

THE NEED FOR JUDICIAL ACTIVISM ACCEPTANCE SPEECH

*Dr. Tariq Hassan**
On Behalf Of The Chief Justice Of Pakistan

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Honorable President, Dean of the Shepard Broad Law Center, members of the faculty, respected students, distinguished guests, ladies and gentlemen. It is an honor and a privilege for me to represent the Chief Justice of Pakistan, Mr. Iftikhar Muhammad Chaudhry, and to accept on his behalf, the Honorary Doctor of Laws degree conferred upon him by Nova Southeastern University (NSU) today.

As you are aware, Chief Justice Chaudhry could not be here personally due to the complex and delicate situation of the judiciary in Pakistan. He has however, asked me to convey his sincerest congratulations to each of you receiving a degree today and to wish you every success for the future. He has also asked me to thank NSU for conferring this degree and for thereby expressing unequivocal solidarity with the cause of an independent judiciary in Pakistan.

* The author, an LL.M. and S.J.D. from Harvard Law School, is an attorney and advocate of the Supreme Court of Pakistan. He is presently the head of International Legal Services, a law firm based in Islamabad. He was the former Chairman of the Securities and Exchange Commission of Pakistan and Adviser on Law and Economics to the Minister of Finance of Pakistan. The article is an enlarged version of a commencement speech given by the author on the occasion of the 2008 Commencement Ceremony of Nova Southeastern University, which conferred an Honorary Doctor of Laws Degree on the Chief Justice of Pakistan, Mr. Iftikhar Muhammad Chaudhry, in recognition of his courageous stand in support of the rule of law in Pakistan, and as a symbol of the critical importance of an independent judiciary and bar in the fight for freedom and democracy around the world. Dr. Hassan represented the Chief Justice of Pakistan on the occasion and received the Honorary Degree on his behalf. The author wishes to thank Dr. Parvez Hassan, Barrister Aitzaz Ahsan, and Advocate Athar Minallah for their support and Barrister Amber Darr for her assistance in writing this article. *Editor's note: this speech, in its original form, appears in the July 2007 issue of Vital Voices.*

From that fateful day, March 9, 2007, when he was first suspended from office¹ until today, Chief Justice Chaudhry's impeccable judicial conduct in the face of extreme personal hardship has made him not only a hero to the Pakistani public but also a symbol of an independent judiciary for the entire international legal community.

The Pakistani administration has, however, vilified Chief Justice Chaudhry for being a "judicial activist"—an attribute that I would like to make the subject of my speech today. The Pakistani administration blamed Chief Justice Chaudhry for interfering in executive functions and government policy. Indeed, the Proclamation of Emergency on November 3, 2007, which suspended the Pakistani Constitution² and the fundamental rights of the citizens of Pakistan, cited judicial activism as the primary reason for doing so.³

This is not the first time that emergency has been declared and the Constitution suspended in Pakistan. However, this is the first time that the judiciary has been made the basis for such an action! And, this is also the first time that more than sixty judges of the superior courts in Pakistan have consequently refused to take oath under the Provisional Constitution Order. These judges—together with the multitude of lawyers who have since March 2007 braved police brutality, unwarranted arrests, and financial distress—have kept alive the struggle for the independence of judiciary in Pakistan. This

1. A reference was filed against the CJP before the Supreme Judicial Council pursuant to which he was sent on forced leave. Pervez Musharraf, Reference (Mar. 21, 2007), available at <http://proud-pakistani.com/2007/03/21/text-of-reference-filed-against-the-cjp/> (last visited Aug. 28, 2008). However, a full bench of the Supreme Court comprising thirteen Judges restored the CJP pursuant to its Order dated July 20, 2007. Chaudhry v. Musharraf, 2007, 578 PLD V (SC).

