

Scenario 1

Humble Submissions:

In the name of those:

".....unsung heroes who have suffered immeasurably for many years because they preferred right over wrong.....of the scores imprisoned and tortured, coerced and intimidated Many chose unemployment and exile rather than to agree with perverted justice.

They paid a heavy price in health, livelihood and reputation and right to happinessbut they took a stand for justice which those who had sworn to do so, refused to do."

Since the first day of schooling, all children of Pakistan are mostly briefed that their homeland was created by Mohammad Ali Jinnah on the basis of two nations - theory and for the propagation of Islam. It was true and remained so during its initial years of existence but study of the later developments proved that this piece of land was separated from the Indian subcontinent for exclusive rule and malicious usage by *Generals backed by Judiciary and Jagirdars*.

Since the first day of constitutional developments in Pakistan it was being envisaged that the general populace would be subjected to democratic rule but in practice all public institutions are being controlled by army Generals in the name of 'eradicating political corruption'; civil dictators in the name of 'democracy' and bureaucracy mainly consisting of serving or retired army officers, close relatives of first row politicians and Generals.

Since the first day of parliamentary history of Pakistan the federal and provincial assemblies are being used as debating forums only and legislation, got coined by ruling dictator families, is simply floated on the floors to have accents & stamps only.

Since the first day of its independence the Pakistani rulers are continuously betraying the people in the name of Islam; sometimes by introducing *Haddood* Ordinance (of 1979), sometimes by imposing '*Shriah*' law, sometimes by announcing that all penal codes would be revised in the light of Islamic injunctions and sometimes by establishing separate courts to hear these such cases. The irony of fate is that not even a single male has been finally convicted *under Haddood Ordinance* since its promulgation in 1979. [Yes; in a case of *Hadd*, one poor woman was punished under these laws and her co-accused male partner was set free]

AND the most unfortunate mention is that throughout the history of Pakistan, the higher echelons of judiciary, who were supposed to protect the constitution and democratic institutions always stood up to help the Generals & *Jagirdars* and upheld their unconstitutional acts. I'll beg to quote a wishfull thinking:

'This is not the country I opted for in the Referendum held in my home province of NWFP in 1947 and this is not the country I would like to die in. I badly want a Pakistan to defend, a nation I can belong to, fight for and die for'.

This is what **Roedad Khan**, a former bureaucrat (remained posted as Federal Secretary Interior, too) has written in his book **Pakistan - A DREAM GONE SOUR**: [Oxford University Press (1997)]

Roedad Khan recalls the advice of Mr Jinnah to civil officers: 'to serve a government if it is formed according to the constitution. Public services deteriorated in Pakistan and a stage has now come wherein public servants have been reduced to the 'level of domestic servants'.

But the governing principle for the Pakistani civil servants for the last two decades has been that **'if you are not with them [rulers], you are against them'** and the irony of fate is that the same has been going true for judiciary, too.

Hazrat **Ali Bin Abu Talib (RAA)**, the fourth Caliph had told that:

'if the judicial system goes corrupt somewhere & justice becomes unapproachable for the public, that society is bound to perish'.

In my humble (personal) opinion, the institution of judiciary in Pakistan has already broken down. There are so many occasions to mention, so many stories to be told and so many events to be analyzed that one may need thousands of pages for narration.

If I were in Pakistan, I would have been hanged on the charges of 'Contempt of Court' or 'Scandalizing the Courts' and thus I could not do this unpleasant job there. But the very basic question arises that in democratic societies whether a judge's judicial personality and characteristics, judge's ability to understand law in prevailing cultural or political scenarios; a particular judge's educational and professional knowledge, his mode of entry and rising to the superior positions or judge's decision making potential on merits and fearlessness or alleged political sympathy AND the judgments passed by the courts in some particular background of events can be analyzed, commented upon or dissected in writing or discussions in public media openly or not.

