irrigate (your land) and then withhold the water till it reaches the walls between the pits around the trees." Zubair said, "By Allah, I think that the following verse was revealed on this occasion", "But no, by your Lord They can have No faith Until they make you judge In all disputes between them." (4.65*)

Judicial system during the era of the rightly guided caliphs was the same; Umar the second Caliph in one of his letter addressed to Muawiah the governor of Syria said, I have written a comprehensive letter on the subject of judiciary. You are required to follow the method which protects your religion and to exercise your efforts when parties come to you, so accept Adil witnesses and absolute swearing, close the weak to your seat so that he may relax express his viewpoint with clear words. Also give relaxation to poor people, as when the case is delayed this will compel him to leave his right and go back to his family without getting his right. No doubt his right become void --- Do your struggle for compromise between the people if disposal of the case judicially is difficult for you. With this we come to know that quick decisions are foundation for judiciary in Islam and there should not be unwarranted delay. And not wait of announcing of judgment except there is a solid reason. The firm rules are: passing order / judgment is obligatory when the process of hearing statements of parties are completed.

Speedy disposal of cases without using delaying tactics is one of the effective factors for establishing Justice but

* Paper presented by the delegation of the Supreme Court of Libya in the International Judicial Conference 2014

this factor is confronted with obstacles and difficulties which warrant time for study this phenomena.

We, therefore, attempted in this paper to present the causes, why justice is delayed and its impacts on judiciary and its functions. We will also discuss how the Libyan Supreme Court implemented these rules and reduced its negative impacts on establishing justice among the people. We will try to discuss briefly, the following important issues.

1. Time duration for litigation in judicial system of Libya.
2. The negative impacts of prolonging litigation.
3. Causes for adjournments of cases.
4. Legal text leading to quick disposal of cases
5. Confrontation of Libyan Supreme Court with prolonging litigation period
6. Suggestions for fixing time limit for disposal of claims.

Firstly, time duration for litigation in judicial system of Libya.

It is well known fact that establishing rights and achieving justice and equality and speedy disposal of litigation is highest requirement. Because reaching to this fact is possible only by discussion and comparing between the arguments of the parties, giving opportunity to the party to present his claims and to get assistance from the experts of that particular topic so that the real fact may become clear. The speedy disposal of cases is subject to a basic condition of the study of the case deeply in all respects and to understand it. But if these conditions are not fulfilled then speedy disposable will be considered as breaking justice and not finding of facts.

The person who wants to study the judicial system of Libya will find that judicial procedures, from the institution of suits till its final disposal take few years. The minimum time limit for civil, criminal and administrative disputes may not be less than three years keeping in view various process and degrees of judicial hierarchy and in some cases the maximum period may take more time. Therefore, fixation of time limit is not just and acceptable for the purpose of establishing **'Adl'** among the people and their freedoms.

Secondly, the negative impacts of prolonging litigation. Slow justice is the evilest kind of cruelty.

The right of litigant is to get Court decision in appropriate period without delay whether the Court decree the case in his favour or against him. When the Court decree in his favour, he recovered his right and be relaxed but when it was against him, he has to bear financial and psychological burden of litigation for a long period. This would review his mind and he may rearrange his affairs in the light of Court's decision arise from his claim. But delay in judicial decision after providing all the resources necessary for delivering judgment and removing all the obstacles' in the way of Court decision will cause negative impacts and wastage of many of his rights, this may lead to the following:

1. Cessation of interests of claimant/plaintiff: Many of the interests of the plaintiff necessitates that it should be decided in appropriate time when that time is lapsed the interest is also vanished with it.

2. Leaving litigation due to losing hope of adjudication. Some time the litigants lose hope because they have to wait for a long time for its disposal. He loses his hope in getting or protecting his right through the process of judiciary. So, after becoming hopeless, he leaves litigation and does not follow its proceeding and by this way the case is ended in withdrawal of the same.

3. The litigant's life ended due to his death, during pendency of his claims. On many occasions, the applicant dies before announcement of judgment in his case. Announcement of judgment in so many cases prolonged until the claimants die before getting or protecting their rights so that they may get benefit from it before his death.

4. Leaving demand of his rights due to wastage of a long time in litigation.

5. Less trust on judiciary, the respect of judiciary among the people vanishes and they adopt other ways

for getting their rights.

6. Delay in execution of punishment. This mitigates the impression of severe punishment and badly affects the severances of the crime in the society. Execution of punishment on the criminals, psychologically protects the society because the society has consented for imposing punishment on the criminal. And all the people deterred from whatever the criminal has committed and lastly they compare between the crime and its punishment.

7. Minimizing the fire of jealousy/revenge. This provokes the victim for committing criminal acts to get his revenge.

8. This deprive the person to get benefit from his right and that is harmful for him while on the other hand it is permission for a person who does not deserve to get what is not his right.

9. Confronting of the social structure to demolish and to bring enmity between the litigant which results the continuity of their litigations for a considerable period and every one of the litigant try his best to get whatever is with his opponent party.

Thirdly causes for adjournments of cases.

There are many reasons which contributes in prolonging the decision period among the parties, some of the most important are as under:-

1. Increase in number of suits during the last years in various fields (criminal, civil, administrative, family matters) and the reasons for this increase are;

- Awareness among the people about the rights and availing of these rights.
- Private lawyers try to establish the claim and some of them try to linger on the case in spite of the fact that they do not have a right.
- Extension in circle of aggression on the rights of others.
- Increase in violation of rights of the people from officials of the Government institutions.
- Slackness in disposal of cases
- Taking no steps by the Government institutions to rectify/correct the wrongs of their subordinates disclosed by the Courts, specially those affecting the general public or majority of them.
- Delay in implementing the orders of the Court by the executive.

2. Delay in implementing the Court orders issued during the trial for getting any technical information or enforcement of procedural actions in criminal matters.

3. Weakness of defence side especially government institutions in playing their defensive role and demanding frequent adjournments for getting documents or information relating to defense due to weakness of his claim.

4. Frequent postponement of hearing for long intervals without valid reasons due to rush of work so that they may be decided by the judges succeeding them in the next financial year.

5. Multiple categories of Courts and judicial hierarchy as the Court may err in understanding the relevant circumstances or in properly implementing the law and this error can be corrected by the Superior Court. However, the proceedings before every hierarchy as compare to 1 or 2 steps of hierarchy may result in lingering on the dispute.

6. Multiple preliminary Courts in one city without prescribed territorial jurisdiction creates hindrance in spcefing of Court and hence in disposal of cases as well.

Fourthly, legal texts leading to quick disposal of cases

There are many provisions in Libyan laws relating to administration of Justice and in Laws of general nature which provide for early disposal of case and some of them are as under;

1. Section 117 of Libyan law of civil appeals says *"it is mandatory for the Court to start as soon as possible investigation of the case"*

The legal provisions which declare limitation for examination of impugned judgments and after the expiry of that period terminate right of appeal, so clause 2 of section 302 of law of Civil procedure states : *"non compliance of law of limitation for instituting appeal against impugned judgments results termination of right of appeal and the court by itself may decide termination of that right."*

Clause 2 of section 118 of law of civil procedure states, "when one part of the claim is fit for orders, then the court announce its order when it is proved that the speedy disposal of case is in the interest of the one of the litigants then the court may issue necessary orders and declarations to continue the remaining procedures for the titled appeal."

In the text of section 358 of law of civil and trade procedure under the title "*legality of the order on the subject"* states, *"in exception to the previous section, when the court decide that the impugned order is liable to be set aside for being against the law or committing any mistake in its application or its interpretation and the subject appeal is fit for hearing, it is legal for court to deliver its judgment".* Specially, section 25 of law No. 6 of the year 1982 for organization of the Supreme Court states, *"in exception to criminal procedure rules, when the court decide to set aside the impugned judgment and the issue is fit for adjudication, it is legal for the court to deliver its judgment."*

Fifthly, Implementation of law of limitation by Supreme Court of Libya:

Judicial Implementation:

The Supreme Court has lastly promulgated a law No.33 of 2012 which added a provision of law NO. 6 of 1982 for the propose to organise Supreme Court. The text of the law is, *"Bench or benches shall be constituted in the Court to examine appeals before submitting it to specified benches in the Supreme Court. When investigating benches(s), after having heard opinion of prosecutor, decided that appeal is competent to be placed before the Supreme Court or there is need of a decision to clear a legal issue which has not been decided by the Court in the past, the bench pass a resolution that the case is fit to be referred to the Supreme Court. But when the bench, by consent of all, is of the opinion that appeal is not acceptable formally or is void or illegal or the court in any of its judgment has finally decided the issue, so the bench shall clearly decide not to place that appeal before the Supreme Court."*

As the Supreme Court has clearly laid down rules that this law is to be followed in respect of appeals pending for decision that when it was complete in all respect for decision should be placed before the Supreme Court. By this way litigation as well as the negative impacts of delay will be ended.

Now we present some of the basic rules which the Supreme Court has laid down to avoid delay in disposal of cases pending before it.

1) It is legal for a Court to decide an issue at the stage of examination of appeal.

The Court has jurisdiction to adjourn examination of the subject/contents of appeal to another date due to an application for stay of execution but when the Court does not consider it useful to issue stay against execution then the Court according to the circumstances should reserve its judgment on the subject after fixation of date for hearing. The parties will submit and exchange their paper books during the stage of investigation. The Court may reserve judgment without accepting request for adjournment.

2) Revision petition against the judgment of trail Court.

The Court is not bound to accept application filed by petitioner whereby he intends to open a door for instituting appeal to club it with appeal filed by the opponent party against the judgment of the trail Court, having been given

opportunity to defend it but he did not submit his application in the office of investigating judge or in the Court before reservation of judgment. The issue of reopening of door for filing appeal depends upon Court's order and it is presumed that the trail court has discussed the issue raise by the petitioner in the impugned judgment and has found it without force and dismissed the same on merits because the Court, in this respect, has discretionary power.

3) Trail Court is not bound to refer petition for investigation.

The trail Court is not bound to accept request of petitioner for referring his petition for investigation, if the Court, after examining the arguments and documents placed before it, has sufficient reason to believe that it is not necessary to refer it for investigation.

4) Consideration of appeal where the appellant is not allowed to become absent from appearance in two sessions of hearing for investigation or non submitting file in 1st session of appeal.

The crux of section 318 of Procedural Laws and according to the practice of this court, when the appellant does not appear before the Court in its two sessions held for investigation, the investigating judge himself is empowered to declare that it is likely that no appeal exist. According to clause 2 of abovementioned section, this right is envisaged for him only and not for appellate bench. While the right envisaged for appellate bench is to finally endorse punishment mentioned in clause 3 of the abovementioned section. This will be considered in case where the appellant does not appear and submit his file in the first two hearings. This is the punishment for non submittion of file.

5) The Court does not accept claims on which arbitrators agreed upon:

The crux of section 739 of procedural law is that it is lawful for litigants to withdraw from their rights by submitting an application to that specified bench/court. When litigants intend to withdraw their rights it means that the claim has lapsed one of the condition necessary for accepting its claims which debar the Court from accepting the claims until condition of arbitration exists.

6) The Court is not bound to show response to whatever the parties say. It is sufficient for it to describe its reasons in the judgment.

The trail Court may take in its judgment the proofs in support of the claim for satisfaction. It also may discard those proofs which do not satisfy it. It is not necessary for the Court to show its response to all the details that the parties put forth regarding the points on which they differ. It is sufficient for it to explain all that lead to the judgment.

(B) Organizational applications:

1) Increase in the number of benches of the Court. In the past there were only two benches for civil cases and two for criminal cases and now five benches are working for civil and criminal appeals each.

2) Increase in the benches of the Supreme Court from three to five judges to increase the rate of disposition of appeals.

3) Collection of all the principles used by the Supreme Court in its decisions and then its circulation to all judicial forms of different levels and spheres through publishing in a journal by the Supreme Court on a regular basis; similarly, the issuance of a digital directory containing the principles used by the Supreme Court in addition to the set up website of the Court. All this is done to minimize the number of judgments vulnerable to appeal.

Sixthly, Suggestions for limiting delay in judgments.

Delay in judgments may be prevented through many means. The important of which are as follows:

1) Dispensation of the negative reasons leading to delay in the period of litigation as discussed above.

2) Eradication of the disputes from their origin especially those which are raised to dispense with the

mistake made by the employees of the government institutions, as long as claims are clear and the principles laid down by the Supreme Court regarding them are clear. The judicial institution being independent should play role in urging the government institutions to realize the importance of dealing with the mistake made by their servants, in a prompt manners in order to decrease possibilities of appeals against them.

3) Proactive role of judicial institutions of different levels and spheres in reconciliation between the parties, because mutual compromise is one of the best way to settle disputes and reduce the bulk of cases and this is demanded in shari,a as Almighty Allah commands in different places of the Holy Quran . Allah says ***"There is no harm if the two make peace between themselves (by means of a compromise); after all peace is the best thing"(Nisa Verse - 128).*** The Holy Prophet (P.B.U.H) also applied it in his Sunnah as in his judgment in case of Kaab ibn Malik who owed Abdullah Ibn Hadrad al-Aslami money, so when he met him and their voice become loud .The Holy prophet while passing by them said "***O Kaab pointing through his hand to the half. So he took half the money he owed and withdraw from the other half."***

The Court of first instance may try to induce compromise when it considers it beneficial. For this purpose it may order the presence of parties personally and if the compromise is affected, it is recorded which has the force of execution. The Court may start new efforts for compromise when it considers these efforts appropriate.

Quran has attracted the people to forgive each other in the crimes related to the human body. Allah says ***"And if one slays a Believer by error, he must set free one believing slave as expiation and pay blood-money to the heirs of the slain person unless they charitably forego it." (Nisa Verse- 92)***

Similarly, Allah says ***"O Believers, the law of retribution has been prescribed for you in case of murder, if a free man commits a murder, the free man shall be punished for it and a slave for a slave: likewise, if a woman is guilty of murder the same shall be accountable for it. But in case the injured brother is willing to show leniency to the murderer, the blood money should be decided in accordance with the common law and the murderer should pay it in a genuine way" (Surah Al Baqra Verse -178)***

So as *Allah subhanahu wa Tala* has "legalized retaliation and has kept it under discretion of the next of kin, intended not to detain the community from forgiving each other which eradicate the difference"

4) Induction of judge to play their positive role when they hear the petition. Some parties want to delay the decision therefore, the judges should not delay the hearing more than once for the same cause and that too when the application for postponement is genuine.

In this case the dates fixed should be near to each other

5) When it is proved that someone prolongs the period of litigation wrongfully or hinders the executions, he should be fined or damages be claimed from him.

6) Dealing with all the causes mentioned in the appeal -whatever of litigation may be.

7) Narrowing the circle of framing of issues in a litigation as for as possible under the law. The issues which does not have link with case should be avoided. Because it results non disposal of litigation rather multiplication of claims. For example the rules relating to the issue of jurisdiction whether the claim as a whole falls under the jurisdiction of a particular ordinary Court or not or it falls under the jurisdiction of a Special Court or part of the claim falls under one court and the other part falls under the other court. By summarizing all these issues we may keep in view the maxim, *"who owns the whole owns the part "* and the same procedure will be adopted in the settling of issues pertaining to procedure.

8) The text of the procedural code be reviewed to make it brief and ensure speedy litigation.

9) Review of the distribution of work in Courts and of determination of their jurisdiction so that any overlapping may not occur. There should be only one court of instance at city level. As far as the over

burdening is concerned, it will be ease down by increasing the number of benches.

10) Best use of electronic appliances to execute the procedure of litigation. The use of modern technology to ensure availability of necessary information for the members of judicial institution.

11)Provision of suitable centers to review cases and to deal them timely.

12)Promulgation of necessary rules and regulation for the services of technical, experienced investigating agencies dealing with litigations to ensure quick disposal of cases.

We ask *Allah subhan hu wa tala*! to give wisdom and guide us to decide the matters in the best way and organise our judicial institutions to ensure the effective administration of justice.

Wasallaam Allaimkum Warahmatullah Wa Barakatuh

Role of Judiciary in Protecting Human Rights

Mr. Anees Jillani
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A Landmark Judgment of the US Circuit Court

Dr Joel Filartiga, a physician, was a longstanding opponent of the government of President Stroessner, which had held power in Paraguay since 1954. His daughter, Dolly Filartiga, arrived in the United States in 1978, and while shopping one day in New York, she saw Americo Norberto Pena-Irala (Pena). Pena was the same guy who had tortured to death her 17 year old brother, Joelito.

Joelito was kidnapped in March 1976 by Pena who was then the Inspector General of Police in Paraguay. The Paraguan police then took Dolly to Pena's house and showed her the tortured body of her brother. As Dolly fled, horrified, from the house, Pena followed after her shouting, "*Here you have what you have been looking for so long and what you deserve. Now shut up."* Joelito was apparently tortured and killed in retaliation for his father's political activities and beliefs.

Dr Filartiga then filed a criminal case against Pena; Pena got the whole proceedings confused by getting one of his servants confess to the murder stating that Joelito was having an affair with his wife, and he killed him out of passion. However, even the servant was never convicted or sentenced for the self-confessed murder.

Now when Dolly saw her brother's killer in the United States, she notified the U.S. Immigration & Naturalization Service (INS) which subsequently arrested Pena and ordered him to be deported.

Almost immediately, however, Dolly also filed a civil complaint against Pena accusing him of wrongfully causing death of her brother by torture, and sought compensatory and punitive damages of $ 10 million. The cause of action was legally said to arise under the U.S. Constitution; U.S. wrongful death statutes; the Universal Declaration on Human Rights; the U.N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man and other pertinent declarations, documents and practices constituting the customary international law of human rights and law of nations.

The lower U.S. courts dismissed Filartiga's case on grounds that they did not have jurisdiction over the subject matter. The courts, however, stated that they recognize that official torture violates an emerging norm of customary international law. Dolly Filartiga tried to get a stay against Pena's deportation but he managed to return to Paraguay.

Dolly filed an appeal. She based the appeal on an Alien Tort Statute of the United States which provides that "*the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States*." The appellate court held that "*in light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations*." Having examined the sources from which customary international law is derived--the usage of nations, judicial opinions and the works of justice--the Circuit Court concluded that "*official torture is now prohibited by the law of nations*." The court further concluded that the law of nations forms an integral part of the common law, and accordingly international law confers fundamental rights upon all people vis-a-vis their own governments.

Once the court established that official torture was a violation of modern international law, Pena argued as a defence that the tort occurred outside the territorial jurisdiction of the court, and therefore, it did not have jurisdiction to try the suit. The court overruled this defence by stating that it is not extraordinary for a court to adjudicate a tort claim arising outside its territorial jurisdiction. A state or nation has legitimate interest in the orderly resolution of disputes among those within its borders.

Pena then argued that if the conduct complained of is alleged to be the act of the Paraguayan government, the suit is then barred by the Act of State doctrine. The court responded to it by stating that "*we doubt whether action*

by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly ungratified by that nation's government, could properly be characterized as an act of state."

The court thus upheld Dolly Filartiga's appeal by concluding that:

> *"In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become--like the pirate and slave trader before him--an enemy of all mankind. Our holding today.....is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."*

This decision of the U.S. Circuit Court is no doubt a landmark judgment and goes to prove the role that the judiciary can play in protecting and promoting human rights. It shows the extent of jurisdiction that the courts can exercise for the enforcement of human rights. There is no reason why the courts in Pakistan cannot exercise similar jurisdiction based on international laws dealing with human rights.

The Down-trodden

The extent of human rights issues is really beyond comprehension in Pakistan. Ours is a poor country, with almost two-thirds of the populace belonging to the extreme poor segment of the population. It is thus not surprising that the powerful segment violates human rights of the oppressed on a daily basis. Half the population consists of children, defined as an under-18 person, and they virtually have no influence in the society and nobody raises voice for their rights as they lack political power. Similar is the plight of the women who are customarily expected to restrict their activities. Coupled with the children and women, the poor males constitute an overwhelming majority of the country whose human rights are routinely violated.

Who will help the down-trodden except the judiciary? The judiciary is an institution which is expected to conduct itself impartially, justly and fairly. It has the power to get its orders enforced and thus can play a crucial role in protecting human rights of the oppressed section of the population.

Terrorists Have Rights Too

Pakistan has been embroiled in a war against terror since 9/11. It is not that it was free of terrorism prior to it but the dynamics of terrorism have changed and it is prevalent on a much wider scale than previously experienced. In such circumstances, the role of the judiciary to protect the human rights of the accused and the arrestees assumes great importance. This is regardless of whether they are guilty or not. After all, the terrorists have rights too. And there should be a difference between terrorists who respect no rights and the state which is expected to protect everybody's rights.

Thousands have been arrested during the past decade but the state has failed to produce many of them before a court of law, what to talk of their being convicted. The laws of Pakistan are clear on the question of the rights of the accused. And regardless of the extent of terrorism in the country all concerned must adhere to the law of the land, as long as they remain in force.

The Constitutional Rights

The Constitution of Pakistan is specific on the rights of the detained prisoners. Its Article 10 stipulates that an arrested person should not be denied the right to consult and get legal help of his choice. Article 10(1) says that:

No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

Clause (2) of the same Constitutional Article requires that:

Every person who is arrested and detained in custody shall be produced before a magistrate within a period of 24 hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the nearest magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

Nothing, however, in the above clauses (1) and (2) apply to a person who is arrested or detained under any law providing for preventive detention; or to a person who for the time being is an enemy alien.

It is the responsibility of the judiciary to ensure that the arrestees are informed about the grounds of their arrest; given the right to consult a lawyer of their choice; and produced before a magistrate within 24 hours.

Similarly, sections 81 and 60 of the Code of Criminal Procedure 1898 (No V), in conformity with the spirit of the above Article 10(1) of the Constitution, lays down the specifics of arrests involving arrests with warrant and without warrant.

This is a major check on the arbitrary use of powers by the law enforcement authorities. Production before a judge and access to a lawyer enables the family to find out about the whereabouts of the arrestee; and also assures the accused of a fair trial.

We all are angry with the terrorists, and desire them to be punished. At the same time, we would like these very persons to be proceeded in accordance with law. We should never forget that our law enforcement agencies are capable of making a mistake; or sometimes an innocent person may be picked up due to enmity.

The whole nation presently is supportive of the law enforcement authorities. At the same time, the nation expects them to adhere to the law of the land. It is the responsibility of the judiciary to ensure that ideally all accused should be:

- arrested with warrants if possible;
- produced before the proper courts as quickly as possible;
- informed about the grounds of arrest;
- provided access to a lawyer; and
- Protected from torture.

This is how civilized nations are expected to behave; and we represent one of the oldest civilizations on earth.

Innocent Till Proven Guilty

And these rights are not just confined to those accused of terrorism. Like most of the criminal systems in the world, Pakistan follows a penal structure that undergoes four stages:

- investigation;
- bail;
- trial; and
- Sentencing.

Presently, anyone under section 154 of the Code of Criminal Procedure can file a FIR (First Information Report) against anyone involving a cognizable offense, defined in the Code's Second Schedule; a FIR for a non-cognizable offense is filed under section 155. Once a FIR is registered, the whole criminal law mechanism is triggered which is sometimes difficult even for those involved to stop or control. Since criminal offenses are considered crimes against the state, so it is not possible even for the complainant to withdraw his FIR after its registration.

The judiciary needs to defend rights of all accused in all the above stages. The slow pace of the legal system affects these rights and sometimes even if an accused is absolved by the end, he has suffered immeasurably by that stage. It is thus important that these rights are particularly looked into at the time of filing of an FIR, investigation when the accused is most vulnerable to torture and during trial. Bail should be liberally granted as one is innocent till proven guilty. The societal concerns can be protected by ensuring proper sureties and raising the surety amounts while giving bail.

The Universal Declaration of Human Rights

Human rights however, cannot just be confined to the rights of the criminal accused. The judiciary can play a positive proactive role by promoting all kinds of human rights of the oppressed.

Since 1948, when the Universal Declaration was adopted as a General Assembly Resolution of the UN, the UDHR came to constitute a major part of international relations and international law. It was adopted as an instrument of political obligation rather than having a juridical character. In other words, the UDHR was not considered to be a juridical instrument imposing binding obligations on states and, in this sense, was anything but a reflection of strict legalism in practice.

The subsequent development of the culture of human rights into the realm of law mirrored the development of human rights instruments as international treaties imposing binding obligations on states. There was recognition on the part of the world community that the UDHR's political message, and the political morality implicit in the articulation of the "*rights*" in this instrument, should be transformed into instruments of juridical importance. Accordingly, the political moral status of the Universal Declaration was converted into a regime of complex treaty obligations incorporating concerns for socio-economic justice. Some of these instruments included the Convention on the Prevention and the Punishment of the Crime of Genocide (1948), the Refugee Convention (1951), the International Covenant on Civil and Political Rights (1966), the International Covenant on Social, Cultural, and Economic Rights (1966), the Convention on the Elimination of All Forms of Racial Discrimination (1966), the Convention on the Elimination of All Forms of Discrimination Against Women (1980), the Convention on the Rights of the Child (1989), and the Convention that Outlaws Torture and Other Forms of Cruel, Unusual and Degrading Treatment.

Pakistan has signed and ratified many of these human rights treaties and conventions. The governments have not been doing much for their adoption and enforcement in the country. It thus becomes important for the courts to invoke these international instruments as much as possible and try to make them part of the rule of law.

Categorization of Human Rights

Human rights can be categorized in several types: civil and political rights values make up the foundation of human rights and perhaps are the most important. With growing population and increasing poverty, the rights relating to social justice are assuming importance. Then we can group several rights like those relating to environment and peace into separate categories.

All the categories of human rights are interdependent. Civil and political rights influence socio-economic rights and vice versa. These rights in turn influence the right to peace and environmental integrity and are, in turn, influenced by these latter values. It is important to recognize that human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.

We must appreciate that the right to employment, adequate food, clothing, recreation, the right of every family to a decent home, adequate medical care, the right to social security, unemployment, and a good education are all human rights, many of which are enshrined in Pakistan's Constitution in the form of Principles of Policy. And if the State of Pakistan fails to adequately address these issues, than it is incumbent on the judiciary to protect and promote these very rights. It is a heavy responsibility and the judiciary should assume the leadership role in showing direction to the State to ensure compliance with these rights. After all, what kind of rights can we talk about in the midst of starvation and poverty.

Four Core Freedoms

It is within the scope of the judicial function to provide constitutional protections for socio-economic rights which are deemed to implicate fundamental constitutional concerns. While protecting these rights, the following should particularly be ensured:

- Freedom of speech and expression.
- Freedom of every person to worship.
- Freedom from want – which means economic understanding which will secure to everyone a healthy peacetime life – everywhere in Pakistan.

- Freedom from fear – which means a nation-wide reduction of armaments to such a point and in such a thorough fashion that no one will be in a position to commit an act of physical aggression against any neighbor.

The above four freedoms should be the core inspiration for the judiciary. The following Millennium Development Goals in this respect can also prove to be a guiding principle for the courts:

Goal 1: Eradicate Extreme Hunger and Poverty
Goal 2: Achieve Universal Primary Education
Goal 3: Promote Gender Equality and Empower Women Goal
Goal 4: Reduce Child Mortality Goal
Goal 5: Improve Maternal Health
Goal 6: Combat HIV/AIDS, Malaria and other diseases
Goal 7: Ensure Environmental Sustainability
Goal 8: Develop a Global Partnership for Development

The judiciary must realize that realization of human rights will result in achieving social and community peace while deprivations which entrench hierarchy and stratification will reproduce social conflict often to the detriment of the common good of the society as a whole. A society which encourages or neglects vast segments of its population, and reduces their opportunities in life to the most minimal and dismal levels of participation in the social matrix of values necessary for even the most minimal level of deference, dignity, and respect, is a matter to be avoided. This must be done, if necessary, by active judicial intervention as shown by the ruling in the *Filartiga* case discussed at the start.

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Human Rights and the Environment

A South Asian Perspective

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Introduction[***]

Whether a human rights framework is appropriate for responding to environmental challenges associated with globalization is a question that continues to engage policy makers, academics and the courts alike. Some find the individualism underlying human rights at odds with the collective concerns of environmental law[1] or find that in the divergence between intra-generational or inter-generational equity, there is no single core value underpinning human rights.[2] Others point to a halo effect, the argument that given the special place of civil and political rights in the pantheon of human rights, inclusion of environmental rights gives them a cultural legitimacy[3] they may otherwise lack.[4] Even the debate surrounding the environmental dimension of first-generation human rights is not determinative because the procedural rights of access to information and to become a party to legal proceedings are equally important as far as enforcement of rights is concerned.

When every passing decade shows mounting scientific evidence of environmental threat to our planet, undeniable rust of the international environmental treaty machinery and hugely varying shades in the effectiveness of national regimes means there is a lot to be said for having many tools at our disposal in the fight to stop environmental degradation. Inclusion of environmental concerns in mankind's age-old quest of advancing human rights therefore makes more sense than ever.

Historically, the advancement of human rights pre-dates the environmental movement by many centuries and both have for the large part evolved separately in response to specific threats to human liberty and the planet. However, the advent of the Universal Declaration of Human Rights (the "Universal Declaration") after the end of the Second World War signaled a new era in which we see the plasticity of human rights emerge as a durable phenomenon. Attempts to read the basic corpus of human rights in an ecologically literate manner has thus to be seen in the context of a historic continuum in which two separate streams have merged to put the dignity of man on a stronger footing.

B. Internationalization of Human Rights

The world's first charter of human rights is attributed to the Persian King, Cyrus the Great, whose armies conquered the city of Babylon in 539 B.C. Instead of pillaging the town, the King announced a series of decrees on a baked cylinder, which had the effect of freeing the slaves, allowing the people to choose their religion and announcing racial equality. Today known as the Cyrus Cylinder, it is translated into all six official languages of the United Nations, and its provisions are similar to the first four articles of the Universal Declaration of Human Rights.

The *"Magna Carta"* or *"Great Charter"* marks the next important milestone in the struggle for human liberty. The long-suffering subjects of King John of England forced him to sign this document in the year 1215, which underpins the rule of constitutional law in the English speaking world today as it established the right of citizens to own property and to be free from excessive taxes. The Magna Carta was reinforced by Sir Edward Coke's petition of right in 1628, when the English Parliament, frustrated by the expenses of overseas wars, petitioned King Charles to recognize the principle that there could be no taxation without authority of parliament, no subject could be

*** The author, gratefully, acknowledges the support of Mr. Azim Azfar in the preparation of this paper.

1 Anna Grier, Where Discourses Meet, (2010) 1 (1) Journal of Human Rights and the Environment, at 1.

2 Loretta Ferris "Book review, Kerri Woods Human Rights and Environmental Stability", (2013) 4 (1) Journal of Human Rights and the Environment, at 101.

3 Conor Gearty, Do Human Rights help or hinder Environmental Protection, (2010) 1 (1) Journal of Human Rights and the Environment, at 17.

