CASE NOTE

IS THE MOON THERE WHEN NOBODY LOOKS? A COMMENT ON *ZAFAR ALI SHAH V. GENERAL PERVEZ MUSHARAF*

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The portrayal of democratic rule before 12th October's coup as being 'evil' by the judiciary in Zafar Ali Shah v. Pervez Musharaf, Chief Executive of Pakistan[1] left one pondering over the accurate networking of realities.[2] It was rather the same representative government that was

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[1] Zafar Ali Shah v. Prevez Musharaf, Chief Executive of Pakistan, PLD 2000 SC 869 at p. 1150. Irshad Hassan Khan CJ held that:

> "On an objective assessment of the material placed on record and in view of the arguments advanced by the parties, we find that the very purposes for which the representative institutions were established under the Constitution stand defeated either directly or indirectly. No one could disagree that we must have democracy and any obstacles in respect of achieving that goal must be overcome. But the real question is whether there was a real "democracy" in its generally accepted sense on 12th October, 1999 when the Army takeover occurred? What regretfully existed in Pakistan on that day and for years prior to that time was merely a feigned appearance of what we can call a form of 'oligarchy'..."

Again at page 1213 it was reasserted that:

> "We are not in the favor of an Army rule in preference to a democratic rule. There were, evils of grave magnitude with the effect that the civilian government could not continue to run the affairs of the country in the face of complete break down."

[2] Id. Corruption and corrupt practices, which destroyed the national economy and took the state to the verge of stagnancy, were dealt in detail, lists of the assets owned by former premier and his family are provided (at pages 1131 to 1134) and at page 1148 commenting about economic collapse it was held that:

> "After hearing the learned counsel for the parties and going through the record, we have gathered that the combined effect of the overall policies and methodology adopted by the former government was a total collapse of the country's economy inasmuch as GDP growth during the past three years had hardly kept pace with the growth of population and Pakistan has a debt burden which is equal to country's entire national income. We also take judicial

reinstated by the same Supreme Court in 1993,[3] when the then President Ghulam Ishaq Khan dissolved the government of Mian Nawaz Sharif on the charges of corruption, misuse of powers and complete break down of constitutional machinery by invoking (now repealed) Article 58(2)(b)[4] of the constitution. Even an apathetic perusing of the assets listed[5] to be owned by Mian Nawaz Sharif and his family makes one realize that all this empire could have never been build in a day or just few years of his government tenure, it must have some slanting history of misusing of funds and corruption behind it.

Corruption has become a relative phenomenon in our society and constitutional history. 'Corrupt' was the status of our first Constituent Assembly when it prolonged its duration for nine years after independence by not framing the constitution for the country. 'Reformer' was the Governor General whose extra constitutional act of dissolving that assembly and setting aside of the interim constitution[6] was validated on the basis of doctrine of necessity, applied for the first time in the constitutional history of Pakistan[7]. 'Exploiting' was the legal order set under the First Constitution of Pakistan of 1956 when it was abrogated and Army took over the reigns of the country in 1958. Judiciary applauded this extra constitutional act by pronouncing, that "a successful revolution is its own justification."[8] The then martial law regime of General Ayub Khan constitutionalized itself by

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notice of the fact that the trade imbalance was persistent and due to defective economic policies and lack of economic discipline by the previous regime, the industrial sector has suffered a great set back."

[3] Mohammad Nawaz Sharif v. President of Pakistan, PLD1993 SC 17.

[4] The controversial Article 58 (2) (b) was added to the Constitution of 1973 in 1985 whereby discretionary power was given to the President to dissolve the National Assembly on conditions of law and order situation in the country and complete break down of Constitutional machinery. This Article now stands repealed by virtue of Constitutional (Thirteenth Amendment) Act 1997.

[5] As stated in Zafar Ali Shah v. Pervez Musharaf, Chief Executive of Pakistan, PLD 2000 SC 869

[6] See THE GOVERNMENT OF INDIA ACT 1935

[7] Special Reference No 1 of 1955 by the Governor General, PLD 1955 FC 435. while rendering its advisory opinion, the apex court held that:

(i) Subject to the conditions of absoluteness , extremeness and imminence, an act which would otherwise be illegal becomes legal if it is done bona fide under the stress of necessity, the necessity being referable to an intention to preserve the constitution, the state, the society and to prevent it from dissolution

(ii) The maxims, *Id quod alias non est licitum, necessitas licitum facit* (which otherwise is not lawful, necessity makes it lawful) and *Salus populi est suprema lex* (welfare of the people is the supreme law) are part of our law.