2. See generally Islamic Republic of Pakistan [Constitution] [hereinafter Pak. Const.].

3. See Pervez Musharraf, Proclamation of Emergency (Nov. 3, 2007), available at http://www.pakistani.org/pakistan/constitution/post_03nov07/proclamation_emergency_20071103.html (last visited Aug. 28, 2008). This was accompanied by the Provisional Constitution Order No. 1 of 2007 ("PCO"—issued November 3, 2007 and amended November 15, 2007), which ushered in a one-man rule—and the Oath of Office (Judges) Order, 2007—which required judges to take fresh oath of allegiance under the PCO. See Pervez Musharraf, Provisional Constitution Order No. 1 (Nov. 3, 2007), available at http://www.pakistani.org/pakistan/constitution/post_03nov07/pco_1_2007.html (last visited Aug. 28, 2008; Pervez Musharraf, Amended Provisional Constitution Order No. 1 (Nov. 15, 2007), available at http://www.pakistani.org/pakistan/constitution/post_03nov07/pco_amend_2007.html (last visited Aug. 28, 2008). The Proclamation of Emergency was later revoked on December 15, 2007 by the Revocation of Proclamation of Emergency Order 2007, which in turn was accompanied by the Constitution (Second Amendment) Order, 2007, which sought to validate the extra-constitutional actions through which the judiciary has been uprooted in Pakistan. See Pervez Musharraf, Revocation of Proclamation of Emergency Order (Dec. 15, 2007), available at http://www.pakistani.org/pakistan/constitution/post_03nov07/emergency_revocation_order.html (last visited Aug. 28, 2008); Pervez Musharraf, Constitution (Second Amendment) Order (Nov. 15, 2007), available at http://www.pakistani.org/pakistan/constitution/post_03nov07/pco_amend_2007.html (last visited Aug. 28, 2008).

principle, which forms the cornerstone of every democratic society, is also enshrined in the Constitution of Pakistan.

It is the duty of any court of law to decide according to law and with due process all matters before it, irrespective of whether these matters have arrived before it in the form of a petition filed by an aggrieved person or whether the court itself has taken notice of an irregularity. If the so-called errant members of the judiciary were determining matters otherwise than in accordance with the law or were exceeding the limits of their jurisdiction, the government had legal means available to it to block these excesses. But the government's grouse stemmed from its ego and its belief in its inherent superiority over the other organs of State and not from concern over any violation of the law. Resorting to extra-constitutional, indeed illegal means for the removal of judges merely showed the government's weakness, desperation and self-interest. At the time of the emergency was declared there were a number of cases pending before the Supreme Court, which directly involved General Pervez Musharraf and threatened his continuance in the office of the President. Each of these cases has since been decided in favor of General Musharraf. The courts have become pliant and in negation of the principle of trichotomy of powers, have bowed to the will of the executive.

Is Chief Justice Iftikhar Muhammad Chaudhry indeed a judicial activist? If it is judicial activism for a judge to exercise his constitutional powers to enforce the fundamental rights of citizens, then perhaps Chief Justice Chaudhry is a judicial activist.⁴ Indeed, there are many instances of this brand of judicial activism.

Soon after he assumed office as the Chief Justice of Pakistan, Chief Justice Chaudhry took *suo motu* notice of crimes against women. He re-opened the case of Mukhtar Mai who had been gang-raped in a village in Pakistan and whose rapists had been acquitted by the High Court. He was not deterred by the fact that the government had been trying to hush up the matter for fear of the negative press it had generated internationally. He was focused only on providing Mukhtar Mai and others like her, an opportunity for justice.

A few months later, his Court struck down the privatization of Pakistan Steel Mills Corporation, a strategic national asset that the government was proposing to sell without following the prescribed legal procedures.⁵

In yet another instance of Chief Justice Chaudhry's concern for the quality of life of the citizens and for the environment, he halted the progress of New

4. The Supreme Court has the inherent power to enforce fundamental rights. *See, e.g.*, Pak. Const. art. 184 (which, in relevant part, provides: (3) ". . . the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved have the power to make an order of the nature mentioned in the said Article.").

5. *See Wattan Party v. Fed'n of Pakistan*, 2006, 587 PLD 9(4) (SC).

Murree Development, in the hills of Murree near Islamabad⁶ and put a stop to commercial use of land reserved for public parks.⁷

While the government was uneasy in each of these instances, it was perhaps most perturbed when Chief Justice Chaudhry started taking *suo motu* notice of cases involving human rights abuses by the government. These cases involved gross violations of a person's fundamental right to security guaranteed by the Constitution of Pakistan.⁸ In taking up all these cases, Chief Justice Chaudhry challenged executive authority and upset the established order. But in doing so, he clearly provided access to justice to ordinary persons who up to now had been denied this basic right.

In each of the cases that I have referred to, Chief Justice Chaudhry merely urged the government to operate within the limits prescribed by law and not to act arbitrarily. Was this not similar to what Justice John Paul Stevens of the United States Supreme Court had done in *Rasul v. Bush*—where the line of reasoning adopted by Justice John Paul Stevens in allowing Rasul's claim had not been argued by either side, but was a result of his own extensive knowledge of the history of law in the area?⁹ Was this not what he also did when handing down the majority opinion in *Hamdan v. Rumsfeld*?¹⁰ Should he too be castigated for judicial activism?

