

**SPEECH BY MIAN RAZA RABBANI,
CHAIRMAN SENATE OF PAKISTAN AT THE
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1. The tradition of intra-institutional communication was a missing part of our history your invitation to me today has opened the door to this dialogue and I reciprocate by inviting the Chief Justice of Pakistan to address the Committee of the Whole of the Senate which is seized with the question of access to justice for the ordinary citizen.

2. Kisi Ne Darwaish say poocha, “dunya main sab dukhi Q hain?”, Darwaish Ne Hans k kaha, “khushian sub kay pas hain”, bus kisi aik ki khushi doosray ka dard bun jati hay.

This fits in with the present day Pakistani scenario wherein the basic law is the Constitution, but each organ of the state and institution functioning through or under the Constitution, including federal intrusion into provinces becomes a nightmare for the other.

3. The topic pre-supposes the functionality of institutions, do these institutions exist, are these institutions or structures of convenience, created by the ruling elite to pay lip service to certain commands of the Constitution in order to perpetuate the status quo.

4. Further the proposition says, “considering rule of law”, is there rule of law? Or do we have a selective application of law, in furtherance of a

specific agenda or, is law and the Constitution used to justify state oppression.

5. Have these institutions not at various junctures of history aided and abated the usurpers. The Parliament by validating orders and actions of dictators, the Executive by executing them and, the Judiciary through the doctrine of state necessity.

6. In the absence of respect for the Constitution and law, how do you expect rule of law, when regularly the Constitution is either abrogated or held in abeyance, the Executive is militarized, Parliament is dissolved and Judges made to take oath under the PCO – where is rule of law?

7. The concept of rule of law is broad. There is no universally agreed definition. At its core, the rule of law is a mean of ordering society – including the state citizen relationship. It includes system of rules and regulations, the norms that infuse them and the means of adjudicating and enforcing them.

(i) Dicey thought there were three facets to the rule of law. The broad principles remaining, each society has to find its own equilibrium.

8. We are in a state of transition, where the reality is that the civil-military bureaucracy is the only organized force, Parliament is in a nascent stage trying to wet its feet to its concept of sovereignty, the Judiciary is trying to find its moorings after its realist movement and, the executive is plagued by nepotism and corruption.

9. In these objective conditions, we need to firstly build institutions and internal mechanisms, develop tradition, promote tolerance and recognize the Constitution as the grandnorm and not a nose of wax that can be moulded at the slightest expediency.

10. What are the challenges:

- (i) The challenges of building inclusive state institutions are not confined to Pakistan alone. The postcolonial states in South Asia struggled to establish state institutions that reflected the ethno-linguistic complicity of their society. Keeping in view, societal diversity, creation of decentralized institutions was one of the most important challenges faced by the new states. Since independence Pakistan is functioning under an over emphasized, centralized and exclusive state apparatus.
- (ii) Dilemmas of Post-colonial state, 'over-developed state' (inherited civil-military, judicial structures from the Raj) and 'under-developed political culture', (inherited rudimentary Westminster-style institutions sans plurality of political parties)
- (iii) Ideological ambiguities: tradition versus modernity, parliamentary versus presidential, garrison/security versus welfare state [competing struggles: Democracy, the constitution, political parties, elections are on occasions THEOLOGICALLY contested]
- (iv) Failure to draft a Constitution. Later high mortality

- (v) Rule of Law versus Martial Law [diluted the institutional writ through LFOs, PCOs, SROs etc.]
- (vi) Continuation of colonial 'Steel frame' of bureaucracy verses indigenous.

11. The 18th Amendment has brought about a conceptual change and paradigm shift from centralism to participatory federalism, if it had not been enacted in 2010, its political repercussions would have been of a still born child for the federation.

12. Therefore, now the task of building institutions and strengthening them is multi-dimensional, firstly at the federal level, secondly between institutions at the federal level, thirdly at the provincial level, fourthly between the institutions at the provincial level and fifthly between the institutions at the federal and provincial level to allow the concept of participatory federalism to grow.

13. The Constitution, 1973, enunciates the principle of trichotomy of power between Parliament, Judiciary and the Executive. The common thread running between these organs of state and institutions functioning through or under them is the rule of law. The concept of trichotomy of power, goes back to the period of Plato and Aristotal. A French jurist Montesquieu in his book "Spirit of Laws" published in 1748, for the first time enunciated the principle of separation of powers. Keeping the concept of trichotomy in mind and also being aware that the state is an organic unity and that it cannot be divided into water tight compartments, let us see what is the way forward.