4 Whether there is any unique content in environmental rights is explored in Dinah Shelton, Developing Substantive Environmental Rights, (2010) 1 (1) Journal of Human Rights and the Environment, at 91 and Lynda Collins, Security of the Person, Peace of Mind: a Precautionary Approach to Environmental Uncertainty, (2013) 4 (1) Journal of Human Rights and the Environment, at 92.

imprisoned without cause shown (origin of the right of *habeas corpus*), and martial law could not be used in times of peace.

What we now consider as inviolable basic rights such as ownership of property, freedom from arbitrary arrest and imposition of taxes, supremacy of parliament, took centuries to crystallize and today form the bedrock principles of rule of law and constitutional democracy. In time, the advancement of human rights moved beyond protection of ordinary persons and property to encompass freedom of speech and religion. These are amongst the prominent rights in the United States Constitution of 1787 (including the Bill of Rights) and the French Declaration of the Rights of Man and Citizen two years later, both landmark documents in the history of Western Civilization.

Many would argue that these rights are universal in nature and not the special province of a particular civilisation. It may have taken a few centuries, but the end of the Second World War saw the nations of the world gather together and pledge allegiance to the Universal Declaration of Human Rights with its ringing endorsement of the inherent rights of all humans *"as a common standard of achievement for all peoples and all nations".* It is important to appreciate that the struggle for human rights is incessant and no single landmark document can provide a lasting fence around the expression or exploration of these rights or deal with the myriad problems that threaten the security or dignity of man.

Of the 58 States then members of the United Nations, the 48 nation's[5] that voted to adopt the Universal Declaration of Human Rights on 10 December 1948 had no idea that they were initiating the first step to the internationalisation of the protection of human rights. The League Minority Treaties, the Mandate System, the doctrine of humanitarian intervention and the Red Cross Conventions for the treatment of wounded soldiers in combat had, earlier, prominently enabled human-rights based actions across state boundaries but it was the United Nations Charter, and particularly its Articles 1, 55 and 56, that enabled, for the first time in 1945, a collective global commitment to the promotion and protection of human rights. Inspired by the leadership of Eleanor Roosevelt (U.S.A.), Rene Cassin (France) and Charles Malik (Lebanon), these visionaries, in three (3) years laid the foundation, in 1948, in the Universal Declaration of Human Rights, for an edifice that has convincingly mainstreamed the agenda of human rights in global policies and practices.

The Universal Declaration set its own challenges. It was proclaimed as a resolution of the United Nations General Assembly which meant that, as per Article 11 of the U.N. Charter, it was merely a recommendation and not binding on the member-states. This notwithstanding, the Universal Declaration soon acquired a life of its own. Its eloquence soon resonated in national Constitutions, state practices and the jurisprudence of national courts. Yet, it took eighteen (18) years to transform the declaratory content of the Universal Declaration into hard and binding law in the adoption in 1966 of the (1) International Covenant on Civil and Political Rights, (2) International Covenant on Economic Social and Cultural Rights, and (3) the Optional Protocols (the "International Human Rights Covenants"). The International Magna Carta, many of us felt at that time, stood completed.

The glow of the Universal Declaration had, in the meantime, permeated to the regional levels. In Europe, the European Convention of Human Rights (the *"European Convention"*) was adopted in 1950 and set up the European Commission of Human Rights (later abolished under Protocol 11) and the European Court of Human Rights to implement the new human rights regime in Europe. In the Americas, there was a parallel development. The American Convention of Human Rights, 1969 (the *"American Convention"*), looked to the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights to enforce human rights.

In about two decades since its adoption in 1948, the protection of human rights had transcended to a matter of legitimate *"international concern"* and regional priority well beyond the defence of "domestic jurisdiction" that transgressing states had traditionally invoked, before the U.N. Charter, to shield their human rights abuses. Humanity had come a long way in a shared concern for the dignity and well being of human beings.

South Asia had just emerged by the late 1940's from the yoke of colonialism and it had no significant impact on, or contribution to, the proclamation of the Universal Declaration in 1948. In the U.N. General Assembly, Pakistan, which had become independent about sixteen (16) months earlier in August 1947, took the floor to scope the

5 Eight Socialist States abstained mostly on the ground that the Universal Declaration contained an Article on the right to own property and two States were absent.

Article on the freedom of religion to suggest that it inherently included the right to proselytise. Its Foreign Minister, Sir Zafrulla Khan, who was to later become the President of the U.N. General Assembly and the President of the International Court of Justice, was already a respected voice in the General Assembly at the time of its adoption of the Universal Declaration.

C. International Commitments to Protecting the Environment

About twenty four (24) years after 1948, the international community witnessed another tumultuous event that was to stream a parallel development in the internationalisation of resource management. The United Nations Conference on the Human Environment held in 1972 in Stockholm, Sweden, was to become to environmental protection and sustainable development what the Universal Declaration is to the international protection of human rights. For the first time in human history, the collective global conscience was stirred to care for Planet Earth and to proclaim certain principles that have endured over the years to guide national policies and jurisprudence.

But, unlike the international developments in the protection of human rights leading to the Universal Declaration, the Stockholm Principles had a much broader participation. The Universal Declaration, preceding the Decolonisation Decade, was led by the developed world. The United Nations then comprised 58 nation-states and the foot-print of the colonies was yet to blossom. The flower of independence bloomed in the 1960s and Stockholm included the new Afro-Asian States. From this perspective, the developments toward international efforts to protect the environment were not handicapped by the non-participation of the emerging decolonised states. Thus while the beginnings of the human rights concerns in the U.N. Charter and the Universal Declaration are laid at the door of the victorious U.S. and European Allies, the roots of the internationalisation of the protection of the environment are found in a more universal consensus between the developed and the developing countries. The Third World had arrived on the international stage to influence global policies.

And, it was a measure of the growth in the stature of South Asia that India's Prime Minister, Indira Gandhi, dominated attention and headlines at Stockholm by her campaign Project Tiger.

Stockholm had truly excited global interest and, a decade later in 1982, the United Nations General Assembly adopted the World Charter for Nature by a vote of 111 for, one against (United States) and 18 abstentions.

In the ten (10) year cycle that now characterizes global commitments to international conferencing on sustainable development, the United Nations Conference on Environment and Development (UNCED) met in Rio de Janeiro, Brazil, in 1992, to adopt the Rio Declaration on Environment and Development that authoritatively reinforced the Stockholm Principles and the World Charter for Nature. This spectacular Earth Summit represented a high water-mark in international efforts to prioritise sustainable development. Agenda 21, the Convention on Biological Diversity and the Statement of Principles for the Sustainable Management of Forests were the other landmark achievements of UNCED.

Rio 1992 provided an important opportunity for the leadership of South Asia. Pakistan, then the Chair of the Group of 77, well led the developing countries in the important North-South agenda before UNCED. With the support of China to G77 proposals, Pakistan spoke for a significant part of the global human population represented in Rio, a role that was much respected.

India at Stockholm and Pakistan at Rio had shown the stellar contribution of South Asia to the emerging international commitment to sustainable development. This high profile involvement of both these nations undoubtedly influenced the judicial activism in environmental matters in the jurisprudence of South Asia.

The momentum of Rio was next carried to the World Summit on Sustainable Development in Johannesburg, South Africa, in 2002. The WSSD prioritised Water, Energy, Health, Agriculture and Biodiversity and, for the first time, laid down time lines for the accomplishment of certain stated goals. But, for me, the most remarkable accomplishment in Johannesburg was the pioneering initiative of UNEP to organize a Global Judges Symposium on Sustainable Development and the Role of Law in recognition, apparently, of the role of the Judiciary in many jurisdictions – particularly South Asia as we will subsequently show – to promote environmental protection.

Rio +20 (2012) was the most recent Summit in the decennial calendar of sustainable development. And, once again, it acknowledged the growing role of the judiciary in issues of sustainable development in the holding of the World Congress on Justice, Law and Governance as a parallel event.

Other notable developments have been the Earth Charter (2002) and the IUCN Draft International Covenant on Environment and Development (1995) in the drafting and launching of both of which I had actively participated.

In my attendance of many of these milestone events starting with Rio 1992[6], I developed a layman's guide to the respective positions and concerns of the developed and developing countries in the evolving global environmental agenda. To the developing countries, the important areas were (1) sovereignty over natural wealth and resources, (2) right to development, (3) eradication of poverty, (4) consumption patterns of the North, (5) capacity building, (6) waste trade, (7) reschedule/write off debts, (8) transfer of resources, (9) transfer of technology, and (10) harmful activities of transnational corporations.

The developed countries, on the other hand, sought focus on population stabilization, forests, intellectual property rights, and good governance.

The commonality of interest between the North and the South was, however, readily visible on the need for a global partnership and for empowering youth, women, and indigenous people.

From this pot pourri dialogue emerged durable principles and concepts such as sacred trust for future generations, inter-generational equity, intra-generational equity, polluter pays principle, principle of sustainable development, need for public participation, environmental impact assessment, principle of prevention, precautionary principle, principle of restitution/restoration of environment, principle of strict liability, public trust doctrine, and RRR (reduce, recycle, and reuse) in waste management.

This emerging global environmental order has, to generalise, developed a corpus of soft law and principles for national and international behaviour which have impacted on humanity and Planet Earth. There have been attempts to transform these soft law principles into binding treaty obligations of states. In addition to my active association with the drafting and launch of the Earth Charter[7], I was privileged to lead, as Chairman, IUCN Commission on Environmental Law, 1990-1996, the most significant of such attempts in the launch, in the UN General Assembly in 1995, of the Draft International Covenant on Environment and Development.[8] With Wolfgang Burhenne, my predecessor-Chair, and Nick Robinson, my successor-Chair, we in the IUCN Commission of Environmental Law, sought to fast track the development of "hard" international environmental law. The internationalization of the protection of human rights had provided some guidelines. It took sixteen (16) years to transform the declaratory content of the Universal Declaration in 1948 into binding commitments under the 1966 International Human Rights Covenants. We tried to progress the soft laws content of the Stockholm Principles on Human Environment (1972), World Charter for Nature (1982), Rio Declaration on Environment and Development (1992) and the Johannesburg Declaration on Sustainable Development (2002) into a binding framework treaty on environment and development. But the IUCN Draft Covenant, almost two decades later, still remains a draft.

This is not to say that there was no progress on the ground. Stockholm, Rio and Johannesburg each inspired, mostly in the developed world, national initiatives, policies and legislation that were, sometimes, effectively mainstreamed through judicial interventions.

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[6] I have been privileged to attend Rio (1992), Rio +10 (2002), Johannesburg (2002), and Rio +20 (2012). Additionally, I was a part of the launch of the Earth Charter, The Hague (2000) and attended Earth Charter + 10 at The Hague (2010). Also, I attended several Prepcoms and other preparatory meetings for these major conferences. See, generally, Parvez Hassan, *Changing Global Order: Role of Courts and Tribunals in Pakistan in Environmental Protection*, presented at the New Delhi Dialogue on Role of Courts and Tribunals in the Changing Global Order, organized by the Jawaharlal Nehru University, at New Delhi, India, on 15 March 2013

[7] The Earth Charter has also influenced the development of "soft law". See, generally, Parvez Hassan, *Earth Charter: The Journey from the Hague 2000*, *2002 Pakistan Law Journal (Magazine)*, at 1-4;and Parvez Hassan *Earth Charter: An Ethical Lodestar and Moral Force*, in P. Corcoran, M. Vilela and A. Roerink (eds.), The Earth Charter in Action: Toward a Sustainable World, 29-31 (KIT Publishers, Amsterdam 2005).

[8] See Parvez Hassan, *Toward an International Covenant on Environment and Development*, American Society of International Law Proceedings, 513-522 (1993); and Parvez Hassan, *The IUCN Draft International Covenant on Environment and Development: Background and Prospects*, in A. Kiss and F. Burhenne-Guilmin (eds), A Law For The Environment: Essays in Honour of Wolfgang E. Burhenne, 39-42 (IUCN 1994).

However, the developing countries of South Asia were slow to assimilate the issues of sustainable development in their policies and legislation. But it is a measure of the vision of the judiciaries in these countries that they did not wait for national or international hard law to provide protection against environmental degradation. This region was fortunate in the pioneering formulations of fundamental rights around the right to life including a right to the environment by Justice P.N. Bhagwati in India. They soon resonated in Pakistan through an equally visionary Justice Saleem Akhtar[9]. Similar developments of judicial activism took place in Sri Lanka and Bangladesh. And, the region was all set to see its courts and the judiciary as the major facilitators, in implementation, of the changing global environmental order.

It is clear from the above narrative, that totally independent of the progress of human rights since 1948, the environment and development have, since 1972, also been effectively mainstreamed in the global priorities.

D. Ownership of Human Rights in South Asia

The catalogue of human rights proclaimed as *"universal"* by the United Nations in 1948 were readily owned by South Asia at the highest level of a Constitutional commitment. In fact, the Constitutions of India, Pakistan, Sri Lanka and Bangladesh, all of which post-date the Universal Declaration, elevated these to "*fundamental rights"* for the enjoyment and protection of which every person could directly approach the superior High Courts – and in some exceptional cases involving *"public interest"* – even the highest Supreme Courts of the country. This was a unique incorporation of human rights in the basic law of the land and through the writ jurisdiction; the superior courts of South Asia have championed the rights-based dignity of the human being.

In fact, responding to poverty levels in the region, the judiciary in South Asia supported and championed public interest litigation. This meant that the superior courts bypassed technical hurdles of locus standi and standing to sue to extend relief, in some cases on its own motion suo motu, to the down-trodden and marginalized sections of society. This was as good as things could get for enforcing human rights across class and resource barriers.

The ground was broken in the early 1980's in India when Justice P.N Bhagwati and a group of like-minded judges recognized the need for public interest litigation in a developing nation with weak institutions and myriad socio-economic problems. As Justice Bhagwati wrote in *S.P Gupta vs. Union of India*, a restrictive approach to standing was inimical to the process of national reconstruction in India where *"law is being increasingly used as a device of organized social action for the purpose of bringing about socio-economic change"*.[10] It was observed that in past cases the Indian courts had departed from the strict rule of *locus standi "where there has been a violation of the constitutional or legal rights of persons who by reason of their socially or economically disadvantaged position are unable to approach the court for judicial redress"*.[11] The Gupta case laid the foundation for moulding the rules of civil procedure for maintaining petitions in which the most vulnerable sections of society approach the court for effective redress:

> *It may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law…and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ….*[12]

The spirit behind public interest litigation was to not let the rigidities of law prevent relief for the most vulnerable[13]. Many of the cases related to entrenched maladies such as bonded labour[14] and custodial deaths[15].

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[9] I acknowledged the visionary role of Justices Bhagwati and Saleem Akhtar in South Asia at the UNEP Global Judges Symposium, Johannesburg, (2002); see Parvez Hassan, *Judicial Activism Toward Sustainable Development in South Asia, 2003 Pakistan Law Journal (Magazine),* at 39-41.

[10] Id. at 191.

[11] Id. at 188. The court referred to *sunil Batra v Delhi Administration* AIR *1980 SC 1579 and Sr. Upendra Baxi v State of UP (1984) Scale 1137* as examples of the trend to relax standing where legal injury had occurred to indigent or otherwise weak and oppressed persons.

[12] See S.P. Gupta, supra note 10, at 188.

[13] Menski et al. note that there are four ways in which public interest litigation differs from traditional adversarial litigation: *"First the court may be approached in a flexible way for the petition to be filed, for example the court may accept a letter as a writ petition rather than insisting*

Owing to a common history, the decisions of Indian courts have what legal doctrine deems "persuasive" value in other South Asian jurisdictions including Pakistan, where the plant of public interest litigation was to be transplanted next in a welcoming soil. The first genuine public interest case in Pakistan was a human rights case involving bonded labourers. Much like the sequence of event in the earlier Indian judgment, *Morcha v. Union of India*[16], the Supreme Court of Pakistan invoked jurisdiction on the basis of a telegram sent by a group of brick kiln bonded labourers and their families.[17]

As Justice Tassaduq Hussain Jillani, now the Chief Justice of the Supreme Court of Pakistan, declared in a case before him while he was with the Lahore High Court:[18]

> *The rationale behind public interest litigation in developing countries like Pakistan and India is the social and educational backwardness of its people, the dwarfed development of law of tort, lack of developed institutions to attend to the matters of public concern, the general inefficiency and corruption at various levels. In such a socio-economic and political milieu, the non-intervention by Court in complaints of matters of public concern will amount to an abdication of judicial authority.*

Public interest litigation has been applied successfully to a broad spectrum of social ills from discriminatory laws and regulations affecting women and children to the humiliating treatment of prisoners.[19] These cases arose from three major sources: letters written to the Chief Justice of the superior courts of Pakistan, newspaper reports (which become the basis of suo motu actions by the courts), and cases filed by petitioners that raised questions of human rights.[20] The dilemma of how to enforce fundamental rights in a backdrop of illiteracy and ignorance was answered by a group of like-minded judges by recognizing the virtue of a *"massification of society, where citizens were increasingly drawn together on the basis of rights and justice".*[21]

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that the normal procedure be followed. Second, locus standi is usually expanded and construed in its widest possible meaning to include any bona fide petitioner rather than just a narrowly defined category of 'aggrieved person'. Third, proceedings conducted by the court are inquisitorial rather than adversarial, and they tend to be discretionary, incorporating any elements of informal procedure which the judge considers appropriate to follow. Finally, the nature of remedies awarded is different from what we see in 'normal' constitutional petitions, with long-term aims including enforcement under the supervision of the courts taken into consideration. The aim of the exercise is to achieve better justice, so much is clear." See Werner Menski, Ahmad Rafay Alam and Mehreen Raza Kasuri, Public Interest Litigation in Pakistan (Pakistan Law House, Karachi, 2000), at 65

[14] *Bandhua Mukti Morcha vs. Union of India, AIR 1984 Supreme Court 802*

[15] *D.K Basu v. State of West Bengal AIR 1997 SC 610*

[16] supra note 14.

[17] *Darshan Masih vs. State, PLD 1990 SC 513*

[18] *State v. M.D. WASA, 2000 CLC 471 [Lahore].*

[19] Since all these cases are not reported it is convenient to mention the examples given by Dr. Nasim Hasan Shah, a former Chief Justice of the Supreme Court of Pakistan. In an article published in the Pakistan Law Digest, Dr. Shah states that the courts of Pakistan have used public interest litigation to do away with *" (1)malpractices in our educational system; (2) afford protection to women of any origin (Pakistan or Foreign) subjected to any sex related offences and to stop the menace of obnoxious calls to them; (3) protect the property rights of female heirs/owners by issuance of directions to the Attorney-General to take steps to amend the relevant existing law or to cause fresh legislation to be initiated for securing their rights; (4) prevent exploitation of the children by restraining the authorities from taking them to public places for reception of dignitaries. It has also ruled that children shall not be forced to undertake any such work which under the law has only to be done by the labour force; (5) suspended all restrictions imposed against Nurses working in Military Hospitals and Air Hostesses of Pakistan International Airlines to getting married while in service; (6) stayed public hangings as being contrary to the Constitutional provisions guaranteeing dignity of man; (7) issued guidelines for controlling the traffic muddle in Karachi; (8) checked the practice of extortion of money by Railway staff from the passengers traveling in the Samjhota Express (train running between Pakistan and India) and appointed a Commission of Advocates and Human Rights activists to monitor the situation; (9) directed the Federal and Provincial Governments to stop making appointment against the retirement rules, a practice which was violative of fundamental right of equal opportunity for all citizens to enter upon a profession; and (10) issued guidelines to be observed by the authorities to check environmental pollution caused by fumes of motor vehicles, deforestation, open sewerages, dumping of nuclear waste etc.* ", see Dr. Nasim Hasan Shah "Public Interest Litigation as a Means of Social Justice" 1993 PLD Journal Section 31, at 33.

[20] Id. at 32-33.

[21] Parvez Hassan and Ahmad Rafay Alam, Public Trust Doctrine and Environmental Issues before the Supreme Court of Pakistan, (2012) PLJ Magazine, at 45.

In effect, the incorporation of fundamental rights as justiciable rights in the Constitutions of India, Pakistan, Sri Lanka and Bangladesh, combined with an over-zealous and activist judiciary in these countries, has ensured an effective juridical framework for the protection of human rights in South Asia.

E. Judiciary-Led Fusion of Human Rights and Environment in South Asia

From the participation of Pakistan's Sir Zafrulla Khan in the adoption of the Universal Declaration in 1948 to the popularity of the Project Tiger campaign of India's Indra Gandhi at Stockholm in 1972 to Pakistan's prominent leadership at Rio in 1992, South Asia has effectively participated in the development of two of the most important international agendas over the last six (6) decades. But both human rights and the environment progressed, internationally, in separate and almost flow-alone streams. They were, however destined to converge as they both centred on human dignity and human welfare. It is again remarkable that this fusion was pioneeringly led by an activist judiciary in South Asia. The background and narrative follows:[22]

1. India

On the domestic front in South Asia, environmental rights forked in two directions: as part of framework legislation to be enforced by the executive branch and being framed as fundamental rights in constitutions whose ultimate guardians are the courts. The former model is marked by specialized executive authorities that create and administer environmental policies. A critical tool in the hands of these agencies is the environmental impact assessment (EIA) which allows harm to environmental resources to be assessed and minimized. Complementing the role of these authorities are technical organizations responsible for setting standards and norms and judicial tribunals responsible for dealing with related offences.

The centralisation of planning and enforcement promised by the framework model was widely welcomed as a critical advancement. Wilson et al. have argued that framework legislation represents a very coherent model for top down and co-coordinated environmental planning:

> *The emergence of integrated and ecosystem oriented legal regimes has been an essential first step, permitting a holistic view of the ecosystem, of the interrelationships and interactions within it, and of the linkages in environmental stresses. This has been achieved through the framework environmental legislation technique which provides a broad and flexible framework for addressing environmental issues and for responding to changes in socioeconomic and ecological parameters. It has also provided a basis and a reference point for the coordination and rationalization of previously fragmented, disjointed and overlapping sectoral legal regimes. Although the framework legislation typology will require further refinement over the coming years to ensure that it fulfills expectations, it represents one of the most critical developments in environmental management in developing countries in the two decades since Stockholm*[23]*.*

We now have the benefit of hindsight as framework legislation has been around for many years and I will draw upon the example of South Asia[24] as typical of jurisdictions where robust regulatory and institutional models have not fared well as far as implementation is concerned. On paper, the region boasts an impressive array of environmental protection laws, federal agencies tasked with enforcement of standards and regulatory instruments. Mention may be made of the Environment Protection Act, 1997 (Pakistan), the Environment Protection Act 1986 (India), the Bangladesh Environment Conservation Act, 1995, and the National Environmental Protection Act, 1988 (Sri Lanka).

As I have written on other occasions:

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[22] See, generally, Jona Razzaque, Public Interest Environmental Litigation in India, Pakistan and Bangladesh (Kluwer 2004), and Parvez Hassan and Azim Azfar, Securing Environmental Rights through Public Interest Litigation in South Asia, in 22.3 Virginia Environmental Law Journal 216-236 (2004))

[23] P. Wilson, B. Ogolla, R Branes and L. Kurukulasuriya, Emerging Trends in National Environmental Legislation in Developing Countries, in Donna G. Craig, Nicholas A. Robinson, and Koh Kheng-Lian, Capacity Building for Environmental Law in the Asian and Pacific Region-at 175, at 185-186.

[24] A comparative survey of environmental law in the SAARC region and a proposal for regionalizing environmental management in the SAARC Region is found in Parvez Hassan, *Environmental Jurisprudence from Pakistan: Some Lessons for the SAARC Region*, 2012 Corporate Law Decisions, Journal, at 24-49.

> *But it requires more than writing laws and signing treaties to promote sustainable development. A provision in law about environmental impact assessment is of no use if the country does not have the professional and technical ability to conduct and evaluate such assessments. Setting environmental quality standards for industrial emissions and effluents can make a difference only if the EPA's have the laboratories and equipment and technical administrators to police such standards. A strong cadre of environmental lawyers is needed to draft national laws for implementing international conventions and otherwise to enforce environmental protection laws*[25].

Commentators have cautioned that the passage of laws and set up of institutional mechanism can in fact be a step backward if they result in complacency:

> *Indeed apart from establishing appropriate legal and institutional frameworks, the effective implementation of environmental legislation remains one of the most daunting challenges for developing countries. For in the final analysis, ineffective law may be worse than no law at all. It gives the impression that something is being done whereas the existing legal arrangements are contributing little in terms of practical environmental management.*[26]

The amended Constitution of India, 1950, directs the State "to endeavour to protect and improve the environment and to safeguard the forests and wild life of the country". However, the South Asian region is perhaps the best example of constitutionalism applied to environmental law. Owing to the work of visionary judges, public interest litigation in South Asia has become intertwined with the environmental movement in the region. De Silva offers the following explanation for this nexus:

> *The origin of environmentalism in the developed world was always related to recreation and aesthetics. Environmental activism in South Asia is always about survival. In this context, issues such as involuntary displacement and resettlement, provision of basic human needs of water and sanitation, become central to environmental law.* [26]

The environmental movement in India was one of the biggest beneficiaries of the public interest litigation culture. This sentiment is echoed by Nomani who notes:

> *"Out of the commitment to deep ecological values, environmentalism and eco-centrism, the Indian courts have held that the creation of a reliable and effective rights based approach would not only help to ensure the sustenance and survival of indigenous and marginalized communities, but also the well being of cosmic future generations…. Essentially, being a subaltern phenomenon, a wide spectrum of social and individual groups such as lawyers, environmentalists, action groups, forest dwellers, citizens fora, tribal societies, consumer centers, feminist groups and voluntary organizations have thrown open their grievance before the higher courts… Emboldened by this judicial liberalism, India's robust environmental movement in an adversarial atmosphere of repressive policing and bureaucratic red tape has ushered in a third generation of human rights culture.* [27]"

An embedded constitutional right to protect the environment and superior courts willing to explore these rights to their logical conclusion has given India a mature case law on the public trust doctrine,[28] the precautionary principle

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[25] Parvez Hassan, *Environment and Sustainable Development: A Third World Perspective*, (2001) 31 Environmental Policy and Law, 36, at 40.

[26] See Wilson, supra note 24, at 186.

[26] Lalanath De Silva, *Environmental Law Development in South Asia,* (1999) 4(3) Asia Pacific Journal of Environmental Law 243, at 249.

[27] Zafar Mahfooz Nomani, *The Human Right to Environment in India: Legal Precepts and Judicial Doctrines in Critical Perspective*, (2000) 5 (2) Asia Pacific Journal of Environmental Law 113, at 114-115

[28] *M. C. Mehta v. Kamal Nath (1997) 1 SCC (Supreme Court Cases) 388.*

and polluter pays principle[29], inter-generational equity[30] and incorporation of international treaties in domestic law.[31] Importantly, environmental rights were read into human rights as early as in the 1980's in India.

2. Pakistan

With a robust foundation of public interest litigation in Pakistan, bridging the doctrine to environmental causes posed its own difficulties initially. Part of the challenge was that the Constitution of Pakistan, 1973, was drafted too soon after Stockholm to take cognizance of environmental rights. The only reference to the environment is in a schedule to the Constitution that says that "ecology" can be something that can be legislated on both by the provinces as well as by the Federation, which today has been amended to solely empower the provinces in a nod to devolution. There are no directives of state policy or of fundamental rights concerning the environment.

A group of petitioners who wanted to challenge the construction of a high voltage grid station in a residential area in the Pakistani capital, Islamabad, approached the Supreme Court of Pakistan in 1994 to obtain relief. The residents were apprehensive of the public health effects of electro-magnetic radiation posed by the proposed grid station and also worried about threats to the city's much prized green belt regulations. As counsel, I argued the case on the basis of a *"right to life"* (and right to dignity) in the 1973 Constitution and in doing so I drew on the extensive environment-related case law in India on the constitutionally-protected *"right to life"* as embracing a "quality" of life. This argument resonated with the bench, which embraced a wider connotation to the *"right of life":*

> *The word life has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities or facilities which a person in a free country is entitled to enjoy with dignity, legally and constitutionally.* [32]

The receptivity of the Court to the precautionary principle covered in Principle 15 of the Rio Declaration on Environment and Development, 1992 was another significant advance. In its order, the Supreme Court gave significant relief to the petitioners by staying the construction of the grid station until further studies were done to establish the nature and extent of the threat posed by electro-magnetic radiation emitted by the grid station. Drawing on the experiences of the Indian courts, the Supreme Court set up a commission of experts to study the technical dimensions and to submit a report in this respect.

As Akhund and Qureshi note:

> *Shehla Zia vs. WAPDA case sets out two of the most critical foundations of environmental law in Pakistan. First, by virtue of the broad meaning of the word "life" as contained in Article 9 of the Constitution, together with the requirement for dignity of man contained in Article 14, the fundamental right to an unpolluted environment has been established. Secondly, the case established the application of the precautionary principle where there is a hazard to such rights.*[33]

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[29] *Vellore Citizens Welfare Forum v. Union of India (1996) 5 SCC (Supreme Court Cases) 647.*

[30] *Rural Litigation and Entitlement Kendra v. State* of U.P. (1987) Supp. SCC 487 (India). An earlier judgment in this matter was AIR 1985 SC 652.

[31] *People United for a Better Living in Calcutta v. State of West Bengal 1993 AIR (Cal) 215*.

[32] Shehla Zia v WAPDA *PLD 1994 Supreme Court 693, at 712.*

[33] Nelma Akhund and Zainab Qureshi You Can Make a Difference- A Lawyer's Reference to Environmental Public Interest Cases in Pakistan (IUCN, Karachi, 1998), at 13. Shehla Zia, has attracted a great deal of national and international comment. Okidi in particular notes how the case reinforces the need for lawyers to draw on international scholarship in presenting their cases: *"This fact enjoys clear testimony in the opinion of the Supreme Court of Pakistan in Shehla Zia v. WAPDA, where the profuse citation of scholarly literature confirms the readiness of the national courts to draw on research results from various countries to support their decision. But it underscores one additional point, namely that the quality and wide acceptability of court decisions may also reflect the quality of the plaint and professional literacy of the counsel for the plaintiff. The easiest task for the courts is to follow precedents. However, it is the compelling quality and arguments in a plaint that may leave a court with no option but to set new precedents. In the above case, the counsel for the plaintiff assisted in the progressive development of environmental law", Ben Boer, Koh Kheng-Lian, C. O. Okidi and Nicholas A. Robinson,* Training the Trainers Program, (1999) 4 (2) Asia Pacific Journal of Environmental Law 175, at 181. For detailed background information to the *Shehla Zia case, supra,* see Osama Siddique, *Public Interest Litigation in the Wake of Shehla Zia versus WAPDA: The Cast Story*, in Public Interest Litigation: Shehla Zia versus WAPDA (SDPI) at 7. See also Parvez Hassan, *Shehla Zia vs. WAPDA: Ten Years Later*, 2005 *All Pakistan Legal Decisions,*

Today, the case is routinely cited in Pakistan to allow standing to petitioners and to apply the "right to life" and precautionary principle to slow or stop projects threatening environmental harm before adequate assessments are completed and the voice of affected constituents is heard. Apart from petitions brought by civic organizations, both the Supreme Court and High Court have taken suo motu notice of environmental threats and the involvement of the superior judiciary in a controversial project is often enough to deprive it of political clout. The legacy of Justices Bhagwati in India and Saleem Akhtar in Pakistan have ensured that both countries have enduring "green benches" interpreting fundamental rights in an ecologically literate manner.