[8] State v. Dosso, PLD 1958 SC 533. Mohammad Munir CJ held that "A victorious revolution or a successful coup d'etat is an internationally recognized method of changing a constitution."

presenting the constitution of 1962 to the nation. Besides contribution from the politicians, for reasons President Ayub Khan has to recede from power and another martial law administrator General Yahya Khan was installed. Once again, Provisional Constitution Order of 1969 was promulgated. The regime was challenged in a detention case[9], which was only to be decided after the end of this rule. The Court setting a new precedent overruled Dosso case, and the legal establishment was declared void as being a usurper's era.[10] After that, Interim Constitution of 1972 was put into effect. Following this, a new constitution was framed in 1973. The 1973's Constitution with all its sublime cum majestic doctrinal approach contained in itself a command of directory nature for the preservation of constitutionalism in Pakistan in the form of Art 6[11] which expressly declared any act of abrogation of constitution as high treason which is to be met by death penalty.[12] Along with Art 6, Art 270[13] was also placed in the constitution to validate the laws passed and actions taken from 1969 to 1973. Hence, our first express constitutional confession of being an unfaithful disciples of rule of law.

The allegations of abuse of power and corruption sprouted again and this time again the Army, in the guise of reformer, came to rescue the nation from the unfaithful and corrupt government by abrogating the constitution of 1973. The Supreme Court in its famous judgment in Nusrat Bhutto's case [14] again declared the ultra vires and unconstitutional action of Chief Martial Law Administrator General Zia ul Haq as valid for a temporary period on the basis of doctrine of necessity[15] and adjudged the constitutional regime as corrupt. Thus Art 6 was given a judicial explanation.

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[9] Ms Asma Jillani v. Governor of Punjab, PLD 1972 SC 139

[10] Id.

[11] Art. 6 of the Constitution of 1973:

> High Treason: "(1) Any person who abrogates or attempts or conspire to abrogate , subverts or attempts or conspires to subvert the Constitution by use of force or show of force or by other unconstitutional means shall be guilty of high treason. (2) Any person aiding or abetting the acts mentioned in clause (1) shall likewise be guilty of high treason. .."

[12] High Treason (Punishment) Act, 1973 (LX VIII of 1973)

[13] Art 270 of the Constitution of 1973 provides validation to all Proclamations, President's Orders, Martial Law Regulations, Martial Law Orders and other laws made between 25th of March 1969 to 19th December 1971

[14] Begum Nusrat Bhutto v. The Chief of Army Staff, PLD 1977 SC 657. S.Anwar ul Haq, CJ held in his judgment that:

> "It seems to me, therefore, that on facts, of which we have taken judicial notice, namely; that the imposition of Martial Law was impelled by high considerations of State Necessity and welfare of the people, the extra constitutional step taken up by the Chief of the Army Staff to over throw the Government of Mr. Z. A. Button as well as the Provincial Legislatures stands validated in accordance with the doctrine of necessity."

[15] The prerequisites for the application of doctrine of necessity as laid down in Nusrat Bhutto's case in PLD 1977 SC 657 are referred to in the present judgment of

The 'temporary validation' of that Martial Law regime brought an eleven years eclipse over the constitution of 1973 reducing the reformer to the status of a dictator. The 1973 constitution was resurrected in 1985 when the dictator personified himself again into the president of Pakistan and among the package was a Presidential Order No. 14 of 1985 that added the famous Eighth Amendment to the constitution. Following this, articles 270-A[16] and 270-B[17] were added to the constitution of 1973 that gave validation to the extra constitutional regime of Martial Law from 1977 to 1985, thus marking our peculiar pattern of fashioning constitutional conventions. Inversely articles 270-A and 270-B speak for the supremacy of rule of law; even an unconstitutional regime if validated by judicial pronouncement needs constitutional validation. However, conversely, it constitutionally recognizes the judicial interpretation of article 6 as exposed in Nusrat Bhutto's case in 1977.