14. Firstly, institutions must operate on democratic principles and practices - rule of law, accountability, transparency, the challenge is to determine how best to strengthen institutions so they incorporate such practices as a matter of routine.

15. Secondly, the source of legitimacy of an institution should be from the constitutional imagination. Any institution created outside this ambit will be aberration. For example, Majlis-e-Shoora of Zia the dictator, Musharraf's Parliament or National Security Council.

16. Thirdly, each institution apart from the broad guidelines provided by the Constitution or any other instrument under it, must have a detailed mandate specified either through law or the rules. This mandate should conform to the parameters laid down for each in the Constitution.

17. Fourthly, operationalization of the institution within its mandate.

18. Fifthly, complementariness amongst institution for example the judiciary passes a judgment, the implementation of that judgment is the work of the executive. Another example, Parliament legislates, operationalizing that legislation would essentially be the work of the executive.

19. Sixthly, institutional discretion or individual discretion in institutions distorts the very concept of rule of law (in the Senate we are trying to do this).

20. Seventhly, institutions should not be compartmentalized or polarized, working within their constitutional ambit, there should be bridges of communication at various levels which are built through interaction, rules and traditions.

21. To be more precise, there is the 21st Amendment with a sun down clause, are we ready institutionally, for its replacement, no, what we need is;

- a) A sound and effective criminal justice system, comprising police, prosecution service, judiciary, and prison service which is critical to ensure law and order, rule of law.

- b) We need to depoliticize and professionalise the police on top priority. A police service that is (i) operationally neutral, (ii) organizationally autonomous, (iii) functionally specialized, (iv) institutionally accountable, and (v) professionally service-oriented. At the moment;
 - (i) Police - has no value for life.
 - (ii) Torture.
 - (iii) Encounters.
 - (iv) Missing persons - in the presence of POPA, Anti Terrorism Act. what is the need.
 - (v) Where the criteria for promotion is the number of encounters leaves much to thought.

- c) The rate of conviction in Pakistan is abysmally low, largely because our investigation system lacks quality. A well-carried out investigation is crucial to the success of a prosecution.
 - d) There is a need to set up a specialized agency for investigation and prosecution of complex criminal cases, including terrorist offences, and for their speedy trial by specialist judges.
 - e) We must provide foolproof protection to threatened witnesses, police officials, prosecutors and judges, before, during, and after trial; where necessary by giving them a new identity.
 - f) We need to de-colonize the Executive (particularly its recruited component) through Civil Services Reforms to indigenize them and make them compatible with the 'reformed circumstances.
22. Corruption eats away the vitals of our society and the State, but the NAB law is flawed.
- (i) Plea bargaining, onus of proof, not independence.
 - (ii) Corruption is covered under the PPC, Anti Corruption Act, FIA Act, NAB Ordinance. All are parallel forums.
23. In this discourse of institution building I would not confine myself to the three traditional institutions given under the Constitution but would widen it to include the nursery of one State institution that is Parliament, the political parties which need to develop themselves in an institutional framework.

24. But all is not bleak, the changing dynamics are;

- Parliament did not validate under Article 270AA, 1. The Proclamation of Emergency of the fourteenth day of October, 1999, the Provisional Constitution Order No.1 of 1999, the Oath of Office (Judges) Order, 2000 (No.1 of 2000), Chief Executive's Order No. 12 of 2002, Chief Executive's Order No.19 of 2002, the amendments made in the Constitution through the Legal Framework Order, 2002 (Chief Executive's Order No. 24 of 2002), the Legal Framework (Amendment) Order, 2002 (Chief Executive's Order No. 29 of 2002) and the Legal Framework (Second Amendment) Order, 2002 (Chief Executive's Order No. 32 of 2002), notwithstanding any judgment of any court including the Supreme Court or a High Court, are hereby declared as having been made without lawful authority and of no legal effect.
- The Judiciary didn't legitimize it.

25. This lecture series initiated by you has perhaps for the first time raised such basic questions on intra-state institutions. These questions we as a society and indeed as a state through out our history have avoided and shied away from, but now the time has come when such critical questions and issues need to be debated and resolved if we are serious in providing a better future to the millions of Pakistani.