

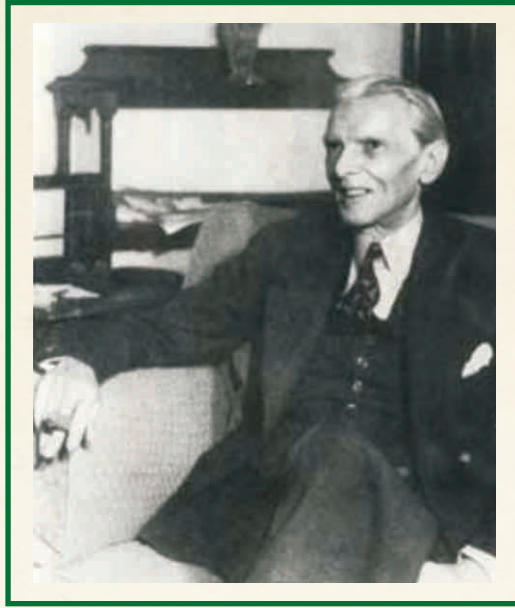


Mr. Justice Anwar Zaheer Jamali
The Honourable Chief Justice of Pakistan

Address

Fundamental Rights-
The Promise of a Just Society

10 December 2015



“Islam and its idealism have taught us democracy. It has taught equality of man, justice and fairplay to everybody. We are the inheritors of these glorious traditions and are fully alive to our responsibilities and obligations as framers of the future constitution of Pakistan.”

Broadcast to the people of the United States of America on Pakistan February, 1948

“The foundations of your State have been laid, and it is now for you to build, and build as quickly and as well as you can. So go ahead and I wish you God speed.”

Quaid-i-Azam Muhammad Ali Jinnah

Message to the Nation on the occasion of the first Anniversary of Pakistan on 14th August, 1948



Law & Justice Commission
of Pakistan

Our Goal

Our Goal is a Pakistan based on a
fair and substantive Rule of Law

Our Vision

A fair, impartial, inclusive and substantive
Rule of Law as the foundation of a modern and
dynamic Pakistan

Our Mission

To lead the reform of law and justice institutions to be fair and
inclusive; strengthen organizational capacities and accountability to
be effectively responsive to citizens' security and
justice needs and well being; and empowering citizens to assert
their rights and claim their entitlements, and exercise their duties and obligation.



CHIEF JUSTICE OF PAKISTAN
JUSTICE ANWAR ZAHEER JAMALI

CHAIRMAN
LAW & JUSTICE COMMISSION *of* PAKISTAN
GOVERNMENT *of* PAKISTAN

Distinguished guests

Ladies and Gentlemen:

1. As State officials, we take an oath that is set out in the Constitution. Accordingly, on 10 September 2015, when I was honoured with the office of the Chief Justice of Pakistan, I swore and reaffirmed my “true faith and allegiance to Pakistan”. I committed “That I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan ... without fear or favour, affection or ill-will”. And of course, “May Allah Almighty help and guide me (A'meen)”. As head of the judiciary, I am committed to “discharge my duties, and perform my functions, honestly, to the best of my ability and faithfully in accordance with the Constitution of Islamic Republic of Pakistan and the law”. Other high State officials also take a similar oath that reflects the responsibility entrusted to them.
2. Being a judge is an obligation that one can only assume with utmost humility and earnestness. In addition to my Constitutional obligation to do “complete justice” (art. 87(1)), personally, I am very conscious of my religio-moral obligation as a judge, which weighs very heavily on me and makes this responsibility that much more onerous. According to the Muslim worldview, to do or provide “justice”, one partakes in a divine function that is epitomized and encapsulated in the “attribute” or “name” of Allah Almighty, al-Adl, “The Just”. We can only pray and aspire to realise that ideal but it is one of the most testing responsibilities one is likely to be bestowed.
3. Today, I would like to discuss, what I consider to be, the essence and the spirit of the Constitution, namely, the Preamble, the Principles of Policy and Fundamental Rights. Without these elements, the Constitution would be a mechanical document structuring and distributing State power and authority. But it is precisely these elements that make our Constitution a dynamic and vibrant document in the life and development of both State and society. As I shall explain, they connect our past, present and future in a very real sense, and highlight the centrality of the Constitution to our progress and development as a Just Society as promised by the Constitution. They touch upon the very essence of the State of Pakistan as a concept, a reality and an aspiration.
4. It is these elements that define our rule of law as a substantive rule of law by means of which the sense of fairness and justice become integral to our determination of what makes valid

law and policy. They inform our understanding and interpretation of the Constitution, laws, public policy and mandates.