It was a testament to its independence that the United States Supreme Court in its landmark decision in the case of *Rasul v. Bush* held that the United States court system has the authority to decide whether non-U.S. citizens held in Guantanamo Bay were rightfully imprisoned and detainees were free to bring suit challenging their detention as unconstitutional.¹¹ This 6-3 ruling of the Supreme Court reversed the decision of the District Court, which had held that the judiciary had no jurisdiction to handle wrongful imprisonment cases involving foreign nationals who are held in Guantanamo Bay.¹² The claimant, Shafiq Rasul, was released before the decision was handed down. This case allowed the prisoners of Guantanamo Bay, the basic human right of access to justice. The executive had no option but to accept and abide by the principles set forth in this decision.

6. Dr. Parvez Hassan, *Environmental Protection, Rule of Law and the Judicial Crisis in Pakistan*, 10 ASIA-PAC. J. OF ENVTL. L. 167, Issues 3 & 4, (2007).

7. See *Haider v. Capital Dev. Auth.*, 2006, 394 PLD (a) (SC).

8. Pak. Const. 1973 art. 9. (*Security of person*—No person shall be deprived of life and liberty save in accordance with law.)

9. 542 U.S. 466, 474 (2004).

10. See 548 U.S. 557, 588–89 (2006).

11. 542 U.S. 466, 474 (2004).

12. *Id.*

This basic human right of access to justice that the United States Supreme Court deemed fit even for non-United States nationals has been denied by Pakistan to its own citizens. Instead of allowing justice to take its course and, if necessary, to harness the executive in the exercise of its powers so that the organs of state could co-exist in accordance with the Constitution of Pakistan, General Musharraf preferred to subvert the Constitution on more than one occasion: first on March 9, 2007 when he illegally suspended the Chief Justice of Pakistan¹³ who is the holder of a Constitutional office and secondly, and more grievously, on November 3, 2007 when he declared emergency rule in the country.¹⁴ Despite his claims to the contrary, it is evident, even to the most non-biased observer that his actions did not stem from national interest but from the need to settle a personal vendetta and to provide a cover to the deep-rooted insecurity he felt as the time for his retirement from the army and the general elections drew nearer.

The fundamental human rights that both Chief Justice Chaudhry and Justice Stevens have sought to protect are recognized throughout the comity of civilized nations. These rights are prescribed in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. These rights are also codified in the constitutions of both Pakistan and the United States and the constitutions of both these countries require their respective Supreme Courts to ensure that these rights are enforced.

If Chief Justice Chaudhry and Justice Stevens are judicial activists then are not the present incumbents of the Supreme Court in Pakistan activists too? After all, have they not exceeded the limits of the Constitution of Pakistan to validate the 2007 Proclamation of Emergency?¹⁵ The difference is that while Chief Justice Chaudhry and Justice Stevens have sought to create rights for the ordinary man, the present incumbents have indulged in judicial adventurism to take away the rights of people. The distinction is best captured in the words of Adam Cohen, writing on the confirmation hearings of Justice Roberts of the U.S. Supreme Court.¹⁶

Conservatives have long complained that activist liberal judges interpret the Constitution to “create” rights, like the right to privacy.

13. Pervez Musharraf, President, Islamic Republic of Pak., Reference Filed against the CJP (Mar. 21, 2007), available at <http://proud-pakistani.com/2007/03/21/text-of-reference-filed-against-the-cjp/> (last visited Jan. 2, 2009).

14. See Pervez Musharraf, Proclamation of Emergency (Nov. 3, 2007), available at http://www.pakistani.org/pakistan/constitution/post_03nov07/proclamation_emergency_20071103.html (last visited Aug. 28, 2008).

15. See, e.g., Khan v. Musharraf, 2008, 178 PLD (r) (SC).

16. Adam Cohen, *Is John Roberts too much of a Judicial Activist?*, N.Y. TIMES, Aug. 27, 2005, A12.

But there are a growing number of activist conservative judges who are intent on using new readings of the Constitution to take away rights. Of the two varieties of activist judges, that is by far the more dangerous kind.¹⁷

Pakistan is a developing country. The ordinary man in Pakistan often finds himself prevented from accessing justice due to lack of awareness of his rights or due to the exorbitant cost of legal remedies. In an atmosphere such as this, Chief Justice Chaudhry's activism, if that is what we may call it, was a breath of fresh air. It is for this reason alone that in the course of the last fifteen months, people throughout Pakistan have not only thronged to Chief Justice Chaudhry, hailing him as their champion, but have also in the general elections held earlier this year, voted for parties that have promised his return and have guaranteed the independence of judiciary.