To find out answer to these questions, I shall take shelter of an article written in August 1999 (as referred in the website of American Society of International Law) by a world known media lawyer **Zahid Ebrahim** on the issue of 'scandalizing the court'. This research was done by him in the backdrop of certain decisions taken by the Supreme Court of Pakistan in cases related to the subject of contempt of court involving some members of the parliament and a provincial assembly. Those wrong doers were members and office bearers of the then ruling party, too.

The laws of contempt are primarily designed to balance the freedom of expression with the judiciary's quest to maintain its authority and safeguard public order. Broadly speaking, contempt of court falls into three general areas:

- violation of an order of a court,
- interference in the judicial process and
- Criticism of a judge, his judgment, or the institution of the judiciary.

More precisely the academics try to engulf the contemporary law of contempt where it seeks to prohibit the criticism of the judge, his judgment or the institution of the judiciary. One should understand that the law of contempt is a 'sacred cow' of the legal world. However, the description of this class of contempt is to be taken subject to one important qualification. That is: Judges and Courts are alike open to criticism, and if reasonable argument and justification is offered against a judicial act as contrary to law or the public good, no court would treat that as contempt of Court. [*The Queen v. Gray* (1900) 2 QB 36]

The extent of tolerance in implementation of contempt of court law had been cited by the courts in England much earlier. The issue had best been understood by the Queen's Bench, Appellate Division for England and Wales [Ref: *R. v. Metropolitan Police Commissioner, ex parte Blackburn* (1968) 2 QB 150] when it refused to hold a member of parliament in contempt for authoring an article in which he vigorously criticized a judgment of the Court of Appeal. The Queen's Bench ruled that:

'No criticism of a judgment, whatsoever vigorous, can amount to contempt of court providing it keeps within the limits of courtesy and good faith.'

It may not be out of place to mention here a world famous case of a Kenyan lawyer, Feroze Nawrojee, who was once charged for contempt of and scandalizing the court. The basis was a letter written by him when he got frustrated by an inordinate delay in deciding a motion to stay proceedings in a traffic case in which a prominent critic of the Kenyan Government had been killed. The protest note of Nawrojee carried an expression of anxiety over an inordinate delay in hearing. It is on record that the Kenyan High Court had concluded:

"The courts could not use their contempt power to suppress mere criticism of a judge or to vindicate the judge in his personal capacity, but rather could use it only to punish scurrilous abuse of a judge when necessary in the interests of justice.....and a judge must scrupulously balance the need to maintain his or her authority with the right to freedom of speech"

Feroze Nawrojee was absolved of the contempt charges in the above cited case. (**Ref: Republic v. Nawrojee, High Court of Kenya**, Misc. Crim. App. No. 461 of 1990, unreported, as referred to in the Article IX Freedom of Expression Manual, 1993 p 182)

The law makers and jurists, while defining and protecting the laws on contempt of court, frame the phrases on the assumption that the judiciary is incapable of bowing to outside influences and immune from bias or prejudice. And this is a hard fact that in all societies, including Pakistan, the courts are reluctant to admit that they may be susceptible to political, economic and moral prejudices prevailing in their surrounds.

Moreover, the balance between freedom of expression and maintenance of public confidence in the judiciary has not been settled yet. For example, in the *Masroor Ahsan* case, the Supreme Court of Pakistan had dismissed a large number of contempt petitions, including one against the Prime Minister who had earlier accused the former Chief Justice of the Supreme Court of reviving 'horse trading' in the country by suspending a constitutional amendment and acquitted the alleged contemnors. Although, the contempt actions were dismissed, the Supreme Court of Pakistan had laid down strict rules that:

".....[it is only] fair comments about the general workings of [the] Court made in good faith, in public interest [and] in temperate language...without impugning the integrity or impartiality of the judge [which] are protected." (**Ref: Masroor Ahsan & Others v. Ardeshir Cowasjee & Others PLD 1998 SC 823**)