5. The Preamble sets out the basis of the State where ultimate sovereignty belongs to “Allah Almighty alone” that is delegated as a “sacred trust”, an authority to be exercised by “the people of Pakistan”. State's authority and power is thus widely and inclusively dispersed amongst the “people of Pakistan” who exercise it through their elected “representatives”. It is the “will of the people of Pakistan” that Pakistan shall be “a democratic State based on Islamic principles of social justice” reflected in the creation of “an egalitarian society”. As such, political legitimacy is vested in “the people of Pakistan” who assert it by stating that “through our representatives in the National Assembly, [we] adopt, enact and give to ourselves, this Constitution”.
6. The Preamble also sets out some of the key “principles” to be observed by the State, namely, “democracy, freedom, equality, tolerance and social justice, as enunciated by Islam ...”. It guarantees fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association ... “. Although they may or may not be justiciable, policies and practices that effectively reduce or concentrate power, wealth and opportunities violate the very essence and spirit of the Constitution and the underlying political settlement articulated in the Preamble that sets as our goal the creation of “an egalitarian society”.
7. Reminding us of the “unremitting struggle of the people against oppression and tyranny”, the Preamble provides the normative conception of the State, as, in the words of the Constitution, “a new order” mandated to create “an egalitarian society”. At the heart of the idea or mission of Pakistan is also this hope and promise of an ethical conception of the State that connects with the Islamic worldview. As such, in our context, the creation of an egalitarian society is not a mere philosophical notion, it is, in fact, a Constitutional imperative that must be practically observed and implemented. This may appear daunting but we must continuously strive to ensure that this goal is a cornerstone of State efforts including legislation, public policy, jurisprudence and economics.
8. Additionally, the pre-eminence of the ethical is clear from the fact that Ultimate sovereignty “belongs to Allah Almighty alone” and State authority is exercised “within limits prescribed by Him” as a “sacred trust”. The ethical is not a mere theological abstraction that provides a notional limitation on the exercise of public authority. It is an insistence on asserting the principles of fairness, equity and justice in politics and public policy and in our efforts to do “complete justice” (art. 187). As one Qur'anic verse eloquently puts it: “My Lord hath commanded justice” (Surah al Ara'af, 29) and then there are more elaborate verses that instruct on doing social and economic justice. These verses being “injunctions of Islam” serve as a source of law. In this regard, article 227 states that “no laws shall be enacted that are repugnant to such Injunctions” and article 203D empowers the Federal Shariat Court to test whether any laws or policies are repugnant to the Injunctions of Islam (Holy Quran and Sunnah).
9. In furtherance of the Preamble, the Principles of Policy set out a particular path for development that commits the State to provide protections and benefits which are largely in

the nature of socio-economic rights. For example, the State shall “secure the well-being of the people ... by raising [the] standard of living, by preventing the concentration of wealth and means of production and the distribution in the hands of a few to the detriment of the general public...” (art. 38(a)). The State shall “provide basic necessities of life, such as food, clothing, housing, education and medical relief, for all such citizens ... as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment” (art. 38 (d)). Clearly, the Principles of Policy conceive Pakistan as a welfare State.