If Chief Justice Chaudhry's attempt to uphold the rights of women and to protect the environment and to prevent the abuse of human rights at the hands of the government is judicial activism, then let us have more of it! Let us take a leaf out of the liberal activist judges of the United States, who have in *Brown v. Board of Education*¹⁸ and *Roe v. Wade*,¹⁹ reshaped national policies in areas as sensitive as racial segregation and right to abortion. Let us, as lawyers and judges forge a future that values the rights of individuals irrespective of their color, caste, religion, race, or creed. Because it is only in respecting and protecting our individuals that we will cement the foundations of democracy in Pakistan and build a tolerant and egalitarian society—and be proud of it just as you are rightly of yours.

The crime of destroying institutions of the State and denying access to justice to its citizen's has a name—it is called high treason.²⁰ Article 6 of the Pakistan Constitution specifically states that any person who actually abrogates, or attempts or conspires to abrogate, subverts or attempts to subvert the Constitution, by use of force or show or force or by other unconstitutional means is guilty of high treason.²¹ The punishment prescribed in the High Treason (Punishment) Act, 1973 for a person found guilty of high treason, is death or imprisonment for life. General Musharraf is familiar with this Article, because it is this Article that he sought to invoke against former Prime Minister Mian Mohammad Nawaz Sharif when the latter had attempted to remove

17. *Id.*

18. 347 U.S. 483, 495 (1954) (holding that "separate educational facilities are inherently unequal").

19. 410 U.S. 113, 154 (1973) (holding that laws against abortion violated the Constitutional right to privacy).

20. Pak. Const. art. 6 (1973).

21. *Id.*

General Musharraf from the post of Chief of Army Staff. General Musharraf should, therefore, be fully aware that in taking arbitrary and unwarranted action first against the Chief Justice of Pakistan, and then against the judiciary as a whole, he has not merely harmed the judges, but has destroyed a sacred pillar of the State.

The people of Pakistan must continue with their struggle for their rights. I recall that the people had advised the lawyers when they started their struggle for the independence of the judiciary in March 2007 that they should not upset the status quo since General Musharraf was all powerful and any movement against him was bound to fail. The lawyers themselves had no idea when they started their struggle that their determination would eventually succeed in bringing General Musharraf down. All they knew was that an injustice had been done which needed rectification and they were not going to rest until justice was done. They achieved success on the way but faced failure as well. The lawyers saw the Chief Justice first restored to office on July 20, 2007 and then arbitrarily removed from office again along with fifty-nine other members of the superior judiciary on November 3, 2007. Despite the seemingly insurmountable odds both the lawyers and the judges have persisted in their struggle and have become symbols of strength and moral courage throughout the world—not just in Pakistan.

We in Pakistan are encouraged and heartened by the award of this degree by NSU, as we were by the remarkable and outspoken support of the American legal community, and lately even the U.S. Congress. These instances are reminders for us that people everywhere are united in the pursuit of the same principles: justice, human rights and the rule of law and will not rest until these rights are secure.

I would like to end with the prayer in which I hope you will join me: that Chief Justice Chaudhry and his brother judges are restored to their rightful offices because only then can Pakistan hope to achieve an independent judiciary. I had made this observation in an article I wrote in December last year, which I would like to share with you.

Institutions are more important than individuals. However, as a friend of mine reminded me, it is individuals who make the institutions. The judges who refused to be cowed down by the president and chief of army staff to give judgment in his favour and those who have since refused to take oath under the Provisional Constitution Order are indeed judges who have shown their mettle and who can be relied on to foster and maintain the independence of the judiciary.²²

22. Dr. Tariq Hassan, *I Speak for the Judges*, THE DAWN MAGAZINE ONLINE, Dec. 11, 2007, <http://www.dawn.com/2007/12/11/op.htm#2> (last visited Sept. 3, 2008).

I would also request you to honor, on this momentous occasion, all the other judges who have joined Chief Justice Chaudhry in his struggle and to acknowledge the efforts of Chief Justice Chaudhry's legal team, headed by Barrister Aitzaz Ahsan, as well as the sacrifices of numerous unnamed lawyers without whom this struggle would not have been possible.²³

I once again wish you all the very best on behalf of Chief Justice Iftikhar Muhammad Chaudhry and on my own. I appreciate being granted this tremendous opportunity to accept the degree on his behalf and thank you all for your support.

23. See generally Dr. Tariq Hassan, *A tribute to the unknown lawyer*, THE NEWS, March 9, 2008, http://www.thenews.com.pk/arc_news.asp?id=9.