There is a school of thought who still believes that the verdict in the Masroor Ahsan case was influenced by the political environment of the day and would have constituted contempt under the traditional law. But the others consider it a milestone because, while responding to criticism levelled at the Supreme Court of Pakistan for acquitting the legislators of the ruling party on contempt charges, the Chief Justice of the Supreme Court had remarked that:

" the court was not bothered about criticism till the time it was according to law and in temperate language." (**Ref: The Dawn of 15th June 1999**)

Now let us take account of certain facts of recent history of Pakistan. After announcement of 20th March 1996 decision on the subject of appointment of judges by a full court, the then Prime Minister Ms Benazir Bhutto had declared it, on 28th March 1996 in the National Assembly session, as an effort to take away the inherent powers of democratically elected parliament. The next Prime Minister Nawaz Sharif and his companions, on 28th November 1997, practically insulted the judiciary, raided and ransacked the Supreme Court premises thus conveying the message that the superior courts should work under the directions of political bosses.

In the developed world, the media people have succeeded in convincing the judiciary to listen them and read their criticism if based on facts and evidence. In 1997, the European Court had accommodated the columnists and newsmen and tilted themselves in favour of freedom of expression through their decision in a case titled ***De Haes & Gijssels vs. Belgium***. In this case, De Haes and Gijssels had published articles accusing four Belgian judges of bias. They were prosecuted for contempt of courts wherein the European Court ruled that:

"..... although Mr. De Haes & Mr. Gijssels' comments were without doubt severely critical, they nevertheless appear proportionate to the stir and indignation caused by the matters alleged in their articles. As to the journalists' polemical and even aggressive tone, which the court should not be taken to approve, it must be remembered that Article 10 protects not only the substance of the ideas or information expressed but also the form in which they are conveyed."
(**Ref: De Haes & Gissels vs. Belgium, 25 [1997] EHRR 1**)

However, it must be acknowledged that the European Court were also influenced by the fact that De Haes and Gissels had offered to demonstrate the truth of their allegations with the help of the case files, though were denied this opportunity by the Belgian Courts.

In Pakistan, in the arena of recent developments on the subject, there is much room for both judiciary and politics to create better environment for the general public. All the foregone governments, both political and military sponsored, had failed to stick to the expected norms of respects for the judiciary and had used them as their subordinate offices. The regimes in succession had failed to provide autonomy and freedom for the superior courts and had always opted to twist their arms in favour of ruling politicians and army dictators.

The last word: though the offence of 'scandalizing the court' continues to be a hot debate all over the globe, but here in England, the last successful prosecution for scandalizing the court had been reported in 1931, as **David Pannick** maintained in his book '**Judges**'

'..... (that successful prosecutions tend to) inhibit journalists, who wrongly suspect that they have a legal obligation to speak respectfully and cautiously when discussing the judiciary.' (Ref: David Pannick, Judges, Oxford University Press, 1987.)

In the words of the Chief Justice Aziz Ahmadi of India, a citizen cannot be expected to wait for the system to correct itself; he would be expected to take upon himself the task of enforcing the rights granted to him by the constitution.

There is a risk that Pakistan -- which typifies what Gunnar Myrdal calls a '**soft state**' because it lacks social discipline, it is high on promises and low on delivery -- will join those many countries in Africa and soon become one of the failed states. This risk draws closer every day.

As per wording of **Shahid Javed Burki** uttered from the World Bank desk during the 1990s:

" The country is now left with no viable institutions, including that of the judiciary and we are in danger of losing Jinnah's legacy. Given the impact of change, Pakistan could cease to exist in its sovereign nation-state form. Approaching the twenty-first century, Pakistanis may at last find their elusive commonwealth, only it may not be the one envisaged by the nation's creators."

It is time for our politicians, bureaucrats, academic scholars, army Generals and intellectuals to rise to the occasion and ensure that forecasts of pseudo-historians do not come true.

In the light of the whole discussion, I feel strength to write more details in the following pages while repeating the words of Roedad Khan again:

'The lesson is that when dykes of law and justice break, revolutions begin'. We may not be far off from that position.