10. According to article 29, “[I]t is the responsibility of each organ and authority of the State, and of each person performing functions on behalf of an organ or authority of the State, to act in accordance with the Principles of Policy ...”. Citizens therefore have a legitimate expectation that the State will take the necessary measures to provide the promised benefits and protections. Even where the application of the Principles of Policy is dependent on the availability of resources, organs of the State cannot simply ignore the Constitutional commitments – the State is required to earnestly strive to realize them.
11. I am therefore compelled to state that it is not sufficient that the governments merely seek an annual statement of performance from ministries, departments and other organs of the State against the Principles of Policy. More concrete social and economic indicators based on the Principles of Policy are required to measure and evaluate their performance so as to take meaningful remedial measures. The increasing income disparity and the concentration of wealth and opportunities certainly do not make for the promised egalitarian society, indeed, they run contrary to the very idea itself. Moreover, I am compelled to say that given our ethical conception of the State promised by the Constitution and the Principles of Policy commitments there are serious questions over the nature and direction of our development. These are points for critical self-reflection given citizens' legitimate expectations based on our socio-economic constitution imperative.
12. Fundamental Rights lay at the very heart of the Constitutional concept of Pakistan as earlier discussed. They protect very basic “interests” that are considered “inviolable” and essential to the development of the human personality and society, such as life (art. 9), dignity (art. 14) and equality (art. 25). The Shehla Zia case defines the right to life by observing:

The word life is very significant as it covers all facets of human existence. The word life does not mean nor can it be restricted only to the vegetative or animal life or mean existence from conception to death. The word life includes such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally (Shehla Zia v WAPDA PLD 1994 SC 693).

Interestingly, in light of this 1994 judgment, the Supreme Court of Pakistan is, arguably, leaning towards a rights-based approach to development, where, in Amartya Sen's language, “capacities” are protected as rights rather than simple “existence from conception to death”. It renders justiciable questions about the quality of life that are touched upon in the Principles of Policy. But unfortunately the jurisprudence has not been adequately developed by local scholarship elaborating the significance and import of the judgment and nor has it been implemented by the Executive as a duty of care to the citizens. Nonetheless, it is a

progressive judgment that is indicative of the judicial mind on the significance of Fundamental Rights.

13. This approach is also similar to Islamic thinking on rights that recognizes and prioritises “objectives” or “values” that must be protected as rights. The theory is known as “maqasid al Shari’ah” that draws on “public welfare” as a basis of developing law and rights in Islam. I leave it to legal academics and Islamic scholars to examine these connections and draw out their significance for Pakistan.
14. The pre-eminence of Fundamental Rights in the Constitutional scheme is evident from article 8 which provides that any law, custom or usage having the force of law may be declared void in so far as it is inconsistent with fundamental rights or “takes away” or “abridges” any right so conferred. Hence, to avoid needless litigation, the Legislature and the Executive must ensure that laws, policies and their actions comply with Fundamental Rights to avoid being declared null and void by the Courts.
15. Whilst we are fortunate to have a transformative Constitution as evidenced by the Preamble, Principles of Policy and Fundamental Rights, we are suffering from a chronic crisis of implementation. Mal-administration and corruption are undermining and sapping our Constitutional values and energy, eroding the very ethical basis of our State and society that is foundational for their creation and wellbeing. As I have mentioned earlier, whilst we recognize that implementation is an Executive function, where Fundamental Rights are violated, the Courts are compelled to intervene and at times prompt organizational reforms –which again, is essentially an Executive function.
16. We are confronted with the same dilemma with the Principles of Policy. Given citizens' legitimate expectations based on Constitutional imperatives, what is the Judiciary to do when the Executive and governments are veering so far off the Constitutional course that citizens' health and well-being are being adversely impacted? When public policies undermine the welfare and interests variously protected by the Constitution? Moreover, what are Courts expected to do when the inviolable rights to life and dignity are actually violated due to State policies and conduct in sheer ignorance of the Preamble and the Principles of Policy? Whilst we are reluctant to intervene, ultimately, such violations will compel the Courts to take notice. To avoid such action, we respectfully advise that all sections of the State must implement the Constitution and laws effectively including Fundamental Rights.
17. We are fortunate to have a transformative document as our Constitution. Not a single word or punctuation in the Constitution is idle or can be ignored. The Constitution has to be construed and interpreted in its totality as an integrated and mutually reinforcing document. For this purpose, there needs to be greater Legislative, Executive and Judicial emphasis on implementing, what I termed the essence and the spirit of the Constitution to effectively establish a rule of law based State and society as envisaged by the Constitution. A key test is the implementation of Fundamental Rights informed by the Preamble and Principles of Policy.
18. The Preamble, the Principles of Policy and Fundamental Rights constitute the essential pact of inclusion. It is only an inclusive and just society which the Constitution promises as “an