Once again, in 1987, by invoking infamous article 58(2)(b), the then President General Zia ul Haq dissolved the government of Mohammad Khan Junejo on the charges of corruption and total break down of constitutional machinery. He also announced the dates set for general elections, the first in a decade after the fall of democratic governments in Pakistan. The judiciary trying to live up to the mark declared the act of president unconstitutional but declined to grant relief keeping in view the then politically charged situation in the country.[18] This decision again greatly politicized the judiciary. In 1990, Benzair Bhutto's government was thrown out on the charges of corruption under Article 58(2)(b). The Supreme Court going away from Haji Saifullah's[19] precedent declared the presidential act as constitutional and the government was adjudged corrupt.[20] Following the events, Mian Nawaz Sharif[21] formed his first

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Zafar Shah Case, PLD 2000 SC 869 at page 1171 are " (a) an imperative and inevitable necessity or exceptional circumstances; (b) no other remedy to apply; (c) the measure taken must be proportionate to the necessity; and (d) it must be of a temporary character limited to the duration of exceptional circumstances"

[16] Article 270-A of the Constitution of 1973 gives validation to all laws passed and action taken during the Martial Law regime from 1977 to 1985.

[17] Article 270-B of the Constitution of 1973 gives constitutional coverage to the elections of Houses of Parliament and Provincial Assemblies held in 1985 before the resurrection of 1973 constitution.

[18] Haji Saifullah v. The Federation of Pakistan PLD 1989 SC166. Since the government of Mohammad Khan Junejo was dissolved in May 1988 and the court gave its verdict in 1989, a date quite close to the general elections. The Supreme Court held that it is not appropriate to restore the government at that time in the wider interest of the country.

[19] Id.

[20] Khawaja Ahmed Tariq Rahim v. President of Pakistan PLD 1992 SC 646

[21] Former exiled Prime Minister of Pakistan, who was the Chief Minister of the province of Punjab when in 1988 the President dissolved Junejo's government in 1988.

Government that got itself dissolved after a year, again on the charges of corruption. This time judiciary set a new precedent[22] by restoring the government and, thus, insulated the corruption into our constitutional order in an awkward fashion. However, this decision was rendered dubious when the restored government of Nawaz Sharif was dissolved in July 1994 by the mutual consent of President and Prime Minister of Pakistan. This was followed by another general elections in October, 1994. The Benazir government formed in result of these elections was again dissolved by the then President Farooq Ahmed Khan Leghari on the charges of corruption and maladministration. This time, Supreme Court moving away from Nawaz Sharif's case declined to grant relief on the grounds that executive order was made bonafide and "the President has exercised his discretion to dissolve the National Assembly objectively."[23]

Nawaz Sharif government got a second life from 1998's general election. On the eventful day of 12th October 1999, the Army resurrected itself as a reformer and put an end to the ever-stumbling legal order in the country. This time neither the parties nor the allegations were different: it was corruption, maladministration, uncertainty of rule of law and ridiculing the honor of judiciary.[24] Even the judicial pronouncement did not create any shocking waves, it was the same old fairy tale and reincarnation of doctrine of necessity on the basis of which, once again, the Supreme Court of

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[22] Mohammad Nawaz Sharif v. President of Pakistan PLD 1993 SC17

[23] Benazir Bhutto v. Federation of Pakistan, PLD 1998 SC 388.

[24] Syed Zafar Ali Shah vs. General Pervez Musharaf, PLD 2000 SC 869.
At page 1207 it was stated that:

> "An overall view of the whole spectrum of circumstances prevalent on or before 12th October, 1999 reveals that the representatives of the people who were responsible for running the affairs of the State were accused of corruption and corrupt practices and failed to establish good governance in the country as a result whereof a large number of references have been filed against the former Prime Minister, Ministers, Parliamentarians and members of the Provincial Assemblies for their disqualification on account thereof. The process of accountability carried out by the former Government was shady, inasmuch as, either it was directed against the political rivals or it was not being pursued with the diligence. We have also noted with concern that all institutions of the State including Judiciary were being systematically destroyed in the pursuit of self-serving policies. We uphold the plea raised on behalf of the Federation that the democratic institutions were not functioning in accordance with the Constitution, they had become privy to the one man rule and the very purposes for which they were established stood defeated by their passive conduct".