The downside of litigation is that it is time-consuming and expensive and even litigants who emerge successful often discover that they have attained a Pyrrhic victory; after all the time, acrimony and expense, the spoils of victory are few. Therefore, in another promising development, the courts in Pakistan routinely appoint commissions with technical members as well as civic society and many times a mediated outcome is made possible where everyone benefits.[34] In my home city of Lahore, intractable issues such as air quality[35], solid waste disposal[36] and widening of heritage roads[37] have yielded to this approach. The critical role of the courts on using fundamental rights as a bulwark against commercial encroachment on the environment is likely to continue as the recent 18th Amendment to the Pakistan Constitutions makes environment a provincial subject. In contrast to their Federal forebears, the provincial EPA's are in a much weaker position to implement framework legislation.

3. Sri Lanka

Although Sri Lanka's 1978 Constitution provides for a series of fundamental rights, it asserts in its Directive Principles of State Policy that the state shall protect, preserve and improve the environment for the benefit of the community, the same are not justiciable. This has not stopped the Sri Lankan courts from giving recognition to these principles by reading them in the light of international law. As Puvimanasinghe points out:

> *The Sri Lankan Constitution does not provide for the right to life, and its chapter on fundamental rights deals mainly with civil and political rights, with limited protection of social, economic and cultural rights. Given these limitations, broad interpretations of the Directive Principles by the judiciary can truly advance social justice.*[38]

The landmark judgment in the field is *Bulankulama v. The Secretary, Ministry of Industrial Development*[39], which brought the issues of sustainable development, inter-generational equity and fate of vulnerable populations to the fore. This case arose out of a joint venture between the Government of Sri Lanka and the local subsidiary of a multi-national for the aggressive development of a phosphate mine that would have displaced around twelve thousand people and depleted the mineral deposits in thirty years instead of perhaps a millennium at the previous rates of extraction. Just as the Pakistan Supreme Court had not allowed promulgation of domestic law to undermine the state's international environmental commitments, the Sri Lankan Supreme Court stated:

> *Undoubtedly, the state has the right to exploit its own resources pursuant, however, to its own environmental and development policies. Rational planning constitutes an essential tool for recognizing any conflict between the needs of development and the need to protect and improve the environment. (Principle 14, Stockholm Declaration) Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in*

Journal, at 48. See also Parvez Hassan, *From Rio 1992 to Johannesburg 2002: A Case Study of Implementing Sustainable Development in Pakistan*, (2002) 6 *Singapore Journal of International & Comparative Law* 683-722

[34] As I noted recently, *"the basic approach that was followed was to recommend to the court how commissions, in other countries have helped provide science/technology-based solutions which lie outside the scope of the Courts. Apart from providing the court expert guidance, the other limb of this approach was to highlight the importance of a non-adversarial, public-private partnership model for handling the most intractable civic problems". Parvez Hassan and Ahmad Rafay Alam, Role of Commissions in Public Interest Environmental Litigation in Pakistan, (2011) PLD Journal, at 84*

[35] *City District Government v Muhammad Yousaf I.C.A No. 798/2002 filed before the Lahore High Court.*

[36] *Syed Mansoor Ali Shah v Government of Punjab Writ Petition No. 6927 filed before the Lahore High Court.*

[37] *Cutting of Trees for Canal Widening Project, 2011 SCMR 1743.*

[38] *Shyami Fernando Puvimanasinghe, Towards a Jurisprudence of Sustainable Development in South Asia: Litigation in the Public Interest, (2009)* 1 (10) Sustainable Development Law & Policy, 41-49 at 44.

[39] 3 Sri L.R 243 (2 June 2000).

> *harmony with nature. (Principle 1, Rio De Janeiro Declaration). In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. (Principle 4, Rio De Janeiro Declaration).*
>
> *In my view, the proposed agreement must be considered in the light of the foregoing principles. Admittedly, the principles set out in the Stockholm and Rio De Janeiro Declarations are not legally binding in the way in which an Act of our Parliament would be. It may be regarded merely as 'soft law' Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly* enacted or *become a part of the domestic law by adoption by the superior courts of record and by the Supreme Court in particular, in their decisions.*[40]

Bulankulama laid a strong foundation for public interest litigation and just one NGO, the Environmental Foundation Limited is said to have handled over three hundred cases dealing with environmental matters.[41] Puvimanasinghe writes that:

> *PIL has also become a common feature in cases concerning development, environment, and human rights, which have closely linked jurisprudence in Sri Lanka. These cases usually involve executive or administrative action and, frequently, business activities. When major administrative decisions concern the natural resources of the country and other important issues of public interest, there is little room for the community at large to question these decisions, to be informed about their implications, and to ensure accountable and good governance. Decisions are sometimes made behind closed doors and a culture of disclosure is not common in public affairs. In this context, PIL serves as a legal tool to raise issues of social accountability in decision-making by the government and industry.*[42]

In *Weerasekear et al. v. Keangnam Enterprises Limited*[43] a mining operation, which had acquired an environmental license was alleged to be causing a public nuisance owing to the noise level of the operation. Although the lower court held that the license was an adequate defence, the Court of Appeal overturned the decision on the grounds that obtaining the environmental license was not a shield to legal injury.

The Sri Lankan judiciary has made innovative use of procedural rights as well, reading a right to information (missing in the 1978 Constitution) as part of the right to freedom of expression. *Environmental Foundation Limited v. Urban Development Authority (2005*) concerned a clandestine agreement between the Government agency and private developers for turning Galle Face Green, a seaside promenade in Colombo, which had the status of a national heritage site into a leisure complex. The Supreme Court found the contract violative of the petitoner's right to information as well as the right to equality, and though this case concerns conservation of historic properties, the reasoning can easily apply to environmental cases as well.

4. Bangladesh

Much like Pakistan, the Constitution of Bangladesh does not expressly provide for environmental rights, but the Bangladeshi courts have also embraced these rights within the constitutional right to life. *In Dr. Mohiuddin Farooque v. Bangladesh and Others*[44], the Supreme Court of Bangladesh stated in its consensus judgment that:

> *Article 31 and 32 of our Constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water and sanitation, without which life can hardly be enjoyed. An act or omission contrary thereto will be violative of the said right to life.*[45]

[40] http://www.elaw.org/node/6722 at 10.
[41] Puvimanasinghe, supra note 40 at 48.
[42] Puvimanasinghe, supra note 40 at 45.
[43] CA (PCH).Apn No. 40/2004 (dd. 2009.06.08)
[44] (1997) 17 BLD.
[45] (1997), 49 DLR 1.

In this case, the writ petition was filed under Article 102 (1) and (2) of the Bangladesh Constitution by one of the country's leading environment NGO's, the Bangladesh Environmental Lawyers Association, in connection with irregularities regarding the country's Flood Action Plan. The objection as to standing was dismissed by the Appellate Division of the Supreme Court of Bangladesh:

> *"any person aggrieved" within the meaning of the Article 102 of the Bangladesh Constitution is not confined to individual affected persons only but it extends to the people in general, as a collective and consolidated personality, if an applicant bona fide espouses a public cause in the public interest* he acquires the competency to claim hearing from the court….being a public sector subject, flood control and control of river and channel flows is a matter of public concern. [46]

As in India and Pakistan, relaxation of standing and favourable rulings on the constitutional right to life permitted a boon of human rights and environmental petitions. In a public interest litigation concerning air and noise pollution, the Dhaka High Court ordered the Government to convert petrol and diesel engines in government-owned vehicles to gas-fueled engines; the same order also calls for the withdrawal of hydraulic horns in buses and trucks by 28 April 2002.[47] Another far reaching decision of the Dhaka High Court has called for the withdrawal of two-stroke engine vehicles from Dhaka city by December 2003, the cancellation of licenses for nine year old three-wheelers, the provision of adequate number of CNG stations, and the establishment of a system for issuing fitness certificates for cars through computer checks.[48]

As in the case of Sri Lanka, an environmental lawyers association (BELA) has been the driving force behind public interest litigation. *In Bangladesh Environmental Lawyers Association v. Secretary, Ministry of Environment and Forests*[49], the Supreme Court of Bangladesh was petitioned to stop the diversion of a forest area and rich ecosystem in Sonadia Island from being diverted for commercial purposes. The ship-breaking industry, long used to operating without environmental considerations, became the focus of another BELA assault when the Supreme Court ordered the closing of ship breaking yards that were operating without safeguards *(Bangladesh Environmental Lawyers Association v Secretary, Ministry of Shipping).*[50]

F. Regional Linkages through Principles of Treaty Interpretation

At the international level, the convergence of human rights and the environment was influenced by different considerations.

One, the U.N and regional human rights bodies took to enforcing environmental rights as such rights have, since 1972, been included in the national legal systems through constitutional or legislative provisions. The human rights bodies, in such circumstances, addressed issues relating to environmental degradation in violation of the guaranteed rights in the agreements over which they have jurisdiction. This is facilitated by some mandates in the human rights treaties. The European Convention, for example, provides that nothing in the Convention shall be construed as limiting or derogating from any of the human rights that may be ensured under the laws of any Contracting State or under any agreement to which it is a Party (Article 53). To similar effect is Article 29 of the American Convention which recognizes the "rights recognized by domestic laws and other agreements" as well as "other rights or guarantees that are inherent in the human personality".

Second, the Vienna Convention on the Law of Treaties, 1969 (the *"Vienna Convention"*), has provided a more durable basis for twinning human rights and environmental matters. Its Articles 31 and 32 lay down the general principles for treaty interpretation. Beyond the good faith duty to interpret treaties in accordance with their ordinary meaning in the context of the whole agreement and its objects and purposes, Article 31 requires the taking into account of:

(1) any subsequent agreement between the parties regarding the application of its provisions;

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[46] Id., at para 49.
[47] Sayed Kamaluddin, BD Judiciary Showing Increasing Assertiveness, DAWN, 4 April 2002.
[48] Id..
[49] www.elaw.org/node/2452 (Write Petition to Bangl. S.C Oct. 10, 2003)
[50] *Bangl. S.C (2009),* available at www.elaw.org/node//3747

(2) any subsequent practice which establishes an agreement of the parties regarding its interpretation, and

(3) any relevant rules of international law applicable in relation between the parties.

Article 32 enables recourse to supplementary means of interpretation either to confirm a meaning in cases where it would otherwise be ambiguous, obscene or manifestly absurd or unreasonable.

Shelton notes:

> *The broad interpretive mandates of regional bodies have led to the practice of finding and applying the most favourable rule to individuals appearing before the courts and commissions. In addition, human rights tribunals have developed various canons of interpretation that reinforce these mandates and the [Vienna Convention on Law of Treaties] rules of treaty interpretation, allowing them to make broad use of environmental laws, principles and standards.*[51]

Jurisprudence under both the European Convention and the American Convention soon began to factor environmental rights in dealing with human rights issues under the respective Convention generally on the basis of the guidelines of the Vienna Convention. This result was also followed under the African Charter of Human and People's Rights, 1984 (the "African Charter"). A few examples highlight the emerging nexus.

1. European Convention

In *Fadayeva v Russia*[52] the plaintiff lived near the largest iron smelter in Russia and claimed that toxic emissions had adversely affected her health, placing reliance on Article 8 of the Convention, which protects a person's private and family life:

Article 8 – Right to respect for private and family life

> 1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> 2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

The Government responded that the extent of the pollution was not extreme enough to set up an Article 8 claim. Finding that Article 8 applied, the Court agreed that there could be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to environmental hazards to be inherent in modern cities but held that the assessment of the minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects.

On the facts, the Court held that respondent state had failed to strike a fair balance between the interests of the community and the applicant's right to respect for her home and her private life. Both non-pecuniary damages and costs of litigation were awarded to the plaintiff. Though Article 8 is framed in terms of the right to privacy but that has not stopped the European Court from adopting a purposive interpretation and reading into it the right to a healthy environment not only in this case but many other instances.

2. American Convention

The experience under the American Convention has been well summed up:

> *At the international level, in the western hemisphere, the Inter-American Commission and Court have articulated the right to an environment at a quality that permits the enjoyment of all guaranteed human rights, despite a lack of reference to the environment in nearly all inter-American normative instruments…The Commission's general approach to environmental*

[51] Shelton, supra note 4, at 93

[52] No 55723/000 (judgment of 9 June 2005) 2005/IV Eur Ct H R 255 (2005)

> *protection has been to recognize that a basic level of environmental health is not linked to a single human right but is required by the very nature and purpose of human rights law.*[53]

The Commission's Report on the Situation of Human Rights in Ecuador, 1997, states:

> *The American Convention on Human Rights is premised on the principle that rights in here in the individual simply by virtue of being human. Respect for the inherent dignity of the person is the principle which underlies the fundamental protection of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populate, are inconsistent with the right to be respected as a human being.*[54]

Shelton notes that *"neither the Inter-American Commission nor the Court adheres to a static or 'originalist' interpretation of the texts"* taking the view that *"human rights instruments must be interpreted and applied by taking into account"* 'developments in the field of international human rights law since those instruments were first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of human rights violations are properly lodged'.[55] The author notes that this dynamic approach of taking cognizance of changing conditions is the hall-mark of the European Court, which has stated that it is of *"critical importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory".*[56]

The above developments will be further reinforced in the 1988 Additional Protocol to the American Convention which provides that "everyone shall have the right to live in a healthy environment and to have access to basic public services".

3. African Charter

Although the European Convention (1950) and the American Convention (1969) enabled a backdoor nexus of human rights and the environment, the approach of the African Charter, of a more recent vintage of 1984, is direct. It provides clearly that *"all peoples shall have the right to a general satisfactory environment favourable to their development (Article 24)".* The difference between the pre-Stockholm European and American Conventions and the 1984 African Charter and the 1988 Additional Protocol to the American Convention show how the international developments on sustainable development since 1972 have impacted on treating human rights and environmental issues together. This approach is indicative of the future.

The work of the African Commission on Human and Peoples Rights (the "African Commission") well lives up to the mandate of the African Charter. In May 2002, the African Commission acted on a Communication, which alleged that the "oil consortium [with the connivance of the military government of Nigeria] has exploited oil reserves in Ogoni land with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards". The Communication went on to note that

> *The resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.*[57]

The Communication accused the Government of Nigeria of withholding vital information about the project[58] from the affected community and using its security offices for *"ruthless operations"* including destructing of Ogoni villages and homes.

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[53] See Shelton, supra note 4, at 104.
[54] Inter-Am Comm HR, Report on the Situation of Human Rights in Ecuador, OAS Doc OEA/Ser.L/V/II.96, Doc 10 Rev 1, 24 April 1997, at 92.
[55] See Shelton, supra note 4, at 93.
[56] Christine Goodwin v The United Kingdom [GC], (App no 28957/95) (Judgment of 11 July 2002) (2002) EHRR 18, para 74.
[57] Ref. ACHPR/COMM/AO44/1, at 3.
[58] See also SERAC v Nigeria, (27 May 2002) Comm 155/96, Case No ACHPR/COMM/A044/1 where the Court took an expansive view of Governmental obligations *"to take reasonable and other measures to prevent pollution and ecological degradation, to promote*

In its ruling, the African Commission took cognizance of the fact that the Federal Republic of Nigeria has incorporated the African Charter into its domestic law and the Complainants' allegation that the Nigerian Government violated the right to health and the right to clean environment as recognized under Articles 16 and 24 of the African Charter. The African Commission also read a right to housing and shelter though the same was not explicitly mentioned in the African Charter:

> *Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.*[59]

G. Looking Ahead

Although not a part of the original vision for human rights in 1948 nor a part of the environment agenda led in Stockholm in 1972, the United Nations, which sponsored both the streams, has, over recent years, seen the desirability of synthesizing the human rights and the environment issues for a better achievement of both the goals. This is the way it should be and it is likely that both will increasingly share a common platform in the future.

Both international and regional initiatives tell a story where human rights and the environment streams are coming together for the greater good of mankind. The United Nations Committee on Economic, Social, and Cultural Rights adopted a General Comment in 2002 on the right to water, referring to article 11 of the International Covenant on Economic, Social, and Cultural Rights.28 The General Comment states:

> ***The human right to drinking water is fundamental for life and health. Sufficient and safe drinking water is a precondition for the realization of all human rights.***[60]

International Treaties and Covenants are often criticized for being mere statements of intent but it cannot be denied that the commitments made at the world stage create an atmosphere where regional and national initiatives are catalyzed. In the same year as the General Comment on the right to water, the European Commission charged eight E.U. Member States with violating water quality directives (France, Greece, Germany, Ireland, Luxembourg, Belgium, Spain, and the UK).[61] The Earth Justice's Issue Paper notes that the *"European Commission's increased regulation of water quality standards demonstrates the commitment to the newly recognized human right to clean water".*[62]

More recently, in 2010, the United Nations General Assembly has recognized the right to water,[63] and the Human Rights Council has appointed an independent expert on the issue of human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment.[64] This evolution of human rights is welcome as currently the Constitution of South Africa explicitly recognizes a right to water as such[65] and the right to water assumes greater importance in the context of the affect of climate change on vulnerable populations. As Westra notes:

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conservation, and to secure an ecologically sustainable development and use of natural resources". Apart from environmental impact studies and independent scientific monitoring, these measures included the duty to provide information and allow the public an opportunity to participate in decision-making.

59 Supra note 59, at 12-13.

60 The sufficiency, safety, affordability, and accessibility to water are defined in the Comment and it further describes a state's legal responsibility in fulfilling the right. The human right to water embraces the notion that sufficient, affordable, physically accessible, safe, and acceptable water will be available for personal and domestic use.

61 The case against France, the European Court of Justice (ECJ) ruled that France had not met the 50 mg/L limit for nitrates in surface waters.

62 Earth Justice Issue Paper, Human Rights and the Environment, Materials for the Fifty-Ninth Session of the United Nations Commission on Human Rights, Geneva, 17 March-25 April 2003. The OECD now recognizes the link between human rights and the environment and contains an environmental ranking of its members.

63 GA Resolution 64/292 of 28 July 2010.

64 A/HRC/19/L.8/Rev.1 and Collins supra note 4, at 92.

65 Section 27 of the Constitution of the Republic of South Africa, 1996.

> *It has been further argued that climate change threatens human rights, and that water damage related to climate change threatens the cultural rights and the very existence of indigenous populations living far beyond the limits of the consumer imagination. Climate change, it has been argued, is, in short, a form of intra-and inter-generational justice. Future negotiations regarding climate change protocols and water law instruments should therefore be place within a human rights framework, and climate change and human rights need to be understood in the light of a close examination of their intimate interconnection*[66]

It is not just in the creation of new socio-economic rights-such as the right to water-that the boundaries of human rights are being pushed outwards. Collins has recently argued that where there is evidence of a significant threat to human health, coupled with scientific uncertainty regarding the existence, mechanism or scope of the risk involved, the security of the person of exposed individuals is violated. The case she draws on is that in October, 2010, members of the Aamjiwnaang community filed suit in Ontario alleging that the decision to allow Suncor Energy Products, to increase production by 24% at their sulphur recovery plant violated their right to security of the person under the Canadian Charter of Rights and Freedoms.

Collins argues that *"human rights are unitary and interdependent; if the precautionary principle does form part of a customary international right to environment, then this understanding of environmental rights should inform states' interpretation of the right to security of the person".*[67] This is part of an effort to ensure that there is unique content to environmental human rights beyond the support provided in domestic constitutions and customary international law to the concept of a human right to environmental quality

The efforts of the South Asian judiciary to protect the environment are salutary but leaving the environmental movement in the hands of national courts is not a global prescription. Firstly, the basic job of the courts is to interpret laws in the resolution of conflicts and implementation requires the co-operation and capacity of other agencies. Secondly, political, institutional and cultural differences make judicial redress ineffective in many jurisdictions for various reasons. This calls for the regionalization of initiatives to reinforce international conventions and paper over weaknesses in national regimes.

As I wrote elsewhere:

> *"Protection of human rights in the world was improved by the internationalisation of these concerns through the Universal Declaration of Human Rights, 1948 and the International Covenant of Civil and Political Rights and on Economic, Social and Cultural Rights, 1966. These pioneering initiatives at the international level were facilitated by regional support and the establishment of European Commission/Court of Human Rights, the Inter American Commission/Court of Human Rights and similar initiatives in Africa".*[68]

Clearly, much progress has been made since July 1994, when Ms. Fatma Zohra Ksentini, Special Rapporteur on Human Rights and the Environment for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, issued her Final Report to the Sub-Commission. The Final Report, including the 1994 Draft Declaration of Principles on Human Rights and the Environment, noted that environmental damage has direct effects on the enjoyment of a series of human rights and that human rights violations in turn may damage the environment.[69] The world's appetite for energy and goods is always growing bigger and unrestrained commerce that arises to fulfil it continually threatens the planet's delicate eco-system.

When logging companies invade what is left of close-canopy tropical rain forests in Liberia or lowland rain forests in Indonesia, they do not just threaten biodiversity hot spots but displace indigenous people who have depended for centuries on nature for their livelihoods, shelter, medicine and folklore. Hydroelectric dams provide much-needed energy at an economically lower cost but cause massive displacement of communities and encroach on

66 Laura Westra, Climate Change and the Human Right to Water, (2010) 1 (2) Journal of Human Rights and the Environment, at 188.

67 See Collins, supra note 4, at 93.

68 See Hassan supra note 25, at 47.

[69] E/CN.4/Sub.2/1994/9.Amongst other measures, Ms. Ksentini recommended that the human rights component of environmental rights be forthright made a part of the work of human rights bodies.

their right to shelter. When mining companies carry out open-pit mining near human habitation or planes fly low over residential neighbourhoods on their landing routes, it is at the cost of the right to shelter in one case and the right to privacy and inviolability of the home in the other.

A rights-based approach to environmental rights, as championed by national courts under their respective constitutions or regional tribunals under human rights conventions, is a critical tool in the struggle to find the right balance between economic growth and the health of the planet and its marginalized communities.

ROLE OF JUDICIARY IN PROTECTING HUMAN RIGHTS "HIV AND AIDS"

UNAIDS
May 14, 2014

International Judicial Conference
18th April, 2014
Fahmida Iqbal Khan
Community Mobilization & Networking Advisor
UNAIDS

JUDICIARY AND HUMAN RIGHTS

- There is a common opinion that an independent judiciary is the strongest guarantee to upholding the rule of law and the protection of human rights
- The necessity of strengthening justice was considered a priority when drawing up the United Nation Charter in 1945, which at that time determined:

- *"to establish conditions under which justice and respect for obligations arising from treaties and sources of international law can be maintained"*

FLOW OF PRESENTATION

1. Key facts and epidemiological situation of Pakistan
2. Human Rights perspective
3. Analyze the role of judiciary to protect human rights- rights to health services by HIV positive people
4. Find possible ways through which judiciary could ensure the human rights of underprivileged/ marginalized individual or groups

HIV Situation in Pakistan...

- **Expanding epidemic:** from low prevalence to 'concentrated' epidemic
- **Geographically expanding epidemic:** from major urban cities and provincial capitals to smaller cities
- **Epidemic mostly concentrated among key populations at higher risk**

KEY FACTS

- Pakistan had an estimated 83 468 people living with HIV by the end of 2013, with 7568 PLHIV registered in 18 HIV centres by end of 2013.
- Out of these, 3211 adult PLHIV and 70 children were on ART.
- Looking at recent trends there has been a slight decrease in the number of PLHIV registered at HIV treatment centres and on ART.
- On average, in 2012-2013 there were 33 PLHIV initiated on ART per month from 40-45 reported in the 2012 GARPR.
- Relative to the estimated number of PLHIV in the country, the number of registered PLHIV within the health care system remains low.
- HIV treatment, care and support facilities are available through 18 HIV treatment centres, 5 paediatric AIDS centres, 16 VCCT and 11 prevention of parent to child transmission (PPTCT/PMTCT) sites. Under Global Fund Round 9 till now 11 CHBC sites have been established.
- Majority of the treatment, care and support facilities are confined to key cities.

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BACKGROUND

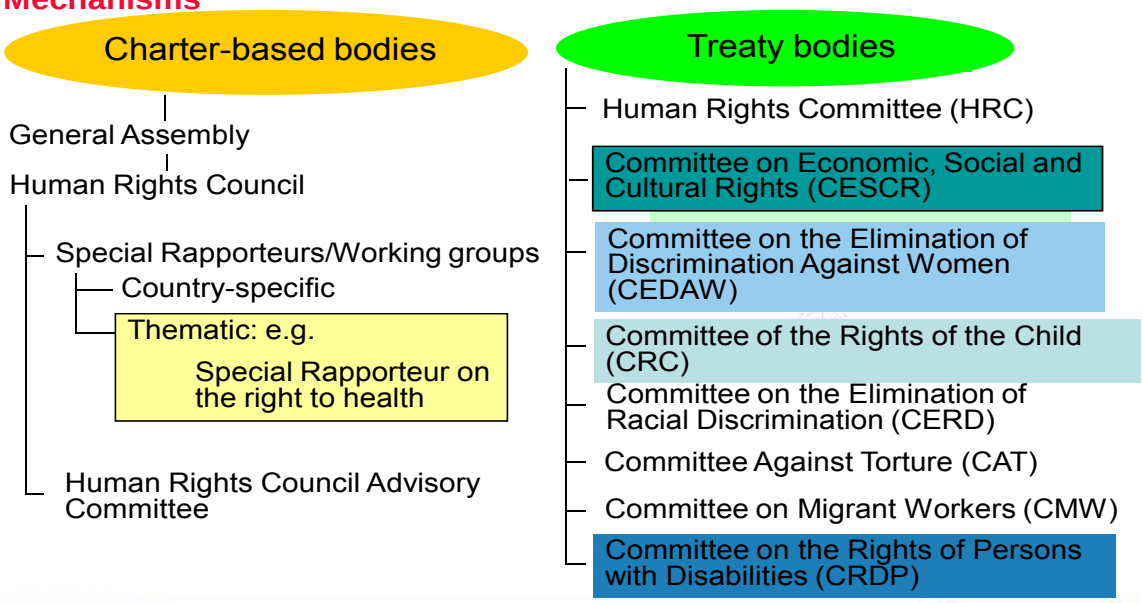
- Apart from scientific and medical issues, HIV epidemic has profound personal, social and legal impact across the world
- More than 30 years into the epidemic, HIV still carries a lot of heavy burden of stigma, discrimination and moral judgment
- PLHIV sometimes refused access to school, or denied employment
- Enforcement of laws prohibiting certain behaviors can affect the ability of key affected populations from accessing HIV prevention, care, treatment, care and support services
- HIV positive people have also turned to courts in case of human rights violations- and courts in different countries do protect and promote the equal rights of women and men for accessing the services

Different levels of Human Rights protection

- **National level**
  NHRIs
  National courts
- **Regional level**
  Regional institutions
- **International level**
  Human Rights Council
  Special Rapporteurs
  Treaty bodies

HRC

United Nations Human Rights Mechanisms



Universal Periodic Review (UPR)

- A peer-review mechanism- the human rights records of all 192 member states of the UN is reviewed once every 4 years (with 48 States reviewed each year) based on an objective, universal, genuine and non-selective manner.
- States declare what actions they have taken to improve the human rights situation in their countries and overcome challenges.
- Sharing of best practices around the world.

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- Sharing of best practices around the world.

Basic Requirements for Human Rights:

- Any society that is to protect human rights must have the following characteristics:
  - A *de jure* or free state in which the right to self-determination and rule of law exist.
  - A legal system for the protection of human rights.
  - Effective organized (existing within the framework of the state) or
  - unorganized guarantees.

Human Rights challenges.

Equality and freedom from discrimination are fundamental human rights, irrespective of sexual orientation, gender identity or because they are intersex.

However, injecting drug users, female sex workers, male sex workers, transgender, experience discrimination, harassment and hostility everyday.

We have a duty of care to ensure these human rights, particularly in health programs.

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STIGMA INDEX REPORTS 2010-2011

A majority of the PLHIVs knew of the organizations to contact in case of stigma and discrimination but unfortunately most of them never tried to get help from such organizations to resolve the issue of stigma and discrimination. Similarly a majority of those whose rights were abused never resorted to legal redressal mainly citing financial constraints.

Why?

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STIGMA INDEX REPORT

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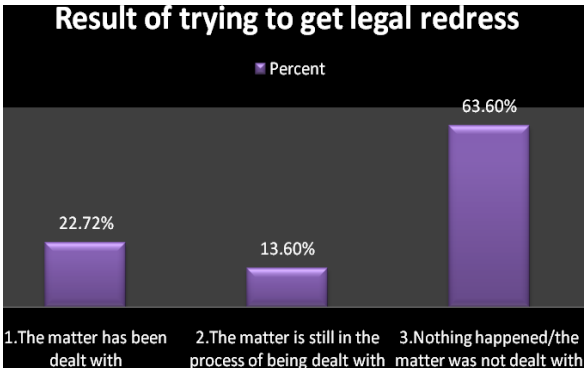
TRIED FOR LEGAL REDRESS IN CASE OF ABUSAL OF RIGHTS

- Out of the respondents whose rights were abused, 72% never tried to get leg redress for abusal of their rights. Out of all the respondents 63.6% replied that nothing happened and the matter was not dealt with, 22.7% replied that that the matter was dealt with and 13.6% replied that the matter is still in process of being dealt with.



Standard-setting at national level – legislation and litigation for protection against discrimination, etc.

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- From 1994 until present, many cases brought in national courts which challenge and win on HIV-related discrimination, relating to discrimination in employment, in armed services, in education, in housing, in health insurance
- Also in other areas, e.g. right to treatment, right to association, intellectual property rights
- Lead to legislative reform, jurisprudence

DISCRIMINATION COSTS LIVES

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- Evidence gathered and analysed clearly shows that an epidemic of discriminatory laws is costing lives, resulting in human rights violations and fuelling the spread of HIV.
- We have to change the laws "on the books" but also "on the streets" and if we don't we are wasting the vast amount of money that we are spending on responding to HIV.

Why the law matters?