egalitarian society” that can ensure sustainable development and a stable State and society. As I stated in my address to the Senate of Pakistan, an unjust State and society, is an unstable State and society that cannot sustain in the long-term. Even in the short to medium term, an unstable State and society cannot realize its potential. It will not attract investment or yield significant improvements in economic growth. Economists like Joseph E. Stiglitz have written on the destructive impact of inequality in *The Price of Inequality* (2012), where he concludes and which I find myself agreeing with:

“The other vision is of a society where the gap between the haves and the have-nots has been narrowed, where there is a sense of a shared destiny, a common commitment to opportunity and fairness, where the words “liberty and justice for all” actually mean what they seem to mean, where we take seriously the Universal Declaration of Human Rights, which emphasizes the importance of not just civil rights but of economic rights, and not just the rights of property but the economic rights of citizens ...

I believe this ... vision is the only one consistent with our heritage and values. In the well-being of our citizens –and even our economic growth, especially if properly measured- will be much higher than what we can achieve if our society remains deeply divided. I believe it is not too late for this country to change course, and to recover the fundamental principles of fairness and opportunity ... (pp. 362-363).

19. Our Constitution reiterates this same message that the Founder of Pakistan, Quaid-i-Azam, Muhammad Ali Jinnah counselled the infant nation in his address to the Constituent Assembly of Pakistan, 11 August 1947: “If we want to make this great State of Pakistan happy and prosperous, we should concentrate on the well being of the people, and especially of the masses and the poor. Everyone of you, no matter what his colour, caste or creed, is first, second or last a citizen of this State with equal rights, privileges and obligations...”
20. For me, as head of the judiciary, the challenge is to ensure effective equality before the law (art. 25) as construed in the context of the Preamble that provides “equality of status, of opportunity and before law, social, economic and political justice ...” and Principles of Policy that obligates all State institutions and organs to ensure access to justice that is “inexpensive and expeditious”.
21. I assure you that the judiciary is striving to observe this message of our founder, Quaid-e-Azam Muhammad Ali Jinnah. Our focus is to ensure equality (art. 25), which is foundational for the rule of law. However, at the same, we need to re-examine those laws and policies that are unfair in content and/or application, and undermine our Constitutional values. All State institutions and organs need to critically assess their respective efforts against the ethical vision that “inspired” the creation of the State and reaffirm their commitment through State actions and conduct. That is our main challenge.
22. In order to meet this challenge, it is critical that citizens are informed and aware of their Fundamental Rights to assert them and claim their entitlements, in addition to holding the State accountable effectively. To this end, today, I am pleased to inaugurate the Law & Justice Commission of Pakistan's mass public awareness campaign on Fundamental Rights, the Principles of Policy and the Preamble. It is supported by a partnership with civil society and the Supreme Court of Pakistan's Human Right Cell that aims to provide, as a last resort

mechanism, practical advice to persons in distress, unable to obtain any relief. It is your campaign, and I therefore hope that you will take this campaign to the very grassroots, to those most vulnerable and marginalized.

22. I must emphasise that we cannot accept persons being forced to commit suicide, suffer horrible deaths, as a protest for the denial of justice. We have to assume our responsibility for such situations and our failure to establish a Just Society as promised by the Constitution. Accordingly, my major effort will focus on strengthening service delivery in the justice sector including the judiciary. I am committed and as I promised will do my best to “preserve, protect and defend the Constitution of the Islamic Republic of Pakistan ... without fear or favour, affection or ill-will”.
23. Thank you.