Furthermore it was asserted that

> "We see no ground to disbelieve the statement made by the Chief of Army Staff/Chief Executive that attempts were made to politicize the army, destabilize it and create dissension within its ranks. Had the former Prime Minister been successful in his designs, there would have been chaos and anarchy rather a situation of civil war where some factions of Armed Forces were fighting against others."

Pakistan declared the General Pervez Musharraf's government *de jure*.[25] In our present political scenario, should we not expect an Article 270-C to validate this so called *de jure* regime?

The 12th May's judgment is both illuminating and puzzling. It is more like great exaggerations of some truths about our legal system, unduly neglected, than cool argumentation or definitions. It throws a light, which makes us see much in law and our legal order that lay hidden; but the light is so bright that it blinds us to the remnant and so leaves us still without a clear view of the whole.

Judiciary's confident assertion that it is the custodian of rule of law in society, its admiration of its unbiased originality, and its somewhat derogatory reference to the concept of independence of judiciary[26] has

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[25] Id at page 1205:

> "After going through the record, we are inclined to hold that though initially the status of the present government was *de facto*, but in view of the validation accorded through the Short Order, it has attained the status of a *de jure* government."

[26] Id. See Pages 1120, 1121 where Irshad Hassan Khan CJ observed in para 220
that

> "The independence of Judiciary is the basic principle of the constitutional system of governance in Pakistan. The Constitution of Pakistan contains specific and categorical provisions for the independence of Judiciary. The Preamble and Art 2A state that "the independence of judiciary shall be fully secured; and with a view to achieve this objective, Art 175 provides that 'the judiciary shall be separated progressively from the executive." The rulings of the Supreme Court in the cases of Government of Sindh v. Sharaf Faridi (PLD 1994 SC 105, Al-Jehad Trust (supra) and Malik Asad Ali v. Federation of Pakistan (PLD 1998 SC 161), indeed, clarified the constitutional provisions and thereby further strengthened the principle of the independence of Judiciary........." further it was stated that "in a system of constitutional governance, guaranteeing Fundamental Rights, and based on principle of trichotomy of powers, such as ours, the Judiciary plays a crucial role of interpreting and applying the law and adjudicating upon disputes arising among governments or between State and citizens or citizens inter se. The Judiciary is entrusted with the responsibility for enforcement of Fundamental Rights. This calls for an independent and vigilant system of judicial administration so that all acts and actions leading to infringement of Fundamental Rights are nullified and the rule of law upheld in the society."

Again it was asserted that:

> "The Constitution makes it the exclusive power/responsibility of the Judiciary to ensure the sustenance of system of "separation of powers" based on checks and balances. This is a legal obligation assigned to the Judiciary. It is called upon to enforce the Constitution and safeguard the Fundamental Rights and freedom of individuals. To do so, the Judiciary has to be properly organized and effective and efficient enough to quickly address and resolve public claims and grievances; and also has to be strong and independent enough to dispense justice fairly and impartially. It is such an efficient and independent Judiciary which can foster an appropriate legal and judicial environment where there is peace and security in the society, safety of life, protection of property and guarantee of essential human rights and fundamental freedoms for all individuals and groups, irrespective of any distinction or discrimination on the

combined to give the impression of an institution, which feels that individual subjectivity can and should go beyond the contexts in which it has developed its shape. Though quite glamorous, this romanticization of judicial independence has been an exercise in futility. The case law referred to in the judgment for promoting the doctrine of judicial independence was in fact an inappropriate display and use of judicial muscle. In Al Jehad Trust Case[27] it was not the doctrinal subjectivity of judicial independence that was promoted, rather purely constitutional conceptualization of judicial independence was resorted to. It basically provides for the separation of judiciary from the executive as contemplated by Art. 175, clarifying the appointment of Judges of High Courts in accordance with the true spirit of Art 1^3 of the constitution, prescribing the procedure and time frame for the appo ntment of Judges, appointment of Chief Justices and transfer of Judg s. It was all done to farther away judiciary from all kinds of political pressures to ensure impartial justice. However, the dicta of Al Jehad Trust case[28] cannot be stretched for taking cognizance in the Zafar Ali Shah case. It must be noted that taking of cognizance is a separate legal issue and mixing it with a constitutional composition of judiciary, which