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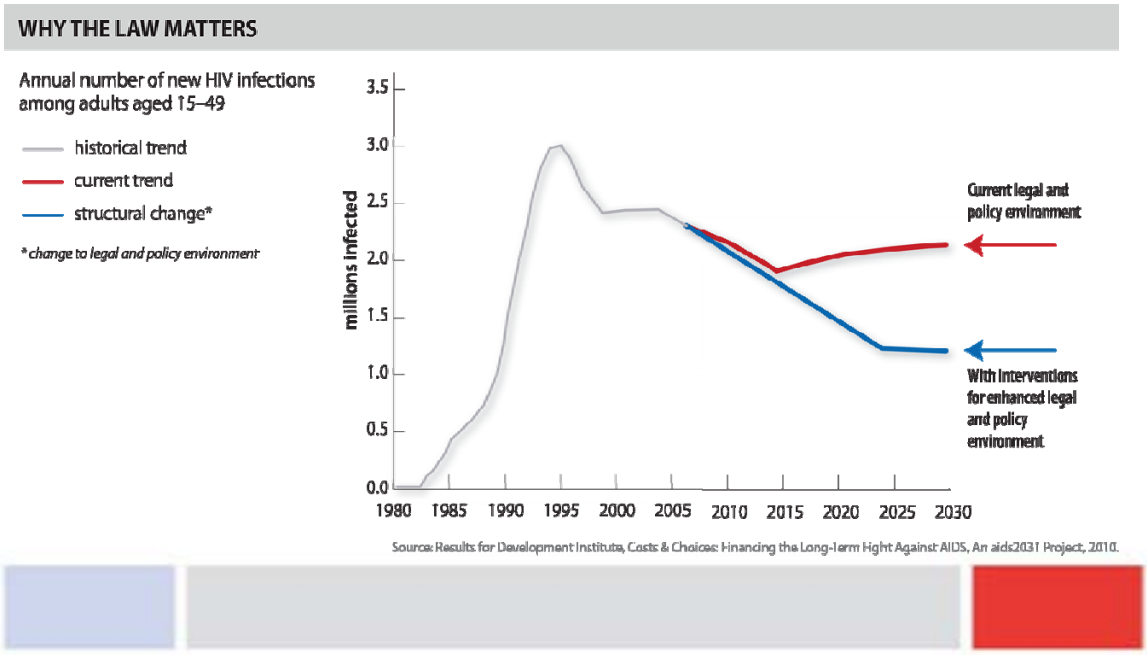

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JUDICIAL ACTIVISM

- The Supreme Court is developing its authority by practicing more pro-people activities that is accepting more human rights issues as representative suits. E.g.. Supreme Court Decree on Transgender
- Judicial activism is constructing the Pakistan's Supreme Court with progressive judicial approach and flexible interpretation of existing laws. Lawyers are getting oriented with human rights issues more than ever.
- However, the rights declared in the Constitution do not reflect all international human rights standards. The court is also in a position that allows it not to implement the rights, or laws, that is not permitted by constitutional provisions. So, the court is interpreting those in light of the references from different judgments from around the world.
- This is helping the Supreme Court to implement nearly all international human rights standards. It is demanding the active participation of judges and lawyers. Mostly, in order to deal with the issue from a human rights perspective, it is dependent on the personal orientation of judges and the political reality at the time.

THE ROLE OF JUDICIARY

- Promoting and protecting human rights is inextricably linked with promoting and protecting health, because human rights offer a societal-level framework for identifying and responding to the underlying social determinants of health
- By facilitating access to justice for people living with HIV, ensuring that court procedures are sensitive to and delivering evidence-informed and rights-based judicial decisions on HIV-related issues, members of the judiciary can challenge stigma, uphold human rights and dignity for all, and contribute to ending the HIV epidemic.

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ACCESS TO JUSTICE AND LEGAL EMPOWERMENT

- Government, lawyers' associations and funders should give priority to supporting access to justice and legal empowerment programmes for PLHIV and key populations.
- Legal aid services should be provided for PLHIV and key populations for complaints relating to discrimination, violence protection and other human rights violations.
- Support should be provided to 'know your rights' campaigns and community legal education.
- Support should be provided to peer-led advocacy initiatives, so that PLHIV and key populations can self-advocate their rights and negotiate resolution of complaints and protection of their rights in relation to health care services, police, and other bodies.
- Support should be provided to community-based HIV organizations to provide human rights advocacy services including advising clients of their human and legal rights, referring clients to relevant grievance bodies, collecting data on human rights issues and conducting advocacy campaigns for law and policy reform.
- Law and Justice Ministry and professional associations should include HIV-related legal and human rights issues in training of judges, magistrates and prosecutors.

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HIV AND LAW

Therefore:

- Getting the legal environment right is essential for addressing the social and structural inequalities which fuel HIV.
- Getting the legal environment right is essential for achieving an AIDS-free generation.

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Amendment or repeal of discriminatory / punitive laws.

Safeguards to prevent arbitrary or discriminatory enforcement of laws

Framing of laws to prevent discriminatory application of laws against PLHIV and key affected populations

FOCUS ON REMOVING STIGMA AND DISCRIMINATION

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THANKS !!

Role of Judiciary in protecting Human Rights

Presented by
Mr. Saghir Bukhari
Senior Programme Officer, ILO
ILO Country Office for Pakistan
Islamabad

Presentation outline

- Human Rights-Brief Introduction
- HR issues in Pakistan
- International and National Commitments
- Role of State
- Role of Judiciary

Human Rights-brief history

Religious ideas

Holy Quran,

Holy Bible,

Bhagwat Gita,

And many others

Written documents asserting individual rights,
- the Magna Carta (1215),
- the English Bill of Rights (1689),
-the French Declaration on the Rights of Man and Citizen (1789),
-the US Constitution and Bill of Rights (1791)

Efforts in the 19th century to prohibit the slave trade and to limit the horrors of war ; In 1919, ***International Labor Organization (ILO)*** established for Social Justice

On December 10, 1948, the ***Universal Declaration of Human Rights (UDHR)*** was adopted by the 56 members of the United Nations.

Human Rights-brief introduction

The rights that someone has simply because he or she is a human being & born into this world.

Core Principles:

- Human Dignity
- Equality
- Non-discrimination
- Universality
- Interdependency
- Indivisibility
- Inalienability
- Responsibilities

In short Human Rights are:

- **Universal** – everyone should enjoy human rights without discrimination as to sex, age, language, religion, or race
- **Inviolable** – human rights are an essential element of one's humanity. It cannot be violated unless determined by law and solely for the purpose of securing due recognition and respect for the rights of others and of meeting the just requirements of the general welfare, morality and public order in a democratic society
- **Interdependent-** certain rights cannot be sacrificed in favor of other rights because taken together, these rights make human beings whole.

Different groups of rights

According to nature:

- **Civil rights**- rights of individuals to be protected from arbitrary interference by government in their life liberty and security, freedom to travel, right to due process.
- **Political rights**- rights of individuals to interfere and participate in the affairs of the governments e.g. right to vote, stand for election, participate in state and social management, freedom of speech, press, assembly
- **Social, economic and cultural rights-progressive** demands of the people to improve their standard of living. e.g. right to education, work, healthy and working environment, practice of religion use of one's language and enjoy one's culture.

According to recipient:

- **Individual rights-** Rights accorded to individuals such as the rights to life, education, health, work. rights to suffrage: freedom of expression, freedom from torture, right to speedy trial
- **Collective/group rights** – are rights given to a specified vulnerable group which may be exercised because of one's membership to such community such as women's rights, children's rights, indigenous people's rights

Modern Protection of International Human Rights

The Preamble to the United Nations Charter states that the "Peoples of the United Nations" are determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."

Modern Protection of International Human Rights

In 1966, the General Assembly adopted:

- The Covenant on Civil and Political Rights (and its First Optional Protocol)
- The Covenant on Economic, Social and Cultural Rights

which, together with the UDHR, are now known as the International Bill of Human Rights

Modern Protection of International Human Rights

In addition to the International Bill of Human Rights, the United Nations has drafted and promulgated a number of human rights instruments covering:

- Rights in the world of work (ILO Conventions)
- genocide
- racial discrimination
- discrimination against women
- Refugee protection
- torture
- the rights of disabled persons
- the rights of the child

UN Human Rights Bodies

- Security Council
- General Assembly
- Economic and Social Council
- Commission on Human Rights
- Sub commission on the Promotion and Protection of Human Rights
- Commission on the Status of Women

UN Human Rights Bodies

- Commission on Crime Prevention and Criminal Justice
- International Court of Justice
- International Criminal Court
- Office of the High Commissioner for Human Rights (created by the General Assembly in 1993)

Mechanism for Human Rights at United Nations in Pakistan

- Human Rights is incorporated and mainstreamed – as one of the normative principles in One Programme II (OPII).
- Human Rights Task Force functions as advisory body to the Resident Coordinator and UN Country Team (heads of all UN agencies) on issues related to Human Rights

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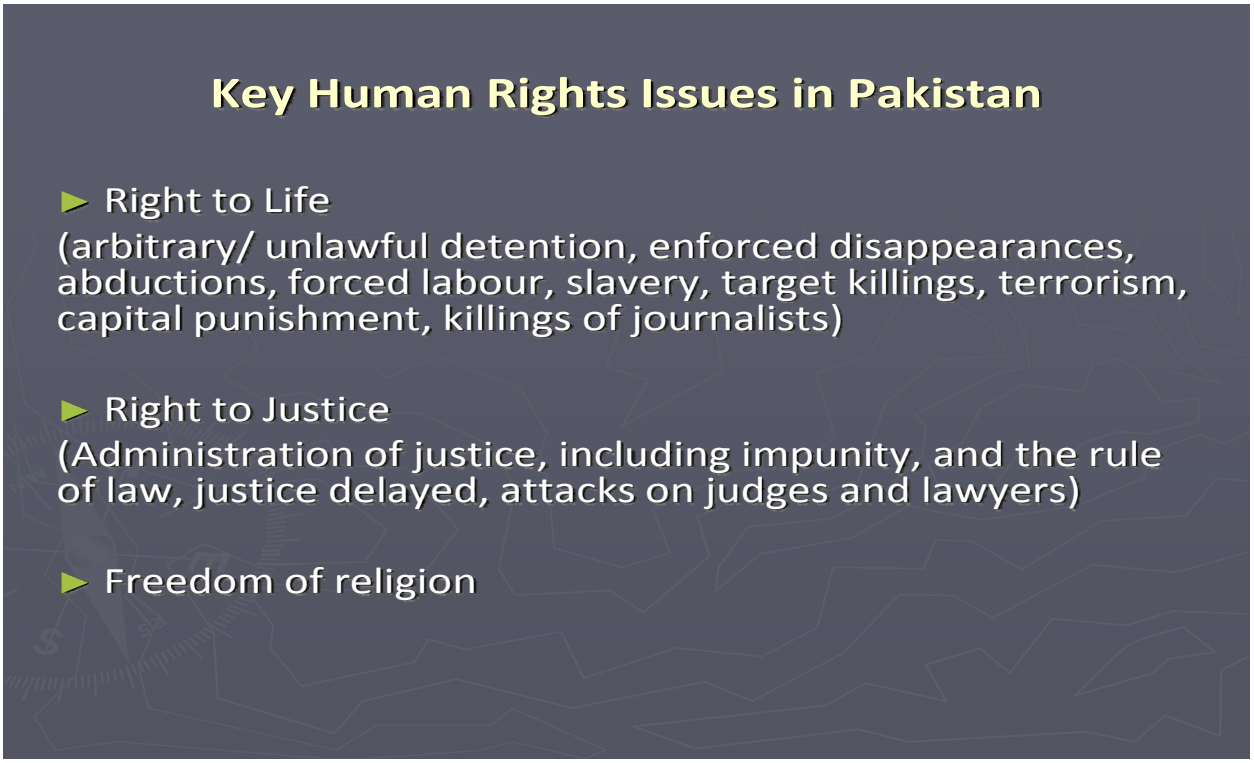


Pakistan seems to have very high number of forced disappearances as claimed by few groups (18 thousand as media reports refer to Mama Qadeer Baluch).

Human rights defenders (HRDs) remain subject to threats; harassment; legal and physical attacks; arbitrary arrests and detention; forced disappearance; torture and extra-judicial killing, by state and non-state actors.

Pakistan remains among dangerous countries for journalists (threats and attacks).

Pakistan has not ratified 'International Convention for the Protection of All Persons from Enforced Disappearance' despite thousands of incidents of missing persons and despite recommendations of the Working Group on Enforced Disappearances and also of Universal Periodic Review 2013.

In recent times, Pakistan has experienced numerous unfortunate incidents of attacks on minorities. --

With a mix of agriculture and industrial economy, the working environment is quite diverse with a range of issues from physical well being to protection from sexual or emotional exploitation.

Jurisdiction of judiciary and law enforcement such as in FATA.

Opportunities

- Constitutional and legal framework
- Important institutions (parliament, government, judiciary, public administration, human rights institutions such as human rights commission)
- Implementation of recommendations of UPR and other conventions
- Vibrant civil society and free media

Pakistan-national and international commitments

- Constitution of Pakistan
  - HR institutions
- International commitments (Treaties, Conventions, and commitments)

Article 6 – Right to Life (Article 9 of Constitution of Islamic Republic of Pakistan)
Article 7- Right not to be tortured (Article 14 of Constitution of Islamic Republic of Pakistan)
Article 8 (paragraphs I and 2) No one shall be held in slavery (Article 11 of Constitution of Islamic Republic of Pakistan)

Article 15 –Protection against Retrospective Punishment (Article 12 of Constitution of Islamic Republic of Pakistan)

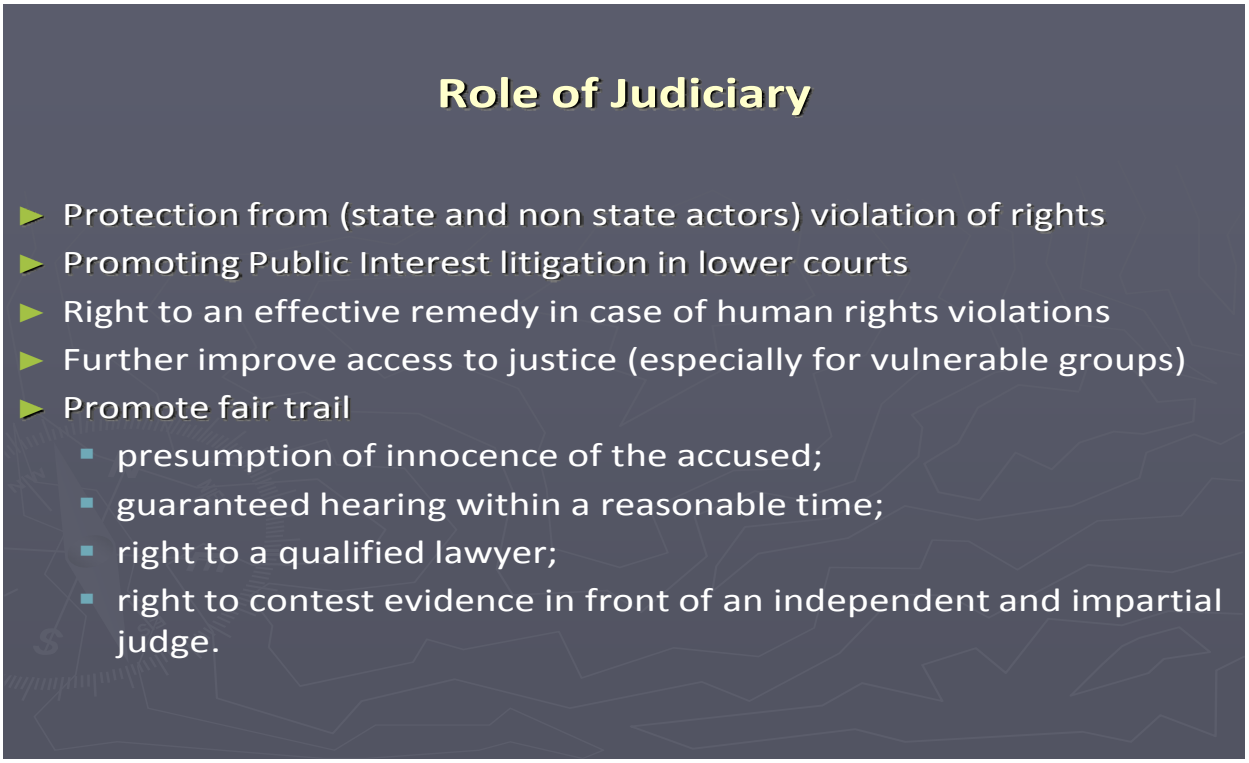
State Role-HR implementation

The **STATE** has the primary responsibility to:

- Respect – required refraining from interfering with the enjoyment of the right
- Protect – requires the prevention of violations of such rights by other persons or third party
- Fulfill – requires States to take appropriate legislative, administrative, budgetary, judicial and other measure towards the full realization of such rights.
- Not discriminate- in meeting its obligations.
- Show adequate progress-progress at a rate that show commitment.
- Encourage participation-people must be able to participate in realizing their rights
- Ensure effective remedy: there must be a remedy for violation of obligations+

Usual nature of human rights violation by the state

- Omission – the non interference or inaction of the state in any situation that requires action to respect, protect or fulfill the human rights of its citizen
- Commission/ breach- any act by the government in violation of any covenant or instrument on human rights which the State is committed to uphold
- Arbitrary derogation – violation due to arbitrary suspension of liberty (emergency rule, martial rules, authoritarian regime)



Though judiciary has been promoting social change through rights-friendly interpretations of the Constitution of Islamic Republic of Pakistan aimed at implementation of economic, civic, social and political rights. The increasingly positive attitude of the judiciary towards public interest litigation, overcoming earlier inhibitions which had constrained the role of the judiciary, has enabled the judiciary to play a dynamic role in facilitating and promoting social change.

There are a number of issues confronting the justice system including significant case backlogs and time delays for the litigants, limited provision of free legal aid for the poor, corruption and nepotism, and parallel legal systems running at the same time make it even more challenging in terms of uniform and equal access to justice. Rule of Law is extremely significant for growth and development in the country.

The Special Rapporteur on Independence of Judges and Lawyers urged the Pakistani Government to address several challenges to ensure the independence of the country's judicial system including the reported cases of serious threats and attacks of judges and lawyers, noting that physical security is an essential condition for all actors in the judicial system to be able to carry out their duties without hindrance or interference.

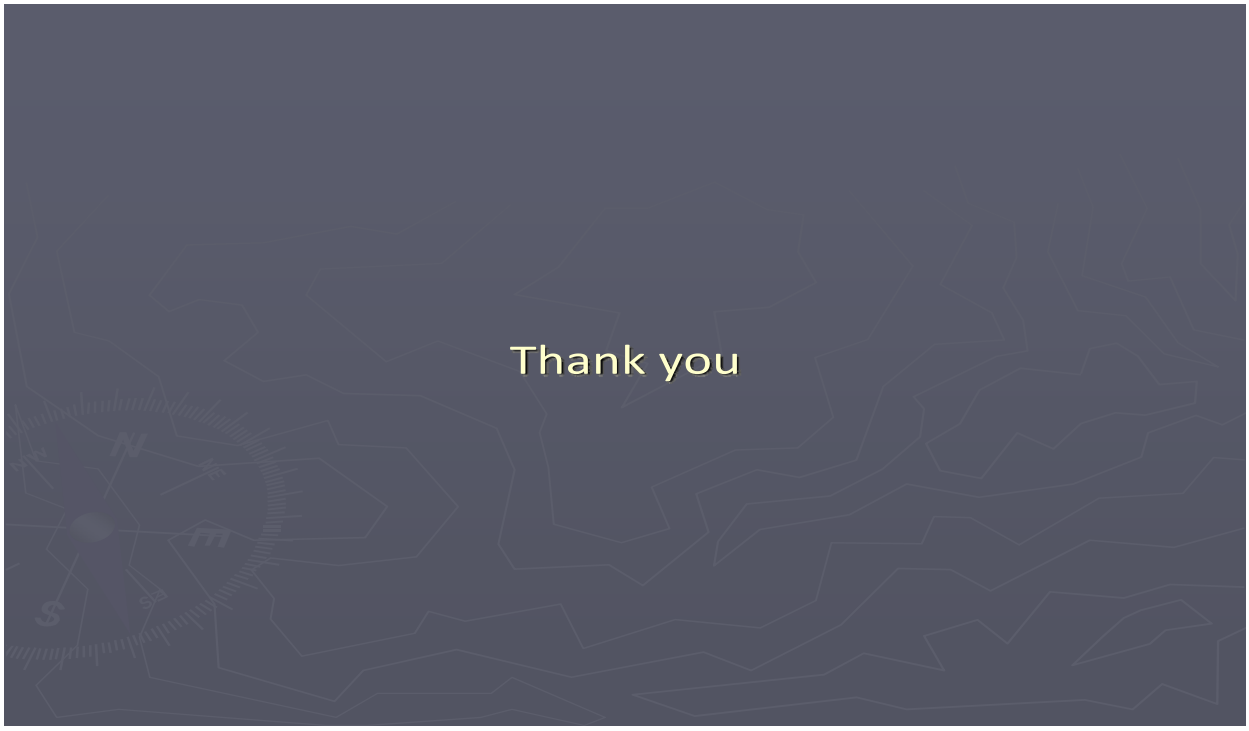
Pakistan has ratified International Covenant on Civil and Political Rights but never submitted report.

Role of Judiciary

- Judicial independence – continue to render justice impartially on the basis of law, thereby also protecting human rights and fundamental freedoms.
- Judicial conduct and integrity – further implement standards from subordinate judiciary and upwards.
- Constitutional frameworks – provide further guidance on provisions in Constitution if Islamic Republic of Pakistan to safeguard due process and judicial independence (provisions delineating the general structure of the judiciary, the courts, and the administration of justice; and/or providing for fair trial rights)

Role of Judiciary

- Promote right to equality (oversight of district courts)
- Continue Judicial activism – to broaden the scope of interpretation to expand individual rights in keeping with progressive social norms and/or societal expectations)
- Judicial training and legal education –further integrate HR in the judicial training and legal education to promote an independent judiciary and the application of human rights standards by courts.


Thank you

Appendix - C

Presentations/ text of papers presented in Group -III
"Access to Justice in the Context of Constitutional Requirements"

Access to Justice in the Context of Constitutional Requirements: A Constitutional Perspective

The Rt. Hon. Lord Justice Geoffery Charles Vos
Judge of the Court of Appeal of England and Wales

Introduction

1. I am honoured to have been invited to address this important Conference. I regard it as of the greatest moment that judges should exchange experiences and seek to learn from each other. I can certainly say that I have received the most marvelous welcome here in Islamabad, and feel that my visit has already been hugely worthwhile and enjoyable. I have already learned a great deal.

2. I want to talk this afternoon about the constitutional significance of access to justice. I do not pretend that the problems that we face in the UK are identical to those that are faced by judges here in Pakistan. But in some respects, the problems that we face in the UK pose a real and significant risk to the rule of law.

3. Lord Bingham famously defined the rule of law as requiring: "*that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts*".

4. Central to that formulation is the requirement that all persons shall be entitled to the benefit of laws that are administered by an open court process that takes place in public.

What are the factors that inhibit access to justice?

5. There are, however, several things that can prevent the citizens of any country from being practically able to take advantage of an open court process. One might list a few of the possible challenges as follows:-

   That no such open court process exists;

   That there are insufficient publicly available lawyers to make it possible for ordinary citizens to access that court process;

   That the costs of the open court process is prohibitive;

   That no adequate system of public funding of court proceedings exists;

   That delays in the court process are such that ultimately justice is denied;

   That judges or decision-makers are corrupt, so that justice is not ultimately achieved.

6. Both in the UK and in Pakistan, we are fortunate to have a constitutionally entrenched independent justice system staffed by some of the most truly independent judges in the world. That may not always make those judges popular, but fortunately judges do not seek popularity. They seek to administer justice and apply the law for the benefit of all citizens equally without fear or favour.

7. But access to justice does not, as I have already implied, depend only on independent judges being available. It also depends on citizens being practically able to have their disputes and grievances placed before them – whether the disputes in question are between private persons or between the citizen and the organs of the state.

Access to justice in the UK

8. It is well-known that in the UK, we have for many years had one of the most costly legal aid systems in the world. When I was called to the Bar – now nearly 40 years ago – legal aid was available for every kind of legal problem and court dispute. Impecuniosities were genuinely no bar to access to justice. Criminal legal aid was freely available at all court levels. Family legal aid was also widely provided. Civil legal aid

was available for housing matters, administrative law issues, clinical negligence claims, and actions against the police, immigration cases and many more. Moreover, at that time, the very best lawyers were all prepared to undertake legal aid cases within their fields.

9. But time has changed all that. Legal aid has been drastically restricted in scope and extent. Even criminal legal aid is not available for all defendants. Few family and children disputes are now covered, and civil legal aid is practically unavailable save in the most exceptional circumstances. Senior lawyers rarely undertake legal aid cases these days, because funding is hugely restricted. Instead, many act pro bono, but not enough do this to replicate the representation that was previously afforded to the less privileged sections of society – which are so often disproportionately affected by legal problems.

10. The absence of legal aid has led, of course, to an explosion of litigants acting in the courts in person. But more than that, it has slowed the court processes down, and meant that many grievances are simply not vindicated at all. Many judges harbour serious concerns about where it will all end.

11. In a speech to '*Justice'* in March this year, our new Lord Chief Justice Lord Thomas said this:-

> "*Our task is therefore to ensure that we uphold the rule of law by maintaining the fair and impartial administration of justice at a cost the State and litigants are prepared or able to meet. We can only do that by radically examining how we recast the justice system so that it is equally if not more efficient, and able to carry out its constitutional function*".

12. You will note that he has suggested, I think for the first time, that the cost of the fair and impartial administration of justice must be such that the "State and litigants are prepared or able to meet".

13. Thus we have reached a stage in the UK where a balance is necessary between the costs of justice and the availability of justice. Why has this happened?

14. It has happened, I think, because of our failure to react quickly enough to adapt our justice system to changing times. The system has become altogether too complex. Cases have become too lengthy and therefore too costly. In crime, technology and the availability or more and more IT and forensic evidence has been partially the cause. But we cannot turn the clock back – and we should not wish to.

15. Years ago, it was the photocopier that caused cases to become more complex. Now almost every communication can be retained and recovered to be argued about in complex litigation. This has allowed lawyers to become lost in a forest of trees, unable to see the wood. We must focus on the main point in any case. But this does not always happen, and judges do not always require it.

16. We should have seen some years ago that it was necessary, sometimes, ruthlessly to control the length of legal proceedings. We are generally good in the UK at avoiding excessive delays, but not at keeping the length and cost of proceedings within bounds.

17. I would interpose this. I sit in the Court of Appeal in England. Many of you will have had cause to look at English CA decisions from the 19th century. Rarely, was one longer than 3 or 4 pages. Now they frequently run to 40, 50 or more pages, sometimes far more. We cannot expect justice at an acceptable cost or to be delivered within an acceptable time frame, if we regard ourselves as free to deal with every point, however insignificant, at inordinate length.

18. In my view, justice must be proportionate. Proportionality is the key to a successful justice system – one that has the confidence of its users and is not affected by the blights of delay and excessive cost.

19. Lord Neuberger, the President of our Supreme Court said in a recent BBC interview:-

> "*My worry is the removal of legal aid for people to get advice about law and get representation in court will start to undermine the rule of law because people will feel like the government isn't giving them access to justice in all sorts of cases. And that will*

> *either lead to frustration and lack of confidence in the system, or it will lead to people taking the law into their own hands*".

20. The idea of one of the most senior judges in the UK suggesting that people may "take justice into their own hands" is a novel one. I think he meant only that citizens would resort to other means of dispute resolution, apart from the courts, but even that is a worrying development; particularly if it is forced upon the citizen as a result of unaffordable legal costs, an absence of legal aid, or court delays.

21. Of course, that does not mean that alternative dispute resolution ("ADR") is a bad thing. It is the epitome of proportionality, and therefore, an increasingly vital element in a modern functioning justice system. It needs the fully committed support of the judiciary and the courts to succeed. But that might need to be the subject of another talk.

22. To return to the point here, if the citizens of our countries are not, in practice, easily able to vindicate their legal rights, society is at risk. To ensure that this can occur, judges, lawyers and court staff must move with the times. We cannot continue to operate the same justice system that prevailed years ago. We cannot allow imperceptible changes to occur without review: like the example I gave a moment ago, of a move from shorter to longer judgments.

23. In this regard, we may well have something to learn from the way you do things here in Pakistan. Cases are shorter and less elaborate, and ordinary citizens have access to the highest court in the land.

Conclusions

24. The consequences of a failing justice system are severe. And even the best regulated of European societies have real problems with access to justice. In continental Europe, the main problems are delay and uncontrolled multiple appeals. In the UK, it is cost and complexity.

25. In my view, the most important thing is to keep a close eye on proportionality so as to ensure that our procedures do not outgrow their importance, and that cases are disposed quickly and cheaply. That gives both citizens and governments the best chance of being able to fund court processes that deliver effective justice. I think we would ignore these problems at our peril.

Access to Justice in the Context of Constitutional Requirements: A Constitutional Perspective

Mr. Amarjit Singh Chandhiok [1]
Senior Advocate
Supreme Court of India

It has indeed been a pleasure to participate in this Conference. At the outset itself, I sincerely thank the organizers and the Hon'ble Chief Justice of Pakistan. Particularly, have to mention the name of Hon'ble Mr. Justice Mian Saqib Nisar, whose affectionate invite, in any event, was hard to decline.

The topic, viz., Access to Justice, will never lose its relevance as long as there will be inequality and deficiencies in the system of governance and administration of justice. It is not necessary before this august gathering and galaxy of jurists to deal with the subject strictly from the precincts of judicial precedents, but one needs to look at it in the context of social and political relevance. Though justice cannot be done to a topic like this, which is heavier even for a thesis, in a small presentation like this, yet a ripple is small and sweet, even if it is the miniature of a wave.

I may recall the words of Hon'ble Mr. Justice Krishna Iyer, a legend of our times itself, about the law of human rights:

> *"Large strides have been made in strengthening the inalienable rights of people, individually and collectively, and, alas, terrible reverses have been suffered by the billions of humans in sustainable development, rights to life and peace and development, to freedom from torture and other fundamental immunities and protective armours without which the boast of human rights vanishes into illusory euphemisms."*

He goes on to add:

> "Indeed, the world is becoming a jungle with mini-wars and bleeding battles and corporate cannibalism with vast economic empires, exploiting billions of humans and developing nations, with a super sovereignty and profit oriented power to grab markets, reducing huge human numbers to *Unpeople* status."[2]

Though he said this in 1999, it is apt even now.

> Access to justice means that the citizenry are able to have their voice heard, exercise their rights, challenge discrimination or hold decision makers answerable or say, accountable. Access to justice is said to be a right vested in every citizen and is a necessary complement of administration of justice. The absence of legislation or legislative silence in regard to such access will not jeopardize that right[3]. In the end, they are able to get the wrongs remedied. The poor and marginalized are too often denied the power or even opportunity to seek remedies in a fair justice system. Effective, responsive, fair and accessible justice system is the cornerstone of democratic governance. Understanding of law from the standpoint of poor people is an unexplored area of analysis and understanding. What exactly do law and justice mean to the poor and the disadvantaged? 'Justice' under the Constitution has strong social, political and economic aspects.[4] In any country where poverty and illiteracy afflict and fetter majority of the population, it will be reasonable to expect that substantive justice to them could mean very little improvement in their lives. How can they fight injustice in their lives - for sheer survival in many cases? How effective has the developed legal system been in their efforts? The truth is that these kinds of questions have never been closely understood by the best of legal luminaries and even the intellectual fraternity both in developed and developing countries. Poverty of law is

[1] Senior Advocate, New Delhi, India, Former Additional Solicitor General of India, Principal Judicial Counsel,European Union Commission
[2] The Dialectics and Dynamics of Human Rights in India, V.R. Krishna Iyer, p 10
[3] (2006) 1 SCC 442 – TashiDelek Gaming Solution v. State of Karnataka
[4] Preamble to the Constitution of India

> one of the reasons behind persistence of poverty and lack of substantive justice to the most desperate clients of the legal system.[5]

Rule of law, access to justice and legal empowerment together contribute to an enabling environment for achieving economic growth and help create a safe and secure environment. Rule of law is inextricably intertwined with the dispensation of justice. In the words of Tom Bingham, it is:

"..All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of law publicly made, taking effect (generally) in the future and publicly administered in the courts."[6]

To ensure access to justice, the first and foremost constitutional requirement is rule of law, which is the foundation for justice and security. Not only the rule of law, but respect for the rule of law has to be there, in letter and spirit. In a country with dictatorship, the dictator's word is law, and may be its Constitution even. There, the rule of law is meaningless. Constitution is there, but not constitutionalism! Constitutionalism is the antithesis of arbitrary powers or say, despotism[7]. Constitutions originate from a belief in limited government. The Preamble of the Indian Constitution affirms securing economic, political and social justice for all citizens of India. It also aims to secure equality of status and opportunity so as to ensure the dignity of people. The right of citizens and the obligation of the State in this regard are well documented in the Constitution of India, in chapters dealing with the Fundamental Rights and Directive Principles of State Policy.[8]

Elements of constitutionalism are as old as the political organization of human societies but modern constitutionalism and its human rights jurisprudence have emerged and evolved as a worldwide system of norms in the last few decades. The evolutionary process of constitutionalism has been a consistent, continuous and purposeful process with a lot of human experience and striving, turning the whole process into a mighty modern force. The might of that force bears a universally shared fundamental sense of 'right' in balancing freedom of the individual and the power of the State. If we look back, we can see that once the US Supreme Court had observed that Mr. Scott, being a Negro and a slave, could not sue. This was denounced by Abraham Lincoln, then a lawyer. Conditions prevailed, rather than consideration!

According to the United Nations Secretary-General (A/59/2005),

> *"The protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves. They are also essential for a world of justice, opportunity and stability."*

More countries including Pakistan, than ever before, are working to build democratic governance. Their challenge is to develop institutions and processes that are more responsive to the needs of ordinary citizens, including the poor, and that promote development.

People, together within nations and around the world, are fostering partnerships and sharing ways to promote participation, accountability and effectiveness at all levels. We aim to build effective and capable states that are accountable and transparent, inclusive and responsive — from elections to participation of women and the poor.

Without an independent judiciary and a free press, a functioning democracy is impossible. However, above both must tower the supremacy of the rule of law. Many of us would not have forgotten the incident that took place in 1999. The Hon'ble Supreme Court had to remain dumb and deaf. Having packed off the elected prime minister and the president of the country, the message to the Court was clear. Apparently, judges like Mr. Justice Dorab Patel, who had the courage to pronounce Mr. Bhutto not guilty and refused to be a party to the sentence of death that Gen. Zia wanted, were obviously not around. Democracy was dead and might was right. The Apex Court held that seizure of power by the General's Army was 'legal.' The doctrine of state necessity was brought into play. One of the Hon'ble Judges, speaking for the court, went on to hold that *"state institutions were being destroyed"* and *"misrule"* had created conditions for a radical transformation. One wonders on what basis of evidence or

[5] Judicial Reforms in India, Ed. Arnab Kumar Hazara and BibekDebroy, p 86
[6] Tom Bingham, The Rule of Law, p 37
[7] M.P. Jain, Indian Constitutional Law, Vol. I, p 8.
[8] Part III and IV of the Constitution of India

jurisprudence their Lordships came to these conclusions. The General Sahib was mistaken if he assumed that the verdict lent legitimacy to the events of October 12, 1999; it just meant that the judges felt that they had no choice. This is to show that when rule of law does not exist in letter and spirit, the consequences can be quite dear. In such a situation, not to speak of access, forget justice itself! Justice too, like truth, has that eternal inherent quality - as truth cannot be hidden forever, justice cannot be kept stifled forever. This is clear from the aftermath. The Constitution was restored with its full dignity through judicial activism and the involvement of the Bar and I think the landmark judgment was pronounced by Hon'ble Mr. Justice Ramday. And now, the situation is moving towards a glorious period where rule of law will have its right place. We must salute Justice Ramday and the Bar which took the initiative and sustained the pain, as a result of the historic movement that lasted for about two years. Here access to justice comes with a struggle.

Despite the Constitution's promise of achieving liberty, equality and justice for all, the poor remain largely voiceless and deprived of their entitlements in society. The conduct of governance, its mystical procedures, obscure rules, lack of transparency and the uncaring attitude of functionaries have resulted in distancing the disadvantaged and the poor from the mainstream.

When we think of access to justice, we will have to think of the common people's understanding and their views about accessing justice. It is an admitted fact that when the formal system for delivering justice does not meet the needs of the disadvantaged, they resort to informal and alternative mechanisms to have their grievances redressed. This lack of understanding and deprivation go hand in hand. Though the poor man lives with a rich assortment of rights, its access to him remains elusive or unknown. This paradox exists because through an activist interpretation of the Constitution, the fundamental rights of a common man have been growing in recent years, even while not making any significant impact on his life. This has resulted in a regime of substantial rights with slow remedies, with an obvious implication on limiting access to justice. Throughout history, poor people have been suffering the wrongs. Not only that they have failed to enforce even the most basic rights that have come their way, especially after Independence, but even where the Court has responded to the concerns of the needy and the marginalized, the compliance of its directions remains a problem. The central problem is thus, even when a right exists, actual remedy stays elusive.

The Constitution of India through its 73rd Amendment paved way for a progressive legal and administrative regime for tribal areas to usher in genuine tribal self-rule. The framework was laid down by Panchayat (Extension to Scheduled Areas) Act, a law enacted in pursuance of the Constitutional mandate in 1996. All ten States with tribal areas were to adopt this law within one year. It empowered villages to protect community resources, control social sector functionaries, own minor forest produce, manage water bodies, give recommendations for mining leases, be consulted for land acquisition, enforce prohibition, identify beneficiaries for poverty alleviation and other government programmers and have a decisive say in all development projects in villages. Despite such provisions, the plight of forest dwellers and villagers in remote areas is pathetic. They go perpetually unheard, with their problems verily unseen. A very large number of people living near the forests and dependent on them are among the poorest, with forest produces forming their means of livelihood. Whether the legal regime governing forest preservation and use reflect this understanding is still debatable. A major concern is whether traditional rights of access and customary rights of villages in the vicinity of the Protected Areas, has been duly recognized by law or not?

From tribal poor when it comes to the urban poor, mostly constituted by the slum and pavement dwellers, their image before the higher judiciary has taken a beating over the years. In the early and mid-eighties, when right to livelihood was being seen as a fundamental right, slums were seen by as a reflection of structural social inequality in the country and that 'humbler the dwelling, greater the suffering and more intense the loss.' Fifteen years following such verdicts, the Hon'ble Supreme Court in early 2000 had a completely different view on 'encroachment' by slum dwellers.

Justice, which is a value laden concept, is understood differently by different segments of the disadvantaged groups. What we have to invent and implement are strategies to overcome barriers in achieving justice. As long as the depraved masses are unable to struggle and create their own charter, the saddest part is that no one is going to do that for them, save some civil society organizations in articulating their needs, which of course, can create a better understanding of local realities.

An essential foundation of good governance is, needless to say, an effective and efficient judiciary.

India and Nepal claim to be governed by statutory law, common law and customary law; Pakistan and Bangladesh in addition to these three components are governed by overtones of religious (Islamic) law; in Afghanistan the legal system itself is based on Islamic Law with variations adapted from American and British Law while Sri Lanka's legal system is a medley of Roman Dutch civil law, customary law and common law. All these factors play a great deal in allowing access to justice.

It is an undisputed fact that the Indian judiciary is held in high esteem in many of the developing and developed countries. The judgments delivered by Indian High Courts and its Supreme Court, are often quoted by jurists and judges around the world for their quality.

Even of the educated are unaware of how to access justice. On one side we have convoluting systems, procedures and precedents. And, on the other lies the phenomenon of writing a complaint on a post card to the Chief Justice becoming a writ petition! Here comes transformation of administration of justice through constitutional litigation, which has become part of contemporary Indian legal history.

Access to justice becomes complete when the law affords adequate protection of fundamental rights, which *inter alia*, cover the right to life, right to respect for private and family life, freedom of thought, conscience, religion and expression, prohibition of torture, prohibition of forced labour, ensures right to liberty and security, right to a fair trial, no punishment without law, etc. When justice becomes inaccessible or otherwise denied, the situation becomes grave. Look at the story of dispossessed tribes, who were not given the promised compensation.

We live in times with the best of justice delivery systems. But we live in times when man's inhumanity towards man is being perpetrated with maximum impunity.

The worst happens when it comes to accessing justice in times of terror. It is universal that police witnesses were often the only witnesses and the court opines that *"the police have no reason to lie."* The witnesses brought to ban any organization under the Unlawful Activities (Prevention) Act, 1967, are best examples for this. Transparency, natural justice and due process simply vanish. Instead, confusion, ambiguity, incomprehension, panic and frustration take seat. And when it comes to custodial torture, which is rampant, neither access to justice nor justice is there. Despite holding *'rights awareness workshops'* with vulnerable communities and other empowering activities, the situation seldom changes. Human rights violations, obviously, go unpunished. Even if access is there, the legal framework does not create mechanisms for investigation and redress. Because there is no police to police the police! The injustice of the justice system!

The Hon'ble Supreme Court of India has repeatedly emphasised that right to a fair trial and access to justice are basic fundamental human rights. It has specifically emphasised that the word "justice" in the term *"access to justice"* has to be understood in a comprehensive sense including entry to as well as use of the justice system and has no statutory definition. Accesses to justice mean unimpeded access to justice.

Sometimes, the State itself will make access to justice a difficult process. An example is undue enhancement of court fee by the State. Access to justice is a legal principle underpinning every justice system. In the larger context, access to justice means access to courts and rule of law, and the right to a fair trial. Article 14.1 of the International Covenant on Civil and Political Rights, to which India acceded, states that:

> *"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…"*

Access to justice is in no way a lesser right than that of free expression and the right to a fair trial with all necessity imports the right of access to the Court an absolute right (Justice Laws).

In providing access to justice, the Legal Aid set up by the Government can play a vital role and members of the Bar too can take an active part. Availability of legal aid to the disadvantaged group and solution to denial of basic rights of access to justice has to be a main concern here. Access to justice covers in its wings the right to life as well.

Once access is gained, the Hon'ble Court will be seized of the matter and justice will be done, though it may take time because of the procedural latches. In the recent past, the father of a boy who is afflicted with a life-threatening disease and could not afford the costly treatment approached the High Court through a writ petition. The court took notice of the matter and took a very compassionate view, because of which the boy was able to get help.

The court also takes *suo moto* cognizance of the matter. There are many cases in which public interest has been safeguarded by the Court *suo moto*.

The law provides for expeditious and fair trial, but to attain that, the court alone cannot fulfill all the requirements. The other machineries have to act in the same spirit, primarily, the police. It has to be reasonable and humane in its approach and custodial treatment. The element of cost of litigation which includes the fee of lawyers etc., need to be taken into consideration. Instead of winning or losing, all concerned must aim to reach the truth.

Above all, members of the Bar should not reduce themselves to only 'court room professionals.' The basic fact is that they are the finest kind of social engineers. Bar Associations and Bar Councils must remember that they should never remain silent when injustice is perpetrated.

By glorifying justice or access to justice, we will not attain anything. So is the matter of denouncing the same. The stark reality of dispensing justice has to be seen in a wider social and political perspective. Apart from proper statutes and international ratifications, all, educated, civilized and perfectly humane minds will have to man the entire process, machinery and the system. Article 1 of the Universal Declaration of Human Rights states that:

> *"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."*

This means there has to be a value-based approach. Not just that, but a value based living, fortified by tolerance and brotherhood. If that is there, perhaps justice will be present in everything we do and we will not be reduced as consumers of justice! highly philosophical indeed!

Thank you very much.

Access and Justice for the Poor[1]

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"Equal justice under law" is one of America's most proudly proclaimed and widely violated legal principles". (Deborah L. Rhode[3])

Access to justice is a wide ranging concept. It implies equal access for all irrespective of class, religion, sex or race. It implies access to all kinds of justice, namely, legal, economic, political, social and cultural justice. It implies equal access to all kinds of state and societal institutions for getting justice, namely, courts, tribunals, government institutions, societal forums etc.

The specific focus of this paper is on the relationship between access to justice and poverty and this paper raises the conceptual question whether "*equal justice is what we put on courthouse doors, not what happens inside it"*[4]. Does equal justice under the law for the poor only exist as a constitutional principle and not as court room reality? This is because as Cappelleti and Garth, rightly point out that possession of rights without effective mechanisms for the vindication would be meaningless[5]. Or the ironic statement of Anatole France's that "*Another source of pride to be a citizen! for the poor it consists in…laboring under the majestic equality of the laws, which prohibit the rich and the poor alike from sleeping under bridges, begging in the streets and stealing bread",* reminds us that the perfect equality of a citizenship that ignores the material circumstances of particular citizens, is a recipe for actual inequality[6].

In exploring this relationship between access to justice and poverty, this paper concentrates on only one aspect of this relationship. This paper raises the general question as to whether economic inequalities in Pakistan deny the majority of the people of Pakistan from having equal access to the courts of justice on the basis of class inequalities. It raises the specific question as to whether the absence of the right to effective legal aid, or right to be represented by a competent counsel, due to economic inequalities, leads to lack of equal and effective access to the courts of justice for the poor. Therefore, the issue of equal access to the courts of justice is linked with free legal aid, or being represented by effective counsel, irrespective of one's economic background and the lack of equal access to the courts of justice becomes linked with the denial of being represented by effective counsel because of the absence of legal aid due to economic inequality.

The Problem: Various aspects

Access to the courts of justice involves access to both civil and criminal courts, from the initiation of the case in the court of first instance and to the court of last instance, at the expense of the state, and/or as provided by public-private organizations. Therefore, any effective state, or private, legal aid system for the poor and the powerless, who can't afford an effective lawyer, would involve civil and criminal legal aid, at all stages of the court proceedings.

Of course, without denying the importance of civil proceedings, the importance of legal aid for the poor and powerless in criminal matters, especially offences involving imprisonment of various kinds, imprisonment for life or death sentence, is of foremost importance. For the poor and powerless not to be represented by counsels in such cases is the gravest example of the violation of access to justice.

Moreover, in the abovementioned criminal matters, for the poor and powerless to be represented by counsel, who are not effective due to their lack of competence, would also be a violation of access of justice. In other words, if

[1] I am grateful to Amna Usman, Barrister-at-Law, and Waseem Iqbal, Advocate, for assisting me in writing this paper.
[2] Advocate, High Courts of Pakistan.
[3] Deborah L. Rhode, *Access to Justice,* Oxford University Press, 2004, P.3.
[4] Deborah L. Rhode, *Access to Justice,* Oxford University Press, 2004, P.16
[5] M. Cappelletti and Garth (Eds.), '*Access to Justice – The Worldwide Movement to Make Rights Effective: A General Report ', Access to Justice – A World Survey*, Vol 1, Sijthoff and Noordhoff - Alphanaanderijan, 1978. P.5, 8-9.
[6] Daniel M. Brinks, *The Judicial Response to Police Killings in Latin America,* Cambridge University Press, 2008.

even in America, less than 1 percent of lawyers are in legal aid practice[7], it is reasonable to presume that low professional fees paid to pauper advocates appointed by the court is hardly going to attract the most competent advocates[8]. Therefore, access to justice is guaranteed not merely by the presence of a counsel but by a competent counsel. The US Supreme Court captured this issue by observing that *"there can be no equal justice where the kind of trial a man gets depends on the amount of money he has"*[9].

In addition to the above, in the discussion of free legal aid to the economically poor accused in criminal cases, what should not be forgotten is that free legal aid is also the need of the economically poor victims of crimes pursuing their cases against the perpetrators of crime e.g. rape victims, family members of murder victims, victims of religious, ethnic and terrorist violence etc.

Also, in cases involving large scale violation of fundamental and human rights of a large class of people, the importance of free legal aid cannot also be underestimated for the enforcement of such fundamental and human rights of a large class of people, who may not even be aware of their legal remedies, let alone have legal resources to rectify such violations. Therefore, the connection between free Legal Aid and Public Interest Litigation initiated by third parties for the enforcement of such fundamental and human rights of a large class of people.

Legal Aid as a Constitutional and Statutory Right under Pakistani Law

In an obvious reference to the provision of Legal Aid by the State, Article 37(d) *('Principles of Policy')* of the Constitution, 1973, states that the "State shall ensure *inexpensive* and expeditious justice" [Italics added]. But Principles of Policy are not enforceable nor are they fundamental rights.

Article 25 of the Constitution contains the equal protection of law, or equal justice under the law clause, and Article 4 of the Constitution also contains a different version of the equal protection of the law clause. Access to justice for all is an intrinsic part of the equal justice under the law and equal protection of law clauses.

Article 9 of the Constitution envisages that the right to life includes the access to justice for all[10], or equal justice under the law.

Article 10 of the Constitution recognizes the right to consult and be defended by a legal practitioner of his choice.

Article 10A of the Constitution guarantees a fair trial, which fair trial must include access to justice for all.

Is the absence of free legal aid for the poor, a violation of the abovementioned equal justice under the law, equal protection of law, right to life, right to legal practitioner of his choice and right to fair trial or in other words, is it a violation of the access to justice concept? In one of the rare judgments under Pakistani law which has explored this relationship between access to justice and free legal aid in the context of criminal trials, Justice Rahmat Hussain Jafferi (as he was then), in the judgment reported as ***Faisal Versus The State***[11], holds as follows:

(a) On the issue of access to justice for all:

> *"right of 'access to justice to all' is a well-recognized and invariable right enshrined in Article 9 of the Constitution….The right to access to justice includes…..the right to have a fair and proper trial".*

(b) On the connection between fair trial and right to counsel:

> *"The problem arises to accused persons who are poor, pauper and cannot engage a counsel to represent them in a Court of law in criminal proceedings……it has become essential that a fair trial cannot be visualized without an accused being represented by a counsel of his choice or by a counsel on State expense….a trial and proceedings without a counsel cannot be called a fair trial and proceedings".*

[7] Deborah L. Rhode, *Access to Justice,* Oxford University Press, 2004, P.4.
[8] Under Order XXII, Rule 7, Supreme Court Rules, 1980, a court appointed lawyer is normally paid Rs.6000.
[9] 351 U.S. 12 (1956).
[10] PLD 2007 Karachi 544 at 549(F).
[11] PLD 2007 Karachi 544 at 549, 553-554.

(c) On the connections between fair trial, right to counsel and state provision of legal aid:

> *"Under the Constitution, it is the duty of the State to protect, respect, safeguard, ensure and facilitate the exercise of fundamental rights, therefore, the State is duty-bound to provide assistance to accused persons who are poor and indigent…….the accused from the very stage of his arrest till final disposal of the case is required to be defended or represented by a legal expert viz advocate if he is poor, indigent or pauper and the State is responsible to provide such assistance to him on State expense".*

(d) On a Free Legal Aid system:

> *"We are aware of the fact that presently no scheme to deal with the above problem is under consideration with the Government or any adequate arrangements are available to cater the requirements of such poor accused persons. We hope and expect that Government would give very serious consideration to prepare and implement on urgent basis a scheme in respect of providing free legal assistance to poor, indigent or incommunicado accused persons".*

Justice Rahmat Hussain Jafferi (as he was then), in the abovementioned judgment, goes on to give directions regarding a temporary free legal aid system in Sindh until the State develops its own free legal aid system.

The above constitutional principles of free legal aid through a right to counsel is also incorporated under various non-constitutional legal provisions e.g section 340, Cr.P.C., Order XXII, Rule 7 & Order XXIII, Rule 6, Supreme Court Rules, 1980, Rule 34, Sindh Chief Courts Rules (A.S.), Chapter VII, Rule 6, Sindh Court Criminal Circulars, and Chapter 24, Part C, Volume III, Instructions to Criminal Courts, Rules and Orders of the Lahore High Court, Lahore. But the aforementioned non-constitutional legal provisions have been interpreted as limiting the provisions of free legal aid to mainly capital punishment cases[12].

The insertion of a specific fair trial fundamental right, under Article 10A of the Constitution, has reinforced the above connection between fair trial and access to justice but it has two further fundamental implications. Firstly, if fair trial must include free legal aid for the poor then the right to fair trial has been extended to all criminal charges and not simply to capital punishment cases. Secondly, the right to fair trial is not only limited to criminal charges and cases but also to the determination of civil rights. So, has Article 10A now created the scope for a right to free legal aid for the poor in civil cases also.

Moreover, despite the abovementioned directions of the Hon'ble Sindh High Court in the *Faisal Versus The State*[13] to the State to create a free legal aid system, only two failed attempts have been made by the State and Bar Councils for this purpose. Firstly, *Public Defender and Legal Aid Office Ordinance, 2009*, which created State sponsored legal aid system but has lapsed as an Ordinance. Secondly, *the Pakistan Bar Council Free Legal Aid Rules, 1999*, which also created a free legal aid system for limited types of cases but there is no evidence to show that it has been effectively implemented.

But the judicial interpretation neither of the abovementioned constitutional provisions nor of non-constitutional legal provisions, deal with three critically important issues. Firstly, the right to be represented by counsel must include the right to be represented by a competent counsel. The importance of competence of the counsel is critical especially in cases involving capital punishment. Justice Ruth Bader of the US Supreme Court observed that she has *"yet to see a death case…..in which the defendant was well represented at trial. People who are well-represented do not get the death penalty"*[14]. And Stephen B. Bright captures this injustice in the title of his famous article on the death penalty i.e. *"Counsel for the Poor: The Death Penalty Not for the Worse Crime but for the Worst Lawyer"*[15].

[12] PLD 1987 Lahore 312.
[13] PLD 2007 Karachi 544.
[14] Quoted in Stephen B. Bright, *Capital Punishment: Accelerating the Dance with Death in the Rehnquist Court: Judicial Activism on the Right*, New York: Hill & Wang, 2002, P.89-90.
[15] 103 Yale Law Journal 1835 (1994).

Secondly, free legal aid for the economically poor victims of crimes pursuing their cases against the perpetrators of crime. For example, can any economically poor rape victim ever imagine to pursue a rape case without free legal aid, which lasts between 5 to 10 years, dislocates the family physically and economically and leads to counter cases being filed against the victim and her family.

Thirdly, free legal aid for pursuing legal proceedings, like Public Interest Litigation, for the enforcement of human and fundamental rights for a large class of people. For recent examples, on a Public Interest Litigation Petition, a Division Bench of the Hon'ble Sindh High Court, applying the principles of constitutional torts, granted compensation to families of around 270 victims and to the injured of the Baldia Factory Fire Incident[16], through a judicially formed Commission, whereas the normal tort litigation would have lasted for over a decade, which the poor could neither pursue nor afford. Also, on a Public Interest Litigation Petition, a Divisional Bench of the Hon'ble Sindh High Court is in the process of forming a Judicial Commission to investigate the 'Thar tragedy'. Could the poor destitute families of over 200 dead children, be visualized to have the ability to access the courts of justice. The importance of PIL to provide access to the poor and powerless is obvious from the fact that a record number of 201, 450 cases were instituted with the Human Rights Cell between 2009 and October 31st, 2013[17] and there is an explosion of Public Interest Litigation under Article 184(3) of the Constitution. The numbers are as follows:

PIL Cases instituted at the Supreme Court[18]

Year	*Suo Motu* Cases	Human Rights Cases	Constitutional Petitions[19]	HR Cell Applications[20]
1988 to 1999	3	13	23	-
2000	2	3	33	-
2001	2	2	11	-
2002	2	2	42	-
2003	4	2	58	-
2004	4	0	43	-
2005	15	12	41	-
2006	15	80	34	-
2007	27	77	90	-
2008	2	4	18	81
2009	28	97	68	9879
2010	27	135	81	59878
2011	20	42	92	48388
2012	11	69	132	42999

[16] Around 270 workers were burnt alive on September 11th, 2012, at the factory of Ali Enterprises at Baldia, Karachi.

[17] Data provided to the Human Rights Cell, Supreme Court of Pakistan.

[18] The data for the years 1988 to 1999 is based only on reported cases in the law journals and would require further verification and research. The rest of the data is based on the Report of the Proceedings of the International Judicial Conference, 2013 (19-21 April, 2013), Islamic Research Institute Press, at 57-58 and figures may not be exactly accurate because the aforementioned data is in the form of a chart in which exact numbers are not specified. The complete data for the year, 2013, was not available.

The attraction of Public Interest litigation under Article 184(3) of the Constitution for the poor and less powerful is obvious as it ends the domination of lawyers, elimination of complex procedures and the elimination of the unending appeal process with only one right of appeal. Public Interest Litigation is both an alternative to free legal aid and if supported by free legal aid; its benefits for the poor can be greatly extended.

Access to Justice and Legal Aid: A Comparative Perspective

The issue of access to justice and the problems in the development of a free legal aid system is part of a continuing global debate whether in America[21], United Kingdom[22], South Africa[23], India[24] or Bangladesh[25]. In other words, this is not a specifically Pakistani problem.

Deborah L. Rhode critique of lack of access to justice in the context of the American justice system is devastating, when she states that *"Millions of Americans lack any access to justice, let alone equal access……Given the increasing centrality of law in American life, we can no longer afford a system that most citizens cannot themselves afford…America's gross inequalities in access to justice are an embarrassment to a nation that considers its legal system a model for the civilized world……"*[26]. But her book is also an example of America's recognizing and trying to deal with this issue and trying to develop an agenda for reform.

Similarly, in India, since 1949, there has been a continuous effort to deal with this issue of lack of access to justice because of lack of free legal aid e.g. the Bombay Committee (1949), Trevor Harries Committee in West Bengal (1949), Kerala Legal Aid (to the Poor) Rules, 1957, 14th Report of the Law Commission of India (1958), Central Government Scheme for Legal Aid (1960), National Conference on Legal Aid (1970), Gujarat Committee (1970), Expert Committee (1973), Report of National Judicature: Equal Justice, Social Justice (1977) by Justice PN Bhagwati and Justice VR Krisha Lyer etc. Therefore, there is been a continuous intellectual thought process and reform process to deal with this issue. Moreover, section 304 of the Indian Criminal Procedure Code, 1973, recognizes a clear right of free legal aid in all Session Cases for the Poor, with strong judicial pronouncements, as in the case of 'Muhammad Hussain Versus State'[27], in which the Supreme Court of India held that *"The fact that the right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our judicial proceedings. The necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of a counsel was a denial of due process of law".*

Even in Bangladesh, Legal Aid systems have developed. For example, BLAST ('Bangladesh Legal Aid and Services Trust) , a NGO providing Free Legal Aid, has a head office in Dhaka, six divisional offices unit offices, 12 district offices and three law clinics, and has more than 33 staff lawyers and more than 1000 lawyers on its panels and has developed a successful privately run legal aid model.

In contrast to the above, what is missing in Pakistan is a serious recognition of this problem, there no intellectual discourse about this issue and no indication of an agenda for reform for trying to solve this problem. In short, a serious debate about lack of access for the poor because of a lack of legal aid has yet to begin in Pakistan.

Conclusions and Recommendations

The issue of access to justice, poverty and the development of a free legal system is an intellectually challenging and a complicated political policy issue. Keeping in view the present constraints of the government faced with more pressing issues of an existential nature, in the midst of a financial crisis and the constitutional, administrative and financial limitations of the judicial organ to initiate reforms on this issue, the following suggestions should

[19] Moreover, in terms of the data for the years 2000 to 2012, it is not possible to distinguish between Constitution Petitions which can be described as Public Interest Litigation and Constitution Petitions which cannot be although an examination of the reported judgments shows that the Public Interest Constitution Petitions form the predominant part of this data.

[20] Data provided to the Human Rights Cell, Supreme Court of Pakistan.

[21] Deborah L. Rhode, *Access to Justice,* Oxford University Press, 2004.

[22] Young & Hall (Ed.), *Access to Criminal Justice, Blackstone Press Limited, 1996.*

[23] S. Muralidhar, *Law, Poverty and Legal Aid, Lexis Nexis Butterworths, 2004,* P. 339.

[24] Ibid.

[25] Ibid., P.353.

[26] Deborah L. Rhode, *Access to Justice,* Oxford University Press, 2004, P.5, 11.

[27] *Muhammad Hussain Versus State*', 2012 SCMR 1610 at 1641.

simply be seen not as comprehensive suggestions to solve this problem but tentative first steps towards dealing with this gigantic issue, with only such measures being suggested here, which are implementable.

1. As Justice Jawwad S. Khawaja reminds us *"Some of our greatest national problems will be relieved if only we realize the momentousness of what has transpired in this country since 2007, through the blood, sweat, tears and toil of our people."*[28] What happened as a result of the Lawyers-Judges movement 2007-9 is that the entire basis of judicial power and legitimacy went through a radical transformation from judicial power being based only on constitutional guarantees of security of tenure and moral legitimacy to judicial power being based on public legitimacy. Therefore, the question is whether such judicial power based on public legitimacy is sustainable if the poor i.e. the vast majority, do not have equal access to justice. In short, the access to justice to the poor is now intrinsically linked with sustaining and increasing judicial power based on public legitimacy.

2. The judicial anthem of the Hon'ble Supreme Court i.e. *"Justice for All"* recognizes the centrality of this issue. There has to be now a formal recognition of this problem and the Law and Justice Commission of Pakistan can be directed to conduct a detailed conceptual and empirical study of this issue and give recommendations for the creation and implementation of a free legal aid system for the poor in Pakistan.

3. As Desai and Muralidhar rightly note: *"The guarantees of fundamental rights and assurances of directive principles, described as the 'conscience of the Constitution', would have remained empty promises for the majority of illiterate and indigent citizens under adversarial proceedings. PIL has been a conscious attempt to transform the promise into reality."*[29] The central importance of PIL to the issue of access to justice and a free legal aid system should be acknowledged and incorporated in the free legal aid system. Therefore, not only should PIL be encouraged as an alternative to a free legal aid system but there should be free legal aid available for individuals and groups initiating PIL litigation.

4. The Hon'ble Supreme Court has developed a successful model of the Human Rights Cell at the Supreme Court. Such Human Rights Cells also provided an effective alternative model to free legal aid based on lawyers. Such Human Rights Cells should be replicated at all the four Hon'ble High Courts and at all the other seats of the Hon'ble Supreme Court.

5. The trial courts, Hon'ble High Courts, Hon'ble Federal Shariat Court and Hon'ble Supreme Court should ensure that in all capital punishment cases and all cases involving life imprisonment, the accused should not only be represented by counsel but if the court appoints a counsel, it should ensure that a reasonably competent counsel is appointed, who effectively conducts the case. The courts and the Bar need to consciously ensure accountability of such court appointed counsels in such cases.

6. Any free legal aid system should cater not only for the legal needs of the accused persons but also the right to effective legal counsel for the economically poor victims of the crime. Therefore, any free legal aid system should include provisions for victims of crimes pursuing their cases against the perpetrators of the crime.

The purpose of this paper is to initiate a debate about the connection between lack of access to justice and poverty and the connection between abundance of access to justice and clients who can afford good and rich lawyers. Or as Deborah L. Rhode rightly points out:

"Too Much Law for Those Who can afford it, too Little for Everyone Else"[30].

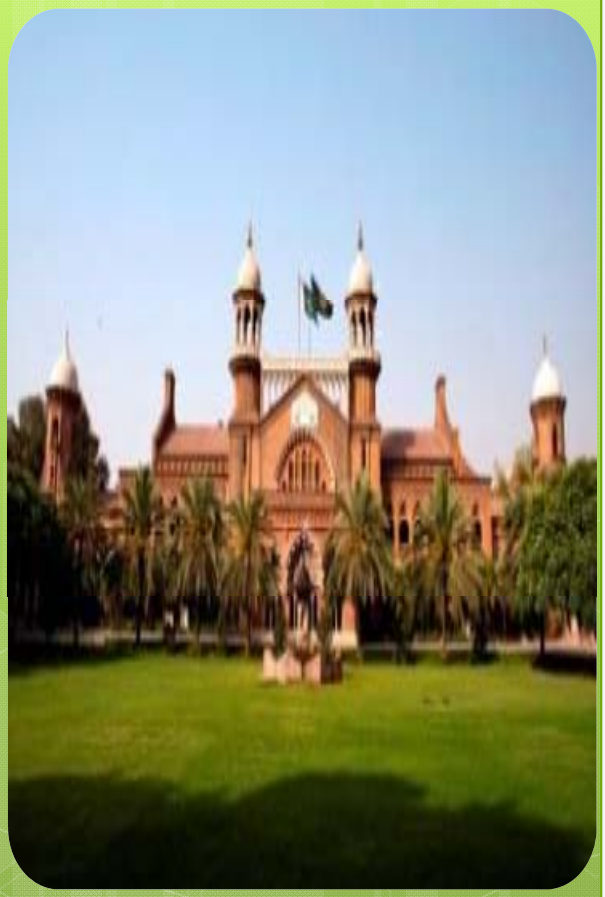
[28] Suo Moto action regarding allegation of business deal between Malik Riaz Hussain and Dr.Arsalan Iftikhar attempting to influence the judicial process, P.L.D. 2012 S.C. 664, at 668.

[29] 'Public Interest Litigation: Potential and Problems' by Ashok H. Desai & S. Muralidhar in B.N. Kirpal & Others (Ed.), *Supreme But Not Infallible,* Oxford University Press, 2000.

[30] Deborah L. Rhode, *Access to Justice,* Oxford University Press, 2004, P.24.

Appendix - D

Presentations/ text of papers presented in Group- IV
"Role of Judiciary in promotion of Culture of Tolerance"



Role of Judiciary in promotion of culture of Tolerance

by

Justice Mansoor Ali Shah
Lahore High Court
Lahore

International Judicial Conference, Supreme Court of Pakistan, 18th-19th April, 2014, Islamabad.


Tolerance means...
appreciating and respecting
differences in people.
International Judicial Conference, Supreme Court of Pakistan, 18th-19th April, 2014, Islamabad.


Tolerance is a fair, objective, and permissive attitude toward those whose opinions, practices, race, religion, nationality, etc., differ from one's own.
International Judicial Conference, Supreme Court of Pakistan, 18th-19th April, 2014, Islamabad.

Tolerance is the capacity for or the practice of recognizing and respecting the beliefs or practices of others.

International Judicial Conference, Supreme Court of Pakistan, 18th-19th April, 2014, Islamabad.

A tolerant society engenders **mutual trust** and cooperation. It tends towards a more **peaceful society**; there is less cruelty, hypocrisy, and duplicity, less dogmatism, hatred, and fanaticism.

International Judicial Conference, Supreme Court of Pakistan, 18th-19th April, 2014, Islamabad.

In a legal sense tolerance is the attitude and the capacity to respect the **rights** of the others.

Tolerance is a "fundamental principle or value"

"Wherein the principles of democracy, freedom, equality, **tolerance** and social justice, ...shall be fully observed" (Preamble to our Constitution)

Fundamental values are sharpened into enforceable rights and are constitutionally guaranteed as "fundamental rights"

These constitutional freedoms (life, liberty, expression, dignity etc) provide a charter of tolerance.

International Judicial Conference, Supreme Court of Pakistan, 18th-19th April, 2014, Islamabad.

- Tolerance is not an absolute value and has limits.
- Certain actions or violations of rights cannot be tolerated. Hence they necessitate a reaction.
- It does not take long to move from zone of tolerance to zone of intolerance.

- Response or reaction to injustice can be through dialogue, or violence, or through corruption

International Judicial Conference, Supreme Court of Pakistan, 18th-19th April, 2014, Islamabad.

- Unless tolerance is rewarded or managed – it will lead to intolerance, rage and violence.



International Judicial Conference, Supreme Court of Pakistan, 18th-19th April, 2014, Islamabad.

Enter: The JUDICIARY

which by its very design and character provides for tolerance management

International Judicial Conference, Supreme Court of Pakistan, 18th-19th April, 2014, Islamabad.

- Approaching the court of law instead of taking law in ones own hands is an exercise in tolerance.
- Judiciary provides a platform for grievance resolution or dispute settlement.
- Acts as a ventilator – helps you manage your rights and tolerance.

- If the judicial systems are sluggish, slow, incompetent or corrupt – they will not not command public confidence.
- Lack of an independent judicial forum will force people to devise their own ways of managing disputes – which by and large will lead to violence, dogmatism and corruption- encouraging intolerance.

- *So what can judiciary do to improve tolerance ?*
- Showcase itself to be the best dispute resolution system available in the market.
- Constantly reform and improve our paramedical court system – think of innovations-

- We need to address the grievance of an ordinary man on the street.
- We need to strengthen and empower our district judiciary – the courts of first instance.
- We need to dispel the impression that litigation eats up generations.

Substantive level

- Selection of a judge is critical.
- The man who is to run this tolerance management institution has to be an icon of tolerance - open, liberal, unbigoted, unbiased, permissive, sympathetic, understanding, etc

- A judge who sits in the court with an open mind, listens and absorbs divergent view points, has no pre-conceived notions, does not bring his personal beliefs into the court, is independent , patient, well mannered and knowledgeable
- Judge, has to be a living text-book example of tolerance.

CONCLUSION

Judiciary as a organ of the state provides the platform and the breathing space to manage tolerance from escalating into intolerance.

Judiciary must command full confidence of the society it functions in.

Selection of judges is pivotal and equally important is an ever evolving system of judicial reform so that we can keep providing the best system for tolerance management.

International Judicial Conference, Supreme Court of Pakistan, 18th-19th April, 2014, Islamabad.

Trust me- ***we deliver*** !!!!

International Judicial Conference, Supreme Court of Pakistan, 18th-19th April, 2014, Islamabad.

Role of Judiciary in Promotion of Culture of Tolerance

Mr. Shaiq Usmani
Former Judge of the High Court of **Sindh**

What is Tolerance and Intolerance?

1. Tolerance is the appreciation of diversity and the ability to live and let others live. It is the ability to exercise a fair and objective attitude towards those whose opinions, practices, religion, nationality and so on differ from one's own. The diversity of our world's many religions, languages, cultures and ethnicities is not a pretext for conflict, but is a treasure that enriches us all. As William Ury, Harvard Professor notes, "*tolerance is not just agreeing with one another or remaining indifferent in the face of Injustice, but rather showing respect for the essential humanity in every person".*

2. Tolerance is neither indulgence nor indifference. It is respect and appreciation of the rich variety of our world's cultures, our forms of expression and ways of being human. Tolerance recognizes the universal human rights and fundamental freedoms of others. People are naturally diverse; only tolerance can ensure the survival of mixed communities in every region of the globe. On the other hand intolerance is the failure to appreciate and respect the practices, opinions and beliefs of another group, discrimination and marginalization being the manifestation of it.

3. Thus tolerance, which entails appreciation of diversity, the ability to live and let others live, the ability to adhere to one's convictions while accepting that others adhere to theirs, the ability to enjoy one's rights and freedoms without infringing on those of others, being so cardinal to human life has always been considered a moral virtue. Tolerance is also the foundation of democracy and human rights. Intolerance in multi-ethnic, multi-religious or multicultural societies leads to violations of human rights, violence or armed conflict.

4. What tolerance and intolerance really is can be best appreciated by an anecdote showing a perceived conversation between Jean (John) Calvin, a French Theologian of 16th century and Thomas Hobbes an English Philosopher in 16th Century.

   Calvin: "In order to improve oneself, one must have some idea of what's good. That implies certain values. But as we all know, values are relative. Every system of belief is equally as valid and we need to tolerate diversity. Virtue isn't 'better' than vice. It's just different".

   Hobbes. "I don't know if I can tolerate that much tolerance"

   Though tolerance may seem an impossible exercise in certain situations as illustrated by Hobbes above, being tolerant nonetheless remains key to easing hostile tensions between groups and to helping communities move past intractable conflict. That is because tolerance is integral to different groups relating to one another in a respectful and understanding way in cases where communities have been deeply entrenched in violent conflict.

The Origins of Intolerance

5. In situations where conditions are economically depressed and politically charged, groups and Individuals may find it hard to tolerate those that are different from them or have caused them harm. In such cases, discrimination, dehumanization, repression, and violence may occur. Intolerance also arises where injustice prevails in a society and where upward mobility in the society is not based on merit but favoritism and nepotism. The absence of a comprehensive system of justice that is fair also gives rise to intolerance in a society just as religious bigotry and racist attitudes exacerbate intolerance.

How is Intolerance Perpetuated?

6. Amongst individuals in the absence of their own experiences, they base their impressions and opinions of one another on assumptions. These assumptions can be influenced by the positive or negative beliefs of those who are either closest or most influential in their lives, including parents or other family members, colleagues, educators, and/or role models. On the other hand collectively individual attitudes are influenced by the

images of other groups in the media and the press. For instance, in this connection negative stereotypes of Muslims presented in the Western media raises and perpetuate the increasing Intolerance of Muslims in Non Muslims world. Similarly education imparted to Children which provides biased and/or negative historical accounts of world cultures or is based on myths can demonize and dehumanize other cultures rather than promote cultural understanding and a tolerance for diversity and differences. In this connection an example may be given of the education imparted in certain Madressahs in our country which leads to the students imbibing intolerance for other cultures for no reason at all.

The Consequences of Intolerance

7. Intolerance will drive groups apart, creating a sense of permanent separation between them. For example, though the laws of Apartheid in South Africa were abolished nine years ago, there still exists a noticeable level of personal separation between black and white South Africans as evidenced in studies on the levels of perceived social distance between the two groups. Similarly, even though caste system, which is by far the worst manifestation of the phenomenon of intolerance has been abolished in India by law, in practice it still exists and the evidence of its existence is ironically enough still visible even in our country in the treatment meted out to Christians because they are descendants of those who had belonged to scheduled castes. This continued racial division, intolerance and discrimination perpetuates the problems of inter-group resentment and hostility.

Tolerance: The Endangered Virtue

8. Since the end of the cold war, there has been a steady increase in social, religious and cultural conflicts. Too many of which have quickly turned into full-scale armed conflicts; too many fundamental human rights have come under direct assault, too many lives have been lost.

9. What does the revival of historical grudges and armed conflict in the Balkans have in common with the alarming increase in the number of racial assaults in Western Europe? What formal relationship, if any, exists between extremist or supremacist groups around the world? What does genocide in Rwanda have to do with wars led by extremist religious groups in other parts of the world? Is there any link between the violence that targets writers, journalists and artists in one country and discrimination against indigenous people in another country?

10. The only immediately available answer is that intolerance is on the increase everywhere and as a result there is killing on a massive scale. Intolerance raises many moral questions. It always has in the past also raised political questions causing disturbances in certain societies and civil unrest and even civil wars. Intolerance is increasingly seen as a major threat to democracy, peace and security. Understandably, the issue is alarming the governments all over as well as the public. Yet, any talk of intolerance raises more questions than it answers. In fact Intolerance has been ever present in human history. It has ignited most wars, fuelled religious persecutions and violent ideological confrontations. The question then arises is it inherent in human nature? Is it insurmountable? Can tolerance be taught or learned? How can democracies deal with intolerance without infringing on individual freedoms? How can they foster individual codes of conduct, without introducing draconian laws and without policing their citizens' behavior? How can peaceful multiculturalism be achieved?

What Can Be Done to Deal with Intolerance?

11. To encourage tolerance, parties to a conflict and third parties must remind themselves and others that tolerating *"tolerance"* is preferable to tolerating *"Intolerance".* Individuals can play considerable role here in as much as they can focus on being tolerant of others in their daily lives. This involves consciously challenging the stereotypes and assumptions that they typically encounter in making decisions about others and/or working with others either in a social or a professional environment. Dialogue can also lead to good results to enhance communication between both sides. Dialogue mechanisms such as dialogue groups or problem solving workshops provide opportunities for both sides to express their needs and interests. In such cases, actors engaged in the workshops or similar forums feel their concerns have been heard and recognized.

12. Intolerance in a society is the sum-total of the intolerance of its individual members. Bigotry, stereotyping, stigmatizing, insults and racial jokes are examples of individual expressions of intolerance to which some people are subjected daily. Intolerance breeds intolerance. It leaves its victims determined to pursue revenge. In order to fight intolerance individuals should become aware of the link between their behavior and the vicious cycle of mistrust and violence in society. Each one of us should begin by asking: am I a tolerant person? Do I stereotype people? Do I reject those who are different from me? Do I blame my problems on 'them'?

13. The media too can make a positive contribution by using positive images to promote understanding and cultural sensitivity. The more groups and individuals are exposed to positive media messages about other cultures, the less they are likely to find faults with one another -- particularly those communities who have little access to the outside world and are susceptible to what the media tells them.

14. Intolerance is most dangerous when it is exploited to fulfill the political and territorial ambitions of an individual or groups of individuals. Hatemonger's often begin by identifying the public's tolerance threshold. They then develop fallacious arguments, lie with statistics and manipulate public opinion with misinformation and prejudice. The most efficient way to limit the influence of hatemonger's is to develop policies that generate and promote press freedom and press pluralism, in order to allow the public to differentiate between facts and opinions.

15. Correct education can also help in promoting tolerance and peaceful coexistence. For Instance, schools that create a tolerant environment help young people respect and understand different cultures. Governments also should aim to institutionalize policies of tolerance. Essentially, education for tolerance should aim at countering influences that lead to fear and exclusion of others, and should help young people develop capacities for independent judgment, critical thinking and ethical reasoning. For example, in South Africa, the Education Ministry has advocated the integration of an public school tolerance curriculum into the classroom; the curriculum promotes a holistic approach to learning. The United States government has recognized one week a year as international education week encouraging schools organization institutions, and Individuals to engage in projects and exchanges to heighten global awareness of cultural differences.

16. Laws are necessary but not sufficient for countering intolerance in individual attitudes. Intolerance is very often rooted in ignorance and fear: fear of the unknown, of the other, other cultures, nations, religions. Intolerance is also closely linked to an exaggerated sense of self-worth and pride, whether personal, national or religious. These notions are taught and learned at an early age. Therefore, greater emphasis needs to be placed on educating more and better. Greater efforts need to be made to teach children about tolerance and human rights, about other ways of life. Children should be encouraged at home and in school to be open-minded and curious. Education is a life-long experience and does not begin or end in school. Endeavours to build tolerance through education will not succeed unless they reach all age groups, and take place everywhere: at home, in schools, in the workplace, in law-enforcement and legal training, and not least in entertainment and on the information highways.

17. On the International plane also efforts have been made to inculcate tolerance. Tolerance, multiculturalism, global diversity, religious and cultural dialogue were among the topics that were debated in over fifty national, regional and international meetings throughout the year. Serving primarily as occasions to exchange views and knowledge, these meetings also worked on the definition and requirements of tolerance and negotiated lines of action to promote tolerance and to counter the rise of intolerance in coming years. These efforts culminated in the Declaration of Principles on Tolerance, which was adopted and signed in Paris by UNESCO's 185 Member States on 16th November 1995 which qualifies tolerance as a moral, political, and legal requirement for individuals, groups, and states.

18. The Declaration qualifies tolerance not only as a moral duty, but also as a political and legal requirement for individuals, groups and States. It situates tolerance in relation to the international human rights instruments drawn up over the past fifty years and emphasizes that States should draft new legislation when necessary to ensure equality of treatment and of opportunity for all groups and individuals in society. In addition to pledging to promote tolerance and nonviolence through educational policies and programmers, Member

States declared 16 November the annual International Day for Tolerance.

Role of Judiciary

19. Under the 1995 Convention each Government is responsible for enforcing human rights laws, for banning and punishing hate crimes and discrimination against minorities, whether these are committed by State officials, private organizations or individuals. The State must also ensure equal access to courts, human rights Commissioners or Ombudsmen, so that people do not take justice into their own hands and resort to violence to settle their disputes.

20. Unfortunately in so far as our country is concerned, the State over a period of years has totally failed to perform their cardinal function that is to govern justly and to regulate the society in a way that people are not deprived of their rights and if they are, there is redressal for their grievance. This is so even though the principles of the religion of Islam lay a great deal of emphasis on tolerance. The early history of Islam is replete with incidents where highest standards were preserved in so far as tolerance of other religions and minority communities were concerned. In effect our Democracy has changed the definition imparted to it by Abraham Lincoln. Our democracy is now "*a Government of the politicians by the politician for the politicians"* as opposed to for the people. Under the circumstances due to recently acquired clout by the judiciary in the wake of the lawyers revolution which I term as the "Black Revolution", now it falls on the Judiciary to fill in the vacuum which thankfully it has been doing reasonably and effectively since 2007.

    The judiciary is well suited and well placed for the task as being the guardian of the Constitution. Judiciary can do what the state cannot or will not. All it has to do is to increase its protectiveness to enforce certain fundamental rights with greater gusto and also enforce the Principles of Policy, which hitherto have been regarded as non justiciable. There is no basis in treating the Principles of Policy as non justiciable even after seven decades of this country's existence. These Principles must not be treated as a mere window dressing.

21 The relevant provisions of our Constitution that deal with tolerance and intolerance directly or indirectly are as under:

Preamble

Wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed;

Art 25. Equality of citizens – (1) All citizens are equal before law and are entitled to equal protection of law.

(2) There shall be no discrimination on the basis of sex.

(3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

Art 28. Preservation of language, script and culture, - Subject to article 251 any section of citizens having a distinct languages, script or culture shall have the right to preserve and promote the same and subject to law, establish institutions for that purposes.

Art 33. Parochial and other similar prejudices to be discouraged. – The State shall discourage parochial, racial, tribal, sectarian and provincial prejudices among the citizens.

Art 36. Protection of minorities. – The State shall safeguard the legitimate rights and interests of minorities, including their due representation in the Federal and Provincial services.

Art 38. Promotion of social and economic well-being of the people. – The State shall –

(a) secure the well-being of the people, irrespective of sex, caste, creed o race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest

and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants;

22. Side by side with enforcement of fundamental rights and principles of Policy it is necessary for the Judiciary to change its present culture which is beset by procrastination and delays because that leads to frustration amongst the people involved with Courts and develops a feeling of helplessness and a belief that they will never get justice which in turn leads to intolerance, which is then manifested in the form of terrorism and increase in crime. It is therefore, necessary for the Judiciary to slowly move from adversarial system to inquisitorial system which is closer to Islamic system of justice and more effective as suo moto proceedings in Courts, which are essentially inquisitorial have amply demonstrated. There is a need to expand the scope of suo moto proceedings and extend these to the Provincial High Courts as well, if necessary through legislation and if that is not possible through bold interpretation of the Constitution by the Apex Court. Needless to say that there is also the need to make our complicated Court procedures, which are the inherent cause of delays, simpler and effective and the execution of Court decision effective and immediate. Besides, new avenues should be explored such as introducing Restorative Justice programs where issues regarding intolerance can be resolved through victim-offender mediation, through for instance providing an opportunity for victim to ask for an apology from the offender.

23. It is thus obvious that Judiciary can play an effective role in curtailing intolerance in the society and promoting tolerance to the benefit of the society as a whole and thereby blaze a new trial and succeed where the State in its somnolence has failed.

The Relationship of Court Power and Societal Tolerance

Mr. Jeffrey A. Apperson
Vice President
National Center for State Courts
United State of America

"World peace, like community peace, does not require that each man love his neighbor -- it requires only that they live together with mutual tolerance, submitting their disputes to a just and peaceful settlement." (President John F. Kennedy)

The responsibility for administering many just and peaceful settlements in society are generally delegated by constitutional authority to the Supreme Court and such subservient courts as may be created by law. Therefore, courts, by playing a critical role in resolving disputes fairly, openly, equally and timely, reinforce tolerance among diverse segments of society.

In the Pakistan Supreme Court case of Constitution Petition NO. 61 of 2011, a landmark case for the world, former Chief Justice Chaudhry reinforced the obligation of the State to reinforce constitutional rights of citizens to equal protection of rights under law by citing the case of "*Commissioner of Income Tax v. Eli Lilly Pakistan"* reported as 2009 SCMR 1279, where the court observed that:

"It is the duty and obligation of the State on account of the various provisions of the Constitution to provide the atmosphere based on honesty by providing equal protection of law. Every citizen must be treated equally, dignity of human life should be maintained, and liberty of life and honour must be guaranteed as envisaged in Articles 9, 14 and 25 of the Constitution."

Robert G Ingersoll stated: "*Tolerance is giving to every other human being every right that you claim for yourself."* As noted infra, the State grants these rights and the courts enforce them, thus creating an environment, theoretically, for tolerance.

For citizens to have respect for these natural laws and tolerate the enforcement of such, the citizens must also have respect for the institutions that administer them. For the judiciary, as the key institution delegated the responsibility for administering justice, gaining this respect is an important element in societal tolerance for equal rights.

While the courts have a responsibility to administer justice to promote societal tolerance, there is a question that is fundamental to the execution of this responsibility—do the courts have the power and resources necessary to fulfill the duty of administering justice and fostering tolerance?

To administer justice equally and create an environment of tolerance, a court system must operate in an environment that supports the constitutional mission. Courts must be independent from actual and perceived undue influence and have the resources to operate effectively. The power of jurisdiction must be aligned with the ability to administer such jurisdiction. The other branches of government must perform their executive and legislative missions. As Alexander Hamilton noted in the Federalist Papers, the judiciary is the weakest branch of government, but perhaps the most important because it interprets the Constitution. It is a weak institution, because it can only defend itself by the quality of its acts and the support of the will of the people. All too often, the other governmental branches blame the judiciary for problems knowing it cannot defend itself publicly.

The Florida Bar Journal framed this alignment of independence of jurisdiction and administration well in an article written by *Steve Henley* and *Jo Haynes Suhrs* which observed, in part:

"Caseload growth, social trends and evolving legal complexity explain why courts found it necessary to develop the capacity for administration, but how the management role is defined within the judicial context is governed by the fundamental principle of judicial independence. Judicial independence, a unique and powerful principle in the American governmental system, is based on the proposition that no judicial decision should be influenced by any

factor other than the relevant law and the evidence presented in the case, and that in particular other components of government should not play an inappropriate role in determining judicial outcomes.

Judicial independence is supported through a number of structural means. Among them is the general requirement that other branches of government not exercise direct control over critical inputs for the courts. For this reason the tenure and compensation of judges in most jurisdictions is protected through a constitutional mechanism, making it difficult for legislative and executive branches to threaten the livelihoods of judges. Similarly, courts must be able to govern themselves. *"The judicial branch is not a coequal branch of government unless it has the ability and the authority to manage its internal operations, including its largest single component, the trial courts."*[6] Court administrations, in this context, provides a necessary operational bridge to other components of government while buffering the adjudicative process...." (March, 2004 Volume LXXVIII, No. 3.)

The article goes on to explain how the profession of a court manager evolved in the U.S. and their role in assisting judges with the execution of jurisdiction:

"In the early 1960s, fewer than 10 trial courts in the nation employed professional managers, most in large urban courts. Today, nearly every court in America functions with the support of personnel working under the direction of a professional manager, usually called a "court administrator."

Court administrators are typically hired by the chief judge of the jurisdiction, often with the consent of the other judges and report directly to the Chief Judge. Court administrators and their staff allow judges to focus their time and attention on adjudicatory activities, rather than administrative responsibilities, while the administrative staff focuses on the efficiency of court operations.

Management functions typically performed by trial court administrators include: goal setting for the court in coordination with administrative judges; analyzing court operations and case management strategies; conducting research and measuring court performance; formulating and implementing management policies; coordinating relationships with the local bar, government agencies, community service providers, and the public; and exercising general administrative control of all operational and administrative support activities." (Cite, infra.)

Also critical to the effective management of jurisdiction is the ability to protect witnesses from threats, the security of judges and to enforce the orders of the court. Such a service was created by U.S. Code 28 U.S.C. 566, which states:

> ***"(a)****It is the primary role and mission of the United States Marshals Service to provide for the security and to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals, the Court of International Trade, and the United States Tax Court, as provided by law."*

There are other important control factors that affect the ability of a judiciary to perform. Does the judiciary have control of an adequate budget, hiring of personnel, the training of its staff, space and facilities, discipline of attorneys, contempt power, and a living wage that deters corruption and provides incentives for good lawyers to become judges? Do the legislative and executive branches have control over administrative functions? These issues must be joined to determine whether the balance of institutional power is equal.

There is another important international consequence that is evolving- the creation of international courts of arbitration and criminal justice to assume jurisdiction when national court systems are not independent, fair and functional. While there were laws in place to protect minorities in Bosnia, Kosovo, Rwanda, and others, the courts did not have the power to resolve differences and promote a culture of tolerance.

To a degree, the failure of court systems to protect minority rights where courts do not have the power to protect minorities from the majority will in part facilitate hate and subsequent crimes against humanity.

The Judiciary's Role in Promoting a Culture of Tolerance

Mr. I. A. Rehman
Human Rights Commission of Pakistan

Before we discuss the judiciary's role in promoting a culture of tolerance it may be useful to clarify what tolerance in the present-day world, and especially in Pakistan, means? This especially in view of the fact that the concept of tolerance has been acquiring new meanings with almost continual change in the patterns of interaction among members of the human family.

According to the Oxford Dictionary tolerance means *"the disposition or ability to accept without protest or adopt a liberal attitude towards the opinions or acts of others."* This definition represented exemplary social behaviour among people who had acquired a liberal attitude, who in particular had learnt to avoid fighting because of religious differences. It reflected the attributes of a post-reformation society. But acceptance without protest or adoption of a liberal attitude towards the religious views or practices of others cannot be taken for granted across wide swathes of the globe. Pakistan can easily be spotted in one of those parts of the world where lack of acceptance of the religious belief of others lies at the root of quite a few crises faced by the state and society both.

The old world definition of tolerance has also been rendered inadequate by the rise of the concept of rights in the various fields of human endeavour, now recognised as civil, political, economic, social and cultural rights, and the rights of the weaker and vulnerable sections of society – women, children, minorities, labour, migrants, stateless people, etc.

While the modern discourse on rights has been sustained by the United Nations' efforts at developing mechanisms for the enforcement of human rights the word tolerance is rarely used in its documents and expositions. However, we do find 'tolerance' mentioned in the United Nations Charter as a mode of behaviour necessary for establishing peace. After referring to the need to save humankind from the scourge of war, the preamble to the Charter mentions the world community's *"faith in fundamental human rights, in the dignity and worth of human person, in the equal rights of men and women, and the nations large and small."* These rights can be realized by ensuring justice and respect for international treaty obligations and by promoting social progress and better standards of life in larger freedom. And for these ends, the Charter says, the people of the world are determined to *"practice tolerance and live together in peace with one another as good neighbors."*

It can be argued that the whole edifice of human rights mechanism evolved by the United Nations rests on mutual acceptance of one another's rights, that is, tolerance of the rights of others. The idea of tolerance has continued to be promoted in different ways by elaborating the features of an order based on it, though the expression 'tolerance' is not used.

For instance, we find the modern concept of tolerance as the source of inspiration for one of the fundamental duties of citizens, added to the Indian Constitution in 1977, that is, *"to promote harmony and the spirit of common brotherhood amongst all the people of India, transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women."*

However, the world realised that non-acceptance of religious diversity was one of the main obstacles to the '*practice of tolerance.'* More than three decades after the adoption of the Universal Declaration of Human Rights the UN General Assembly approved the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief and we had a working definition of intolerance in the following words:

> *"Intolerance and discrimination based on religion or belief means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis."*

We may also take note of the growing emphasis on practicing tolerance in the political sphere. Democracy means government by the will of the people and not merely by the whim of the party enjoying a majority in parliament. Pakistan has paid dearly for its political parties' failure to tolerate one another's opinions and acts. For some time

now modest efforts have been made to move away from the tyranny of a majoritarian state and establish participatory democracy, which means due tolerance by the majority party of the views, opinions and rights of all those outside the ruling party whether they are inside parliament or outside it.

Similarly, acceptance of the right of the poor to be rid of poverty and exploitation is premised on authority's obligation to accept the under-privilege's right to a decent standard of living.

Here we may recall the dictionary meaning of tolerance because it has a significant bearing on the form practice of tolerance should assume. The dictionary refers to acceptance without protest of the opinions and acts of others. Acceptance of and even obedience to a law or a policy that has a dimension of tolerance, will be meaningless and counter-productive if it is done reluctantly or with reservations. In such cases it will amount at best to a compromise or dissimulation and not tolerance. Tolerance in the real sense must be an attitude adopted without reservations, without any effort. Further, it is not enough that a few people, or a section of society, may learn to practice tolerance, because they will not be able to realize the objectives of tolerance, namely, establishment of peace and justice without interfering with individual and collective freedoms and rights. These objectives will be realised only when a large majority of the people, if not all of them, practice tolerance or, in other words, society can establish a culture of tolerance.

The definition of intolerance quoted just now also offers us a fairly good idea of what could be meant by tolerance. It is quite clear that tolerance is a discipline expected of human collectives, in state and private sectors, as well as individuals. Indeed the state institutions have a leading role in promoting values of tolerance as their opinions and acts greatly influence the opinions and acts of citizens.

There should be no difficulty in realising that quite a few provisions of Pakistan's Constitution and its laws are hit by the definition of intolerance. Whether these deviations from the path of tolerance can be justified by reference to the state's religion or its ideology is another matter, and that does not affect the conclusion about the existence of a framework of intolerance.

There is urgent need to review all laws, regulations, policies and practices that reduce the basic entitlements of women, children, labour, peasants, non-Muslims, minority Muslim sects and strengthen the sinews of intolerance.

Unfortunately, Pakistan's predicament has been aggravated over the past few decades by its society's shift away from its traditions of religious tolerance. The level of tolerance for the followers of religions other than Islam has sharply declined. Well-organised groups have taken upon themselves the task of converting non-Muslims, especially small girls, to Islam in a manner that has no sanction in Islam or the laws of the land. Also, the inter-sect intolerance among Muslims has assumed the form of a prairie fire that threatens to destroy all possibilities of peace and justice in the country.

This is happening in a society that not long ago distinguished itself by accepting the right of various schools of religious thought to interpret Islam as their lights guided them. No more than eight decades have passed since Iqbal exhorted the Muslims of this subcontinent to remove from their faith the crust of Arab imperialism (Allahabad address at the 1930 session of the Muslim League) and commended the Turkish deduction from the Hadith that the whole of the earth was a mosque and thus the entire humankind was protected. *(Reconstruction of Religious Thought in Islam)*

The task of saving the people from the whirlwind of intolerance demands a gigantic effort to which both the state sector and the civil society have to make their due contribution. What can be the judiciary's role in subduing the dark forces of intolerance and promoting the culture of tolerance?

The question as to why the judiciary should at all promote tolerance can be answered by recognizing the identical objectives of justice and tolerance. Both aim at establishing peace by resolving disputes, differences and competing claims. Tolerance not only facilitates settlements based on mutual acceptance of one another's interest and acts but also prevents post-settlement tensions. The judiciary promotes justice and tolerance by ensuring that genuine claimants get no less than what is due to them and the offenders are punished no more than what they deserve. In the ultimate analysis tolerance and justice complement each other – justice breeds tolerance and tolerance facilitates justice.

It goes without saying that the judiciary alone cannot promote tolerance if country's laws do not conform to the contemporary values of justice and rights, if society upholds or condones inequality, and intolerance is rooted in belief or custom. No judge can persuade a man to accept his wife's opinion and stop committing violence on her if he believes he has a right to thrash her. No court can prevent ordinary villagers from seeking relief from an unlawful jirga if such gatherings are presided over by ministers or a former prime minister. However, the judiciary can and should suggest ways of removing the obstacles to the rise of a tolerant society. If a young man's misdemeanor or offence can be attributed to a flaw in school curriculum the court must call for appropriate changes in the content and method of education.

In this regard our judiciary has a sound tradition. If Judicial Commissioner Mcleod and Deputy Commissioner Brandreth could persuade the colonial government to save the Punjab Muslims' land holdings from passing into the hands of money lenders, today's judges can call for freeing the cultivators of the curse of absentee landlordism. And let us not forget that the law to end the system of bonded labour had its origin in a Supreme Court ruling on a simple complaint.

To be fair to the judiciary it has often upheld the value of tolerance, implicitly at least, if not always explicitly.

More than five decades ago, Justice Z.H Lari of the Singh High Court struck down the order of Sobo Gianchandani's detention for being a communist and declared that nobody could be punished for holding any particular political views. (The matter might have been different if membership of the Communist Party had been declared under law as a criminal act.)

A few days ago the Supreme Court released its detailed judgment relating to delimitation of constituencies for local government elections and said, through the present Chief Justice of the country: *"The freedom to profess religion and to manage religious institutions (Article 10-A – a misprint, as Article 20 was obviously meant) encases the right to both profess a certain religion and not to do so. It also places a duty on the state not to interfere with the religious beliefs and ideologies of individuals."*

Both of these judgments separated by half a century in time counsel the state to display tolerance for citizens' diverse beliefs and opinions. In a good number of cases while overturning curbs on civil liberties, establishing citizens' entitlements to public facilities, and providing relief to victims of discrimination on the basis of belief, gender or social status, the judiciary can be seen to have advocated practice of tolerance. But apart from emphasizing the importance of tolerance in cases that come before it, can the judiciary make a wider and more direct contribution to the growth of a culture of tolerance? The possibilities are worth exploring.

The best route to the creation of a tolerant society, of course, lies through consolidation of the tradition of even handed justice, so that no party can feel that justice does not appear to have been done to it. But if a court verdict leaves one of the two parties to an issue, or both, with a feeling of grievance, then hostility between them will not only survive, it will get more and more virulent.

Unfortunately, Pakistani people's confidence in the judicial system's capacity for justice has suffered some erosion. The losers often think they have lost not on merit but because they lacked the resources to match the legal assistance available to the opposite party. Access to justice is thus considered contingent on the size of one's purse or position on the social scale. The country's unrepresentative rulers only clamoured about the need for speedy and inexpensive proceedings and these are the only two attributes of justice in a simple citizen's mind. Law's delays and the mounting costs of litigation are enough to convince him of absence of justice. As a result, the subordinate judiciary is perhaps still feared on account of its punitive power but rarely respected for its capacity to hand down justice. This is the area where the largest number of people comes into contact with the institution of the judiciary and sometimes their frustration affects their view of the higher judiciary too. A conscious effort to re-establish courts as forums for reconciliation on the basis of mutual tolerance could help to reduce litigation.

In order to ensure that judicial decisions lead to tolerance instead of increased acrimony all those sitting on the bench will need to shed their biases. In a country mired deeply in prejudice and superstition it may not appear realistic, at first sight, to expect the judges to be without such unwanted baggage but then where will we find people capable of breaking out of unhealthy cultural influences except among dispensers of justice, academics

capable of carving out new paths to freedom from cant and thinkers qualified to lift ordinary human beings with the touch of their wisdom?

Sometimes people are afraid of discussing issues of judicial biases but there is no harm in admitting a problem that has been noticed in almost all societies. In Britain, for instance, politicians and students of law belonging to liberal and labour parties often raised the issue of judges being recruited from propertied classes and that enabled the Tory party to occupy all the commanding heights in the realm of justice. In the United States where the party occupying the White House has often tried to pack the Supreme Court with like-minded judges the question of judges' biases has often been in debate. There were times when biases on issues such as the rights of the black Americans, abortion, and civil liberties came to the fore and one found Justice Douglas as the sole voice of progress amidst an array of conservative judges.

When in the 1940s the British government chose a conservative MP (a Barrister though) as the new head of the Federal Court of India the outgoing chief justice, Justice McGwyer, strongly protested that the decision smacked of prejudice against the Indian judges who were qualified to succeed him, including Ch. Zafarullah Khan, if he could decide whether he wanted to be a judge or a diplomat (because while a judge of the court he had accepted the post of India's Consul in Shanghai). Thus, it will be perfectly correct to strive towards establishing an order in which no one can be deprived of a chance of elevation to the bench or promotion in service because of his belief or opinions, and neither women, nor non-Muslims and workers will be denied justice because of bias. Lack of tolerance of others' opinions in the halls of justice could hardly convince the people of the virtues of tolerance.

At the same time we need to look at any signs of decline in judiciary's contribution to the country's social thought. In many countries we are witnessing an erosion of the judiciary's majesty due to the people's perception of a chasm between the judicial system and their communitarian cultural norms. Whether this is the case in Pakistan too needs to be probed, for public ownership of the system of justice is vital to its success.

The search for mechanisms for dispensation of justice that the ordinary citizens could own and whose judgments they could accept as fair had led the Superior Judiciary some time ago to propose alternative means of dispute resolution. Considerable interest was shown in the matter by judges and lawyers, though more by the former than the latter. The idea seems to have been given up. At least it is not discussed with as much enthusiasm as before.

The idea was that parties to a dispute, especially a civil matter, could be asked by the presiding judge to sit down together and work out a compromise that would meet the reasonable demands on either side and save both parties the ordeal of a long-drawn-out litigation and heavy expenses. The move did not find many buyers perhaps because the party having possession over property wished to enjoy the benefit of its advantage at least till the conclusion of the case and appeals. It is possible the lawyers feared loss of fees if the days of hearing were reduced. It should not have been impossible to meet these concerns within case-to-case packages of settlement.

It is not for lay citizens to go beyond inviting the attention of jurists to their need of effective reconciliation mechanisms that not only dispense justice but also promote a spirit of tolerance. The search for innovative judicial mechanisms can nowhere be given up.

The Role of Judiciary in Promotion of Culture of Tolerance

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Introduction:

The Judiciary is an institution of the highest value in every society and the Universal Declaration of Human Rights (Art 10) and the International Covenant on Civil and Political Rights (Art 14(1) proclaim that everyone should be entitled to a fair and public hearing by a competent, independent judiciary .

The rule of law is the foundation of a democratic society. The Judiciary is the guardian of the rule of law. Hence Judiciary is not only the third pillar, but the centre pillar of a democratic State. In a democratic country like Pakistan, where a written Constitution is followed, it is a supreme authority for all citizens and institutions. The authority to interpret the judicial complications is vested in the superior courts. It is also the prime duty of the Judiciary to oversee that all citizens and institutions including the executive and the legislature act within the framework of constitution and the fundamental law of the land[1]

Now-a-days the judiciary is subjected to severe criticism with reference to the back log, inefficiency and corruption. No one can justify, if the allegations are correct. The back log is a common problem in countries were adversarial system of justice is enforced. This inherent problem surfaced in Pakistan due to executive's being prejudice against judiciary and mismanagement of judicial system. Lack of interest in judicial reform, failure to cater the needs of judiciary in consonance with the needs of the growing population and its demands and above all keeping the judicial officers linked with the executive's ranks and grades. Misery adds to such instances in the fast moving world the people are furiously impatient, so to control all such problems and intolerant behavior towards the judiciary, there is a dire need to adapt the culture of tolerance in the judiciary and in legal fraternity.

Tolerance is the basis rather the fundamental principles of a society where compassion, charity, friendship, mutual understanding and peace are prompted tolerance and which leads to the basic guide lines so laid down for democracy by president Abraham Lincoln of U.S.A. in his address of Gettysburg (1809- 186562), i.e. ***Govt. of people, by the people and for the people***. This can never be achieved unless the authority so given by the people to rule the country by 51% of the majority over 49% unless we promote tolerance and peace in the society. It is also directly related to the fundamental principle of impartiality without making any distinctions like cast creed, race and ethnic origin.

We must remember that tolerance is created by the adaptability of flexibility in our behavior and attitude so we would have to adopt an attitude of flexibility; to learn to live together. Tolerance is also related to the principle of acceptance of criticism, difference of opinion and good suggestion for a better community living where justice and equality and brotherhood is promoted.

Another important factor for promotion of culture of tolerance is to promote respect for diversity and human dignity and reduce discrimination and intolerance from society, this specifically relates to the principle value, which says explicitly that we should reduce intolerance.

The aim of creating respect for diversity is to create a basis for peaceful togetherness. In diversity, we find unity or a common platform, and we cooperate to solve any issue in a peaceful manner.

Tolerance at the State level requires making of just and impartial legislation, law enforcement and its judicial and administrative promulgation without discrimination. It also requires that economic and social opportunities be made available to each person without any difference of cast, creed, religion and partism.

[1] From book a code of legal ethics at Page No. 347 by Ramanatha Aiyer's

For tolerance, one has to be open-minded for pursuit of social justice and emphasis is laid upon the values of equality and social concord. The hallmarks which the father of the Nation, Quaid-i-Azam Mohammad Ali Jinnah propounded regarding tolerance is[2]:

> "*Freedom of choice alone does not guarantee justice. Equal rights are not defined only by political value. Social justice is a trial of freedom, of equality, of liberty i.e.*
>
> - *Justice in political liberty*
> - *Justice in economic independence*
> - *Justice in social equality*

We cannot promote tolerance if we don't know, where and in what circumstances the intolerance comes from; generally these are the following root causes of intolerance:

Ignorance a lack of knowledge of understanding, or a tendency to see the world in black and white with no grey zones. With this attitude, I am convinced that what I know is the truth and that everyone else is wrong. *"You're either with us or against us"* that kind of ignorant attitude creates intolerance in the society.

Another cause is adaptation of a bias and prejudice attitude towards community if we are really honest with ourselves, we must put into the shoes of other before enforcing our whims and wishes upon other.

There is another important cause for intolerance is that we want to ***affix*** *our responsibility for our wrong doings to other shoulders,* where the intolerant attitude would come from.

Stress is another factor. We are more likely to be intolerant when we are stressed, so we should learn how to control the said stress situations by adopting tolerant behaviour.

Corruption is one of the most important factors to create injustice, and injustice at a single place is a threat to justice everywhere. It was said by the one experienced judge of Superior Courts that, *"I will never take into cognizance any allegation that is false and meant to harass any judge. But I'll accept any logical allegation of corruption, and will have the allegation probed by a competent judge".* Corruption in judiciary, the bar seems to be mainly responsible, which is becoming unmanageable and heterogeneous on account of discriminative recruitments.

Delay in disposal of cases: Generally, it has been observed that delay in disposal of cases by the courts frustrates the purpose of justice. The judiciary is facing the threat of mounting arrears and long delays. A man's hopes and aspirations, often even his life, are involved in a case he litigates. He must wait and wait, throughout the trial court where he gets a decision after eight to ten years. There is appeal in the High Court which takes another seven to eight years; and finally, the greatest tragedy of the system is that in the Supreme Court a civil appeal, in the ordinary course, would take fifteen years for final disposal. The system can yield results only if we abide by the norms of the system. Delay causes dismay, and creates disillusionment in, all those who knock at the doors of the courts. The rule of law and sanctity of judicial proceedings do not depend merely on the courts and the law enforcement agencies. They need a general climate of order and discipline, of tolerance and good behavior.

In recent year's scandals about lack of integrity have besmirched and dishonored the reputation of some judges at the highest level as well as lower levels. It has affected the image of the judiciary as a whole even though the majority of them are persons of great integrity and probity.

Lack of Judicial training: Fundamental judicial reform cannot be successfully carries out in the absence of trained Judges, having knowledge of law, fully cognizant of procedures and having the capacity to conduct judicial proceedings in an effective and efficient manner. The Judge must, therefore, be trained not just in the legal discipline but also know modern methods of Court administration. There is dire need to take bold and dynamic steps to reform and care for the judiciary, to expect any improvement will be a day dream.

[2] Commencement address of Mohtarma Benazir Bhuto to Harvard University, Harvard- 8th June 1989

Training should be imparted to the judicial officers in accordance with the tenets of Islam. They should also be made familiar with the rules of case flow, case management and judgment writing, more particularly to enable them to make the decision immediately on conclusion of the submissions made before them. During the course of training the judges are taught the methods of applying the law and the case law to a particular case to grant appropriate and deserved relief. Also they should avoid *making decisions on the face value of representatives of litigants* and avoid meetings with unconcerned persons in their chambers. Refresher courses should be introduced to update the judicial officers of advanced knowledge and the methods of deciding the cases without loss of time.

There is a dire need to apply the Zero Tolerance Policies in the judiciary as well as for legal fraternity. Basically it is the policy of applying laws or penalties upon even minor infringements of a code in order to reinforce its overall importance and enhance deterrence or the zero tolerance is a concept through which we design some policies in any organization to control any abrupt scenario or illegality which would be responsible for threats to demoralize and decline the status of that organization. These zero tolerance policies are continuously being adopted nationally and internationally. The areas of the application are:

1. ***Zero tolerance and harassment by bullying in the workplace.***
2. ***Zero tolerance in the use and control of narcotics.***
3. ***Zero tolerance in driving.***
4. ***In all educational institution***

Zero Tolerance in Judiciary:

The policies, guidelines and enactments have been done for the proper application of zero tolerance in judiciary by establishing the ***Supreme Court Judicial Council*** and by legislating the ***Judicial Standards and Accountability Act, 2010***. The purpose of this enactment seeks to:

- ***Lay down judicial standards***
- ***Provide for the accountability of judges***
- ***Establishes mechanisms for investigating individual complaints for misbehavior or incapacity of a judge of the Supreme Court or High Courts.***

Misbehavior in Juxtaposition to good behaviour, as a constitutional tautology, will not support impeachment but a misbehavior which is not a good behaviour may be improper conduct not befitting to the standard expected of a Judge.

The bad behaviour of one Judge has a rippling effect on the reputation of the judiciary as a whole. When the edifice of judiciary is built heavily on public confidence and respect, the damage by an obstinate Judge would rip apart the entire judicial structure built in the Constitution.

Bad conduct or bad behaviour of a Judge, therefore, needs correction to prevent erosion of public confidence in the efficacy of judicial process or dignity of the institution or credibility to the judicial office held by the obstinate Judge. When the Judge cannot be removed by impeachment process for such conduct but generates widespread feeling of dissatisfaction among the general public, the question would be who would stamp out the judge? The judge who would impress upon the Judge either to desist from repetition, or to demit the office in grace[3]?

It has been observed that some judges while extending their duties do not follow the norms and ethics as required by them. They must consider their status that they are the vertebral column of judiciary. The judiciary is manned, controlled and regulated by a judge, therefore, a judge should possess all the qualities and attributes which makes this position respectable, honorable for creating public trust and confidence in him. It is for the judge to first prepare himself morally and mentally capable to hold the post. No one is a born judge but the traditions, learning, knowledge of humility, courage and the resolve to do justice impartially and without fear or favour, affection or ill-will make a judge.

[3] From book of legal & professional ethics at Page No. 346 by Ramanatha Aiyer

Golden Rules of Islamic History:

Islamic history is full of golden rules, and traditions of justice, impartiality and independence which lay down that in the administration of justice no distinction should be made between the rich and the poor, ruler and subject and noble and ignoble. In this regard the letter of Hazrat Umar (RA) and Hazrat Ali (RA) has been quoted frequently. I will refer only few principles about the selection of judge:

- *First and foremost is to select and appoint people of excellent character, superior caliber and meritorious record.*
- *Judge should listen patiently and diligently. Ponder over the question then announce the judgment.*
- *Treat the people equally while doing justice in Court so that justice should be seen to be done.*
- *Implement the order promptly because order without implementation is a farce.*
- *Abundance of litigation and complexity of cases should not make judges lose their heart.*
- *They should not be corrupt, covetous or greedy.*
- *They must attach greatest importance to reasoning, arguments and proof*[4].

For application of zero tolerance policies in the judiciary for the judges have already been discussed in the National Judicial Policy Making Committee (NJPMC) by approving additional code of conduct for judicial officers which are required to them to maintain the decorum of the court in a proper manner. These are as under:-

1. To be God fearing, law abiding, abstemious, truthful, wise in opinion, cautious and forbearing, patient and clam, blameless, untouched by greed, completely detached and balanced, faithful to his / her words and meticulous in functions.
2. The officer should not show any fear or favour to any party before him and their lawyers both in his judgment and conduct.
3. He should avoid mixing up with people, roaming in hotels, markets and streets except in dire need and should avoid rage.
4. He should have command and control over the proceedings in the Court and should be consistent in his judgment.
5. He should also be courteous and polite, but not weak towards the litigants and their lawyers and should maintain decorum of the Court.
6. He should always endeavour to decide measures to ensure speedy justice and have effective control over the staff of his Court without being rude, rough or humiliating.
7. The judicial officer should be punctual while taking or leaving his seat and should be dressed in prescribed uniform and seated in a dignified manner but not so as to look a proud man.
8. He should avoid hearing cases, receiving guests or his colleagues in the retiring room and should avoid hearing one party or his lawyer in the absence of the other, except in case of ex-parte proceedings or in complaints cases.
9. He should not hear those cases in which he, his near relatives or close friends have got any interest and should not privately advise any of the parties so that it becomes a favour to the prejudice of the other party

The prevailing conditions in judicial administration which are product of adversarial system have led to a shift from formal system for redress of citizen's grievances to move informal ways of resolving disputes. Now world over Civil Justice System is heading towards in-formalism where grievances are to be resolved before they harden

[4] From the article the role and responsibilities of judge during murder trial caused by firearms injuries and its important aspects while recording the evidence and passing the judgment.

into disputes. It is inherent in man to create conflicts and also to resolve the disputes. Now it is for the people to choose formal or informal system. Even in informal system the judges can play important role in resolving the dispute. But such initiative by the judges is fraught with serious consequences and crises of credibility.

The standards of judicial behaviour, both on and off the Bench, are normally high. The conduct that tends to undermine the public confidence in the character, integrity or impartiality of the Judge must be eschewed and avoided.

I have recently read the book of ***Legal and Professional Ethics by P. Ramanatha Aiyar, an Indian*** writer who had written the golden principles for smooth running of judiciary with legal fraternity. These ethics would also be very helpful to promote the culture of tolerance in present scenario of the judiciary:

Golden Principles for the Promotion of Culture of Tolerance in Judiciary

- ***Relations between the Bench and the Bar:***
  It cannot be forgotten that members of the judiciary are equally members of the legal profession. A judge and an advocate discharge complementary functions in building up the edifice of justice. Thus one is not alien to the other.

- ***Conduct of a Judge towards the lawyer:***
  The Bench should not disregard the privileges of the Bar. The Judge is entitled to insist upon the dignity of his office and upon the way of speech and manners towards him. But the Bar cannot be uncivilized, rude or disrespectful towards the Judge. The Judge also should not be impatient and inconsiderate towards the lawyer.

- ***Duty of the Judge to respect privileges of the Bar:***
  The instinct for fearless decision in the Judge is on account of the sense of independence of the Bar. A judge may admonish a lawyer in a dignified manner where his conduct calls for chastisement from the Court. Duty to the Bar, duty to himself and duty to the public demand civil conduct on the part of the presiding Judge are very important factors in this regard.

- ***Judges/Benches should not keep aloof from the Lawyers/Bars:***

Usually some Judicial Officers suffer from an obsession as if they are free with the members of the Bar they are liable to be misunderstood and that it may even derogate from their own dignity. They generally avoid all kinds of civil and social contacts. This enforced exclusiveness on the part of Judges has a beneficial effect even on the administration of justice. Lawyers are not as a class dangerous to move with; they are not inferior to him in status; free movement between lawyers and Judges will make their work in Court easier. No Judge can fully discharge these duties without the cooperation of the Bar.

- ***Interrupting the Counsel:***

Interruption from the Bench may be as under:

(1) Questioning with a view to elucidate a position, which should be welcomed by the Bar so that the Bar may clarify the point

(2) Some Judges go on putting questions to the lawyers till either the lawyers admit defeat or the Judge feels convinced by the answers given. But the Court should consider that the court-room is not converted into a debating forum.

- ***Cutting short the arguments*:**

A shrewd Judge legitimately cuts short unduly long arguments if he is satisfied that the counsel was merely spinning arguments.

- ***Studying case records previously by the Judge:***

If the Judge goes through the case record prior to hearing arguments, it saves time by the Judge putting his doubts to both counsels and getting their replies thereto. It shows that the Judge had formed an opinion about the case except on the points requiring clarification.

- ***Courtesy, kindliness and Patience:***

The above are the characteristics of a Judge. A Judge could not be impatient while the case is being argued. He must understand that the lawyer arguing before him is paid by his client and so he had made a deep study of the facts and law. As such, a patient hearing is expected from the Judge. More so, in the case of junior members of the profession, LORD JUSTICE FRY said: to give a receptive listening to each side and when hearing young counsel. How great the pleasure a kind word from the Bench has been narrated. BACON (Bacon Nathanial (1647-1676) American Colonist born in England led a rebellion to gain Governmental reforms.) says: it is generally better that the Judge should err on the side of indulgence in the matter than that he should endeavor to hold the reins too tightly. After all, the administration of justice is necessarily but an approximation towards that ultimate and absolute justice which may come with the millennium but never before.

- ***Dignity and stability of Government*:**

The dignity and stability of Government in all its branches, the morals of the people, and every blessing of society, depends so much upon an upright and skilful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, so that it may be a check upon both, as both should be checked upon that.

Judges, therefore, should always be men of learning and experience in the Laws, of exemplary morals, great patience, calmness and attention; their mind should not be distracted with jarring interests; they should not be dependent upon any man or body of men. To these ends they should hold estates for life in their offices, or, in other words their commission should be during good behavior, and their salaries ascertained and established by law[5].

i) Judicial Activism*:*

A Judge should not be a mere passive spectator of the drama that is being enacted before him, but he should take an active part therein. Sometimes, it is said that a Judge should not enter the arena conflict and he should always keep himself out of the ring and allow the field open to the contestants. The theory of Judicial Activism has been introduced by some Judges of the Supreme Court of the USA the phrase being coined by **Justice Douglas**. In Pakistan **Justice A.R Cornelius** has performed his duties well in this regard as being a Chief Justice of Pakistan. It is true that a Judge should cultivate objectivity of mind and as far as possible; he is not to enter the arena of conflict. Sometimes, however, he is presented with an extraordinary phenomenon, as for example, there is a poor widow who is pitched against an affluent and unscrupulous person who is able to suborn witnesses and engage the best talents of the Bar. When the Judge finds that all the big guns are heavily loaded against the woman, then it is his bounden duty to intervene and to try his level best to see that justice is done. This is what is meant by Judicial Activism.

While I was studying the book namely ***Judges and Judicial Accountability by Cyrus Das K. Chandra, President, Commonwealth Lawyers' Association Kaula Lumpur,*** many important aspects have been discussed by giving the reference of Asia pacific conference in which "a *Beijing statement of principles of the independence of the judiciary in the law asia region***"** had been approved for maintaining the good governance and for proper application of zero tolerance policies in the judiciary the following two important aspects were given:

Relationship with the Executive:

1. Executive powers which may affect judges in their office, their remuneration or conditions or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges.
2. Inducements or benefits should not be offered to or accepted by judges if they affect, or might affect, the performance of their judicial functions. The Executive authorities must at all times ensure the security and physical protection of judges and their families.

[5] From book of legal & professional ethics by P Ramanatha Aiyer.

Emergency:
Some derogations from the independence of the judiciary may be permitted in times of grave public emergency which threaten the life of the society but only for the period of time strictly required by the exigencies of the situation and under conditions prescribed by law, only to the extent strictly consistent with internationally recognized minimum standards and subject to review by the courts. In such times of emergency the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts and detention of persons administratively without charge shall be subject to review by courts or other independent authority by way of habeas corpus or similar procedures.

The jurisdiction of military tribunals must be confined to military offences. There must always be a right of appeal from such tribunals to a legally qualified appellate court or other remedy by way of an application for annulment.

Zero Tolerance in Legal Fraternity:
The zero tolerance policies have already been discussed in detail for legal fraternity by enacting the legal ethics under **Legal Practitioner Act 1926** in which different conducts of advocates have been elaborated in very professional manners such as conduct with regards to other advocates, conduct with clients, conduct with regards to the public in general and duty to courts.

A self-respecting independence in the discharge of professional duty without denial or diminution of the courtesy and respect due to the Judge's station is the only proper foundation for orderly personal and official relations between the Bench and the Bar.

Quaid-e-Azam Muhammad Ali Jinnah is a Role Model for us, who won the case of Pakistan due to his reputation of integrity on first as a lawyer and later as a politician, was his best asset according to him. *"A lawyer, who does not acquaint himself with philosophy, history and other branches of knowledge, is a half lawyer".* Jinnah's conduct of cases is marked by the research and scholarship undertaken by him on the subject under issue.

Reputation of a lawyer is his greatest asset, but it is proportionate to the integrity established by him in accepting the brief, in its preparations and presentation. A lawyer who is not correct in his deal with the client loses respect as a man, even if he is brilliant as a lawyer. When a client offered Rs.5,000/- for conduct of a case, Jinnah insisted to receive only Rs.1,500/- because the case was over in three days and Jinnah then was charging Rs.500/- per day. The client saved his Rs.3, 500/-. But Jinnah earned respect

There are a few cases that Jinnah lost but he earned the respect of his client and admiration of the Judges before whom he appeared. ***A lawyer of integrity presents his case fearlessly***. When Jinnah was expounding a point of law before a Full Bench in Bombay and the impatient Presiding Judge, a Britisher remarked, *"the Court has a little knowledge of what you are attempting to submit"* and he wanted Jinnah to leave the point, Jinnah retorted *"little knowledge is dangerous my Lord..I am therefore, going to explain in details".* The Full Bench had to listen to him to the end, resulting in the case being decided in his favour.

I am tempted to refer to one case quoted by Hector Bolitho where Jinnah had lost. However, Jinnah told his client that the judgment should be appealed because it was wrongly given. The client who was unable to pay the expenses much less the fees expressed his inability. Jinnah ordered his clerk to accept the case and incur the expenditure. On appeal Jinnah won the case. The client rushed to the office of Jinnah and wanted to pay him (as he said he has now some resources). Jinnah congratulated him and declined his offer.

It was Lord Denning a legend in his lifetime, who while addressing the lawyers in Lahore had said that lawyers are of two types, a mason or an architect, the later type are those who besides being acquainted with logic have knowledge of history, philosophy and language of the Court Jinnah was an architect lawyer[6].

This is the duty of Legal Fraternity to comprise and encompass courtesy and respect to the Court for the sake of the temporary incumbent of the judicial office, but for the maintenance of supreme importance of the judiciary, lawyer can be deferential without being abject; and independent and fearless without being disrespectful. The greatest amount of firmness can co-exist with an equal amount of grace and politeness. 'Neither truckle nor be

[6] All Pakistan legal decisions Quaid-e-Azam as a lawyer by S.M. Zafar, Senior advocate

truculent'–expresses the duty and the right. Nothing is more destructive of public confidence in the administration of justice than a disregard by the Court of the privileges of the Bar or incivility, rudeness or disrespectful conduct on the part of counsel towards the Judge. Even when the Judge, forgetful of the fact that the lawyer is an officer of the Court and a counselor to it, treats him with disrespect, he should value himself too highly to pay the Judge back in the same coin. A firm and temperate remonstrance is all that a lawyer needs to make.

The lawyer must never display temper in Court because of an adverse ruling or decision. The temptation to show the disappointment, to be sharp in retort and impatient in manner will be strong; but the lawyer should remember that it is highly unprofessional to yield to such temptations. It is much easier to be a hero than a gentleman. When you are right you can afford to keep your temper, when wrong you cannot afford to lose it.

A lawyer should be straightforward and respectful and should not try to create breeze in Court. He should assist the Judge in the performance of his duty.

He should never try either to misstate facts or mislead the Court. His argument should be pointed, clear, precise and concise. He should try to win the confidence of the Court.

(i) He should have also strong sense of humour, and pleasing manners, to relieve otherwise, dull and drab atmosphere of law Courts is created accordingly.

(ii) Oration has very little place in sound and the advocacy. It has the same place as the marked-down tag on the suit of clothes at a closing at sale. It looks nice, but it means little. As in the past, so in the present, the Bar takes a direct and responsible part in the creation and development of our law by legal decisions. A lawyer should be regarded as a cooperator in the search for truth: and he may be and ought to be, a powerful instrument for the administration of justice.

(iii) He should always remember that precedents are more efficacious than arguments: *(Valindiora sunt expla quam verba; el plentus opera docetur quam voce).* Even if there is any decision against him, it is the duty of the lawyer to disclose it. He may later on distinguish it on the facts of a particular case, or even contend that the decision does not lay down sound law; if he does so, he will win the esteem of the Judge.

(iv) Above all, the lawyer must be tactful, what exactly is meant by tact? Essentially, it is thoughtfulness or consideration for others. It is that quality that steers us through life, hurting, humiliating, and inconveniencing others as little as possible. Tactfulness is really a habit of mind, which can be developed. We shall become tactful as we remember to do, or refrain from doing, certain things; for tact is simply that, practically speaking. Without doubt, this subtle, desirable quality is the very lubricant of harmonious living[7].

Lawyer has to be a gentleman first. His most valuable asset is the respect and goodwill he enjoys among his colleagues and in the Court. No one expects of lawyer to be subservient to the Court while presenting his case and not to put forward his arguments merely because the Court is against him. In fact, that is the moment when he is expected to put forth his best effort to persuade the Court. However, if, in spite of it, the lawyer finds that the Court is against him, he is not expected to be discourteous to the Court or to fling hot words or epithets or use disrespectful, derogatory or threatening language or exhibit temper which has the effect of overbeating the Court. Cases are won and lost in the Court daily. One or the other side is bound to lose. The remedy of the losing lawyer or the litigant is to prefer an appeal against the decision and not to indulge in a running battle of words with the Court. That is the least that is expected of a lawyer. ***Silence on some occasions is also an argument***. The lawyer is not entitled to indulge in unbecoming conduct either by showing his temper or using unbecoming language.

A member of the Bar undoubtedly owes a duty to his client and must place before the court all that can fairly and reasonably be submitted on behalf of his client. He may even submit that a particular order is not correct and may ask for a review of that order. He must uphold the dignity and decorum of the Court and must not do anything

[7] From book of legal & professional ethics at page 342 by Ramanatha Aiyer' Justice Raj Kishore Prasad

to bring the Court itself into disrepute. Scandalizing the Court is really polluting the very fount of justice; it brought into disrepute the whole administration of justice.

Recommendations and suggestions:
Legal professionals have to face cases of conflict of interest because an essential element in the professional client relationship is trust. Clients trust that the professional will dedicate all his or her efforts to the relevant service without interference from other pre-occupations. The over-zealous pursuing of clients' interest may sometimes lead to conflicts between a judge and a lawyer so there is a dire need to promote the culture of tolerance in judiciary by following the guidelines as mentioned below:

i) Judges should remain patient during court proceedings with lawyers. They should avoid giving hurtful remarks.

ii) Judges may impart stern admonishment but should not chastise parties or lawyers because

"When the only tool you have is a hammer, every problem looks like nail".

iii) Courts by necessity are adversarial in the common law tradition. Concepts like win/lose, right/wrong are built into the system. Any language that perceives difference as an opportunity for growth, an opportunity to learn about one another and facilitates such growth and the consequent understanding and acceptance of another is going to contribute peace in society.

iv) The court and counsel should interact in a way that provides a pattern for the client as to how to behave as opposed to how not to behave.

v) If the client instructs the advocate to proceed in a way which offends his sense of propriety, he may decline to do so provided he explain his rationale or invite the client to other counsel.

vi) Judges and lawyers alike should guard against gender bias. Especially in family suits, if the courts want to have respect for all litigants and more importantly want to avoid continuous bitterness and animosity between parties once resolution occurs, it is presumed that it could go a long way to taking some modest steps to articulate respect and understanding for all parties.

vii) Counsels can educate the clients to think in terms of brainstorming many options towards mutual agreements when thinking about a settlement to reframe the role of the judge into a coach helping towards a consented outcome[8].

viii) Disciplinary action should be quickly taken and concluded against the delinquent judicial officers and the support staff; in particular, those connected with drug mafia should be awarded stern punishment to serve as deterrence and to set an example.

ix) Introducing pertinent policy / strategy at college and university level should raise standards of legal education higher.

x) The members of the Bar, particularly office bearers of the Bar Associations and Bar Councils should take upon themselves the responsibility to see that all elements spreading the tentacles of the corruption are chopped off.

[8] Regional seminar justice for all impunity for none 9th to 11th Sep 2011 Lahore, Pakistan role of lawyers and judges internal conflicts Hon'ble Chief Justice of the Lahore High Court Mr. Ejaz Ahmed Chaudhry.

xi) The Judge should be careful about his behavior as he is the bastion for people to reap the fruit of democracy, liberty and justice as well as the antithesis rocks the button of the rule of law as it is said nation falls when judges are unjust.

xii) A new syndrome has recently developed among the lawyers i.e. of embarking on strikes for remedying any and every grievance – sometimes even for a demand for transfer of a particular judicial officer on whimsical grounds. Sometimes, strikes are resorted to as a show of solidarity on the arrest or even on a registration of a bonafide case against a member of the bar, litigant faces difficulties which is also the big factor for intolerant behavior as adopted by the litigant so it is suggested that the culture of strike should be condemned by the bars for smooth dispensation of justice.

xiii) That now- a- days it has been observed that the bar councils are being highly politicized and sharply divided into groups, it is suggested that the institution of a legal Ombudsman be established. This institution should remedy the failure on the part of the bar councils and other professional bodies. In the event of the disciplinary bodies not acting effectively, the legal Ombudsman should take over the investigation of complaints and dispose of the same as per law.

xiv) We must consider on the subject of accountability of lawyers and judges as, the dignity of the court is best served by keeping dispensation of justice as the paramount objective on both sides of the bench. We, the lawyers, and the judges are here to serve justice, equity and fair play and the first charge on us is to ensure that our acts be just and equitable and result in fair play for all.

xv) A lawyer must participate to promote the culture of tolerance and he should not be involved in violence or injury to the person. The lawyer's responsibilities are greater than those of private citizens. A lawyer should avoid being a party in any type of litigation even as pro bono public. He should not file any case or writ petition in his own name and act or plead the case of his own for his personal gain or publicity and also avoid while arguing his case by playing with the gallery to impress his client or persons attending the proceedings.

xvi) Striking of a balance between the progressive outlook and the present social milieu has to be at the pinnacle of the mental pyramid.

xvii) Judicial training is a most essential component of the system of administration of justice. Indeed fundamental judicial reform cannot be successfully carried out in the absence of trained Judges, having knowledge of law, fully cognizant of procedures and having the capacity to conduct judicial proceedings in an effective and efficient manner. The Judge must, therefore, be trained not just in the legal discipline but also know modern methods of Court administration and case management.

xviii) People respect the law and have confidence in Courts. They want the laws to be effectively enforced and equally applicable to all. They expect the judiciary to be a neutral, impartial, and most importantly, an independent umpire for dispensing justice and settling their disputes so the judges should be very careful and perform their duties in accordance with law.

xix) As developing societies, we have to survive, and not just survive, but excel in performance, so as to be able to attract investment, increase trade and commerce and enhance the pace of economic development. We could do so only if we are conscious of the fact that we need to modernize our laws in a manner to cope with the challenges of modern times and requirements of present day conditions. We need also to reform our system of administration of justice from time to time to become more efficient and be

able to come to the expectations of the people by expeditiously settling disputes and resolving conflicts

Conclusion:

Bench and Bar both are involved and concerned with the dispensation of justice, we must always change, review, rejuvenate ourselves; we must not immune to stiffness. The tolerance is the virtue that makes peace possible by adopting a dynamic process of cooperation among all states and peoples founded on a respect for freedom, independence, equality and human rights, and a fair and equitable distribution of resources to meet the needs of all peoples.

The culture of intolerance, hatred and frustration can only be eliminated with the realization of justice in its true sense by adopting the guidelines, enactments and the professional legal ethics. We must understand that both the judges and lawyers are accountable at their respective forums. We the lawyers and judges are here to ensure justice, equity and fair play and our prime duty is to ensure that our acts must be just and equitable and must result in fair play for all.

Finally, I must appreciate, congratulate and thank the leadership of Supreme Court of Pakistan, the *Hon'ble Chief Justice of Pakistan Mr. Justice Tassaduq Hussain Jillani and the Chairman of the Organizing Committee* as well as all other members for their untiring efforts to set up this Conference on very important topic, having the object to improve the culture of tolerance in the judiciary. I have no doubt that exchange of information and material through the seminars and conferences would greatly be facilitated through the task of learning from each other's experiences and expertise to strengthen and improve the performance of the judicial system nationally and internationally.

Thanking you.

Tolerance for Intolerance?

Mr. Babar Sattar
Advocate, Islamabad

Chief Justice Tassaduq Hussain Jillani implored while speaking at the reference of Justice Khilji Arif Hussain last week that, "we have to protect the constitutional values of democracy, of religious tolerance, of human dignity and providing inexpensive and expeditious justice." Who can deny that our allegiance to these foundational values, upon which is founded our claim of being a civilized society, is faltering? While reforming the society falls beyond the judiciary's province, more power to Chief Justice Jillani if making our court system an emblem of tolerance figures on top of his agenda for judicial reform.

The factors that explain how the beast of intolerance confronting our state and society today came into being are many. But most relevant to the justice system are two. One, where there is lack of faith in the delivery of justice through formal legal processes, those subjected to injustice resort to self-help. And thus revenge, often in violent form, fills the space that is otherwise to be occupied by justice. And two, where there is no certainty of punishment and the justice system fails to act as a deterrent, those who believe in enforcing their views and beliefs through use of force are further emboldened.

Charity, they say, begins at home. If our judicial leadership wishes to promote tolerance within the society, it must focus on the manifestations of intolerance within the justice system, which require focus on five factors:

(i) Composition of the judiciary;

(ii) Failure to evolve meaningful jurisprudence on the right to liberty;

(iii) Tolerance for intolerance manifested in proceedings before courts;

(iv) Self-righteousness and inability of courts to distinguish between law and personal morality; and

(v) The failure to breathe life into a moth-eaten justice system that offers no hope to the ordinary Joe.

According to the Declaration of Principles of Tolerance proclaimed and signed by member states of UNESCO in 1995, "tolerance is respect, *acceptance* and appreciation of the rich diversity of our world's cultures, our form of expression and ways of being human. It is fostered by knowledge, openness, communication, and freedom of thought, conscience and belief. Tolerance is harmony in difference." And to be practiced, it requires, *"just and impartial legislation, law enforcement and judicial and administrative process."*

In a diverse society, faith in impartiality doesn't grow simply because it is loudly proclaimed. The proof of the pudding is in the eating. But equally important is the perception on impartiality that is linked to the representativeness of decision-making institutions. Other diverse societies have relied on affirmative action to ensure representation of minority and marginalized groups within administrative and judicial forms to buttress the legitimacy of such forms and faith of marginalized groups in their ability to render impartial decisions.

In the entire history of our Supreme Court we have had no more than handful non-Muslim judges – Alvin Cornelius, Dorab Patel, Rustam Sidhwa and Rana Bhagwandas come to mind. Never has a woman served on the Supreme Court or as a High Court Chief Justice. More recently nominations of lawyers for the High Court have been shot down because they are Ahmedi or even because they are suspected of enjoying the forbidden nectar. Even Shia judges serving on the bench complain privately that they face prejudice on grounds of faith.

Words alone might be insufficient to reassure minorities that our courts are impervious to the biases (that spring from gender, religious and ethnic identities) on full display within our society in this age of growing intolerance. And the responsibility for lack of representativeness of our superior judiciary rests with no one other than the judiciary itself. For our judiciary has aggressively guarded its turf and its discretion to singlehandedly determine the composition of the judiciary, even by toying with the perilous idea of striking down a constitutional amendment.

Our courts have undoubtedly expanded the scope of fundamental rights over the years. We have seen evolution of citizens' economic rights. We have seen state's arbitrary decisions struck down under Article 25 (right to equality). We have seen expansive interpretation of the right to life under Article 9, which holds that *"no person shall be deprived of life or liberties save in accordance with law".* But what we have not seen is a meaningful interpretation or enforcement of the right to 'liberty' beyond its most basic physical manifestation i.e. freedom from arbitrary arrest.

What is more problematic is judiciary's manifest tolerance for intolerance. Legal equality is a fiction in a sense that it is meant to exist despite social and economic inequalities prevalent within the society. But if social and economic realities and inequalities begin to determine the nature of justice meted out by courts, what useful purpose do courts serve? If the function of courts is limited to endorsing and legitimizing societal power relations instead of protecting the aggrieved against them, are such courts chambers of justice or expediency?

Let's turn to some recent cases. Some zealots charged that a painting in a long-standing magazine of the National College of Arts was blasphemous. The publication had to be discontinued as a means of resolving the dispute. Another set of zealots charged that a private school in Lahore teaching high school students the history of religions in a course entitled comparative religions was indulging in immorality. The school had to immediately shelve the course to save its skin. The manner in which those charged with blasphemy are convicted under mob pressure needs no repetition.

In 1996 a bigot shot Justice Arif Bhatti of Lahore High Court in his chambers for he had released an 11-year old charged with blasphemy. In 1998, the Bishop of Faisalabad, Dr. John Joseph, shot himself in the head outside a courthouse, to protest the manner in which Christians were being persecuted in the name of enforcing blasphemy laws. Pervez Ali Shah, the judge, who sentenced Mumtaz Qadri to death for killing Governor Salman Taseer in cold blood, has been exiled to Saudi Arabia by the state to save his life from bigots.

If courts can neither protect citizens from social coercion and violence nor themselves and the lessons being learnt (with the help of base human survival instinct) is that it is better to appease the intolerant as opposed to confronting them, are the courts not facilitating the transformation of a coercive social consensus into a conformist one? While the volume of case law on sections 296-B and C of the PPC keeps growing there is hardly any ruling what Article 20 *("every citizen shall have the right to profess, practice and propagate his religion")* means today.

Then there is the question of mixing law and personal morality and thereby taking out legal certainty from rule of law and replacing it with preferences and whims of individual judges. Face book was banned by the Lahore High Court not after due deliberation over how to strike the right balance between the individual right of citizens to liberty, free speech and information and the collective right of society to guard itself against hate speech, but because in the view of the judge adjudicating the matter the moral question involved trumped the very need to discuss legal rights.

YouTube has been banned not in exercise of any lawful authority vested in the government, but in submission to fear of bigoted brigades and the havoc they might wreck if anyone wishes to debate alternative ways to prevent Muslim sensibilities from being offended by an abusive video accessible on the website. And it remains shut not because there is legal merit in the order that shut it down, but because formally allowing access to YouTube (already accessible through proxy servers) would offend zealots who might create a law and order situation.

"Certitude leads to violence", Justice Oliver Wendell Holmes Jr. had argued. And further that, "*this is a proposition that has an easy application and a difficult one. The easy application is to ideologues, dogmatists, and bullies – people who think that their rightness justifies them in imposing on anyone who does not happen to subscribe to their particular ideology, dogma or notion of turf. If the conviction of rightness is powerful enough, resistance to it will be met, sooner or later by force."* Self-righteousness and intolerance are bosom buddies if not conjoined twins.

Self-righteousness, if unchecked, can take law away from reason and certainty and leave it at the mercy of the personal faith and moral preference of the individual judge. Just because such self-righteousness is being practiced by someone adorning judicial robes doesn't make it any less of a manifestation of intolerance than that being

practiced by someone within the society who is forcing his person moral code on a fellow citizen by holding a gun to his head.

In *A Theory of Justice* John Rawls proposed that *"principles of justice"* be decided from behind a *"veil of ignorance"* i.e. in an environment where "no one knows his place in society, his class position or social status…his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like". He claimed that the first principle that would emerge would be for each person, "*to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."* Rawls' theory is certainly a useful device to understand personal biases.

Lastly, what needs to be addressed on war footing is our failure – as lawyers and judges – to salvage our justice system that simply doesn't provide inexpensive and expeditious justice. If we claim that we have been making efforts for reform, especially at the basic level of interface between ordinary folk and justice, let us then exhibit the courage to acknowledge that our efforts are not good enough. Let us also acknowledge that we have become comfortable with practices and expediencies that do not square with the cannons of ethics that bind us as professionals. This must change and what it means is that we must change.

Appendix –E

Event Management

Sr. No.	Name, Designation & Duties Performed
Secretary of the Conference	
Mr. Nasrullah Khan, Joint Secretary (NJPMC)	
Preparation/issuance of Invitation letters and Confirmation of Invitees/Participants	
A. Foreign Delegates	
1.	Ms. Tanveer Badar Jajja, Section Officer (Law), Law and Justice Commission of Pakistan
2.	Mr. Kacho Hatam Khan, LDC, Law and Justice Commission of Pakistan
B. Local Participants	
1.	Mr. Qasim Aslam Minhas, Research Officer-I, Law and Justice Commission of Pakistan
2.	Mr. Haq Nawaz, Assistant, Law and Justice Commission of Pakistan
3.	Mr. Zafar Iqbal, LDC, Law and Justice Commission of Pakistan
Paper Collection for Working Groups	
1.	Ms. Tanveer Badar Jajja, Section Officer (Law), Law and Justice Commission of Pakistan
2.	Mr. Mukhtiar Ali, Computer Operator, Law and Justice Commission of Pakistan
3.	Mr. Kacho Hatam Khan, LDC, Law and Justice Commission of Pakistan
Reception	
1.	Mr. Muhammad Tanveer, MIS Manager (Incharge), Law and Justice Commission of Pakistan
2.	Mr. Iqbal Hussain, Superintendent (Sub-Incharge), Supreme Court of Pakistan
3.	Mr. Ijaz Ali, Superintendent (Sub-Incharge), Supreme Court of Pakistan
4.	Mr. Muhammad Haseeb, LDC, Supreme Court of Pakistan
5.	Mr. Zamurad Hussain, Qasid, Supreme Court of Pakistan
6.	Mr. Wahid Zaman, Naib Qasid, Supreme Court of Pakistan
7.	Mr. Shakeel Mehmood, Naib Qasid, Supreme Court of Pakistan
8.	Mr. Ghulam Rasool, Naib Qasid, Supreme Court of Pakistan
9.	Mr. Kashif Hussain, Supreme Court of Pakistan
Registration	
1.	Syed Mughees Ul-Hassan, Computer Programmer, Law and Justice Commission of Pakistan
2.	Mr. Mehmood Alam, Data Coder, Supreme Court of Pakistan
3.	Raja Fayyaz ul Haq , Data Coder, Supreme Court of Pakistan
4.	Mr. Javed Zafar, Data Coder, Supreme Court of Pakistan
5.	Mr. Muhammad Azam, Data Coder, Supreme Court of Pakistan
6.	Mr. Imtiaz Umar, Data Entry Operator, Supreme Court of Pakistan
7.	Mr. Junaid Aziz, Data Entry Operator, Supreme Court of Pakistan
8.	Mr. Imtiaz Ali Abbasi, Data Entry Operator, Supreme Court of Pakistan
9.	Malik Bilal Zafar, Data Entry Operator, Supreme Court of Pakistan
10.	Mr. Umar Hayat, Data Entry Operator, Supreme Court of Pakistan
11.	Mr. Shahid Mehmood Anwar, Data Entry Operator, Supreme Court of Pakistan
12.	Mr. Qamar Zaman, Naib Qasid, Supreme Court of Pakistan
13.	Mr. Imran Khan, Qasid, Law and Justice Commission of Pakistan
14.	Mr. Muhammad Ismail, Naib Qasid, Law and Justice Commission of Pakistan
Distribution of Material	
1.	Raja Muhammad Faisal Iftikhar, Deputy Secretary (Incharge) Law and Justice Commission of Pakistan
2.	Syed Nasir Ali Shah , Librarian, Law and Justice Commission of Pakistan
3.	Malik Arshad Mehmood, AAO, Law and Justice Commission of Pakistan
4.	Mr. Murtaza Khan, Superintendent (Admn), Law and Justice Commission of Pakistan
5.	Mr. Abdul Qayyum, UDC, Law and Justice Commission of Pakistan
6.	Mr. Zamar Said, LDC, Law and Justice Commission of Pakistan
7.	Mr. Iftikhar Khan, Naib Qasid, Law and Justice Commission of Pakistan
8.	Mr. Asif Mehmood Naib Qasid, Law and Justice Commission of Pakistan

9.	Mr. Wajid Hussain, Naib Qasid, Supreme Court of Pakistan
10.	Mr. Mudassar Hussain, Naib Qasid, Supreme Court of Pakistan
Media Coordination/Press Release	
1.	Dr. Muhammad Tahir, Deputy Secretary (Incharge), Law and Justice Commission of Pakistan
2.	Mr. Shahid Hussain, PRO, Supreme Court of Pakistan
3.	Mr. Zafar Iqbal, Data Entry Operator, Supreme Court of Pakistan
4.	Mr. Muhammad Fakhar Alam, UDC, Law and Justice Commission of Pakistan
5.	Mr. Noor Ellahi, Naib Qasid, Law and Justice Commission of Pakistan
6.	Mr. Mehmood Akhtar, Dispatch Rider, Law and Justice Commission of Pakistan
7.	Mr. Azhar Hussain, Naib Qasid, Supreme Court of Pakistan
Seating Arrangements	
1.	Mr. Jawad Khan, Joint Secretary (Admn), Law and Justice Commission of Pakistan
2.	Mr. Abdul Nabi, Research Officer, Law and Justice Commission of Pakistan
3.	Mr. Pervaiz Iqbal, Superintendent, Supreme Court of Pakistan
4.	Mr. Khurram Shahzad, CA/Superintendent, Supreme Court of Pakistan
5.	Mr. Muhammad Zaman, Judicial Assistant, Supreme Court of Pakistan
6.	Mr. Gulzar Hussain, UDC, Law and Justice Commission of Pakistan
7.	Mr. Farooq Shah, LDC, Law and Justice Commission of Pakistan
8.	Mr. Shoukat Hayat, LDC, Law and Justice Commission of Pakistan
9.	Mr. Asif Mehmood Naib Qasid, Law and Justice Commission of Pakistan
10.	Mr. Qamar Mehmood, Naib Qasid, Law and Justice Commission of Pakistan
11.	Mr. Shahbaz Ahmed, Naib Qasid, Supreme Court of Pakistan
12.	Mr. Muhammad Saeed, Naib Qasid, Supreme Court of Pakistan
13.	Mr. Muhammad Shehzad, Naib Qasid, Supreme Court of Pakistan
14.	Mr. Muhammad Ismail, Naib Qasid, Supreme Court of Pakistan
Working Sessions on 19-04-2014	
Group-I	
1.	Ms. Muneera Abbasi, Joint Secretary (Overall Incharge), Law and Justice Commission of Pakistan
2.	Dr. Muhammad Tahir, Deputy Secretary, Law and Justice Commission of Pakistan
3.	Miss. Ra'ana Rukh-e-Aisha Ansari, Judicial Assistant, Supreme Court of Pakistan
4.	Mr. Shahzad Ahmed, Assistant Private Secretary, Law and Justice Commission of Pakistan
5.	Mr. Muhammad Irfan, Assistant, Law and Justice Commission of Pakistan
6.	Mr. Javed Zafar, Data Coder, Supreme Court of Pakistan
7.	Mr. Bilal Zafar, Data Entry Operator, Supreme Court of Pakistan
8.	Mr. Muhammad Mukhtar, Naib Qasid, aw and Justice Commission of Pakistan
9.	Mr. Wajid Hussain, Naib Qasid, Supreme Court of Pakistan
10.	Mr. Muhammad Saeed, Naib Qasid, Supreme Court of Pakistan
Group-II	
1.	Mr. Jawad Khan, Joint Secretary (Admn), Law and Justice Commission of Pakistan
2.	Mr. Iqbal Hussain, Superintendent, Supreme Court of Pakistan
3.	Mr. Altaf-ur-Rehman, Judicial Assistant, Supreme Court of Pakistan
4.	Mr. Mehmood Alam, Data Coder, Supreme Court of Pakistan
5.	Mr. Umar Hayat, Data Entry Operator, Supreme Court of Pakistan
6.	Mr. Farooq Shah, Law and Justice Commission of Pakistan
7.	Mr. Zamurad Hussain, Qasid, Supreme Court of Pakistan
8.	Mr. Noor Ellahi, Naib Qasid, Law and Justice Commission of Pakistan
9.	Mr. Ghulam Rasool, Naib Qasid, Supreme Court of Pakistan
Group-III	
1.	Ms. Tanveer Badar Jajja, Section Officer (Law), Law and Justice Commission of Pakistan
2.	Syed Mughees ul-Hassan, Computer Programmer, Law and Justice Commission of Pakistan

3.	Mr. IJaz Ali, Superintendent, Supreme Court of Pakistan
4.	Ms. Hina Yasmin, Judicial Assistant, Supreme Court of Pakistan
5.	Mr. Muhammad Azam, Data Coder, Supreme Court of Pakistan
6.	Mr. Imtiaz Umar, Data Entry Operator, Supreme Court of Pakistan
7.	Mr. Asif Mehmood Naib Qasid, Law and Justice Commission of Pakistan
8.	Mr. Shakeel Mehmood, Naib Qasid, Supreme Court of Pakistan
9.	Mr. Sajjad Ali Ujjan, Naib Qasid, Supreme Court of Pakistan
Group-IV	
1.	Mr. Ali Raza, Research Officer (Fund), Law and Justice Commission of Pakistan
2.	Mr. Abdul Samad Chandio, Judicial Assistant, Supreme Court of Pakistan
3.	Mr. Mukhtiar Ali, Computer Operator , Law and Justice Commission of Pakistan
4.	Raja Fayyaz ul Haq, Data Coder, Supreme Court of Pakistan
5.	Mr. Shahid Mehmood Anwar, Data Entry Operator, Supreme Court of Pakistan
6.	Mr. Kacho Hatam Khan, LDC , Law and Justice Commission of Pakistan
7.	Mr. Qamar Mehmood, Naib Qasid, Law and Justice Commission of Pakistan
8.	Mr. Wahid Zaman, Naib Qasid, Supreme Court of Pakistan
9.	Mr. Muhammad Sabeel, Naib Qasid, Supreme Court of Pakistan
Liaison with Police, Media and Transport etc.	
1.	Mr. Jawad Khan, Joint Secretary (Admn), Law and Justice Commission of Pakistan
2.	Malik Arshad Mehmood, AAO, Law and Justice Commission of Pakistan
3.	Mr. Murtaza Khan, Superintendent (Admn), Law and Justice Commission of Pakistan
4.	Mr. M. Yousaf Shaikh, Cashier/Assistant, Law and Justice Commission of Pakistan
5.	Mr. Muhammad Saleem, Assistant, Law and Justice Commission of Pakistan
6.	Mr. Muhammad Mukhtar, Naib Qasid, Supreme Court of Pakistan
Lunch/Tea & Dinner	
1	Mr. Jawad Khan, Joint Secretary (Admn), Law and Justice Commission of Pakistan
2.	Raja Muhammad Faisal Iftikhar, Deputy Secretary (Admn) Law and Justice Commission of Pakistan
3.	Malik Arshad Mehmood, AAO, Law and Justice Commission of Pakistan
4.	Mr. Murtaza Khan, Superintendent (Admn), Law and Justice Commission of Pakistan
5.	Mr. Sirbuland Khan, LDC, Law and Justice Commission of Pakistan
6.	Mr. Talib Hussain, Naib Qasid, Law and Justice Commission of Pakistan
7.	Mr. Gul Rehman, Naib Qasid, Law and Justice Commission of Pakistan
Duties at Benazir Bhutto International Airport, Islamabad	
1.	Mr. Ali Raza, Research Officer (Fund) (for Arrival), Law and Justice Commission of Pakistan
2.	Mr. Fakhar Alam, UDC, Law and Justice Commission of Pakistan
3.	Mr. Ali Muhammad Mughal, UDC, Law and Justice Commission of Pakistan
4.	Mr. Nisar Ahmed-I, LDC, Supreme Court of Pakistan
5.	Mr. Farrukh Javaid, SO (Audit/Accounts), Law and Justice Commission of Pakistan
6.	Mr. Khalid Khan, Assistant, Law and Justice Commission of Pakistan
7.	Mr. Muhammad Ali, Computer Programmer, Law and Justice Commission of Pakistan
8.	Malik Shahbaz Hussain, LDC, Supreme Court of Pakistan
Judges & Dignitaries Reception	
1.	Mr. Qasim Aslam Minhas, Research Officer-I, Law and Justice Commission of Pakistan
2.	Raja Nasir Mehmood, Superintendent, Supreme Court of Pakistan
3.	Mr. Zubair Qasim, Superintendent, Supreme Court of Pakistan
4.	Mr. Muhammad Sohail Iqbal Jami, Judicial Assistant, Supreme Court of Pakistan
5.	Mr. Muhammad Sufian Qamar, Judicial Assistant, Supreme Court of Pakistan
6.	Mr. Abdul Samad Chandio, Judicial Assistant, Supreme Court of Pakistan
7.	Mr. Altaf-ur-Rehman, Judicial Assistant, Supreme Court of Pakistan
8.	Ms. Hina Yasmin, Judicial Assistant, Supreme Court of Pakistan

9.	Mr. Muhammad Irfan, Assistant, Law and Justice Commission of Pakistan
10.	Mr. Khalid Khan, Assistant, Law and Justice Commission of Pakistan
11.	Mr. Amir Shahzad Shaheen, Data Entry Operator, Supreme Court of Pakistan
12.	Mr. Waqas-ur-Rehman, LDC, Supreme Court of Pakistan
13.	Mr. Mehboob Ali, LDC, Supreme Court of Pakistan
Facilitation Desk-I Main Gate & Desk- 2nd 3rd on 19.04-2014	
1.	Syed Nasir Ali Shah, Librarian (Incharge), Law and Justice Commission of Pakistan
2.	Mr. Shahid Mukhtar, Assistant Private Secretary, Law and Justice Commission of Pakistan
3.	Mr. Abid Hussain, Superintendent, Supreme Court of Pakistan
4.	Mr. Junaid Aziz, Data Entry Operator, Supreme Court of Pakistan
5.	Mr. Wakeel Ahmed, UDC, Supreme Court of Pakistan
6.	Mr. Muhammad Haseeb, LDC, Supreme Court of Pakistan
7.	Syed Rajab Ali Shah, Naib Qasid, Supreme Court of Pakistan
8.	Mr. Muhammad Zaman, Judicial Assistant, Supreme Court of Pakistan
9.	Mr. Imtiaz Abbasi, Data Entry Operator, Supreme Court of Pakistan
10.	Mr. Sami-ur-Rehman, LDC, Supreme Court of Pakistan
11.	Mr. Muhammad Shahzad-II, Naib Qasid, Supreme Court of Pakistan
12.	Mr. Yasir Masih, Sweeper,
13.	Mr. Arif Masih, Sweeper
14.	Mr. Rizwan Sweeper
15.	Mr. Muhammad Raffique, Sweeper
Duties at Different Entry/Security Check Points	
Hotel Serena Security Check Point	
1.	Mr. Wakeel Ahmed, UDC, Supreme Court of Pakistan
2.	Mr. Ali Raza Khalid, LDC Supreme Court of Pakistan
3.	Mr. Sajjad Ali Ujjan, Naib Qasid, Supreme Court of Pakistan
NADRA Security Check Point	
1.	Mr. Abid Hussain, Superintendent, Supreme Court of Pakistan
2.	Mr. Sami-ur-Rehman, LDC, Supreme Court of Pakistan
3.	Mr. Muhammad Ashraf, Naib Qasid, Supreme Court of Pakistan
PTV Security Check Point	
1.	Mr. Muhammad Zaman, Judicial Assistant, Supreme Court of Pakistan
2.	Mr. Muhammad Jahangir Khan, LDC, Supreme Court of Pakistan
3.	Mr. Muhammad Sabeel, Naib Qasid, Supreme Court of Pakistan

Group Photo of the Participants of International Judicial Conference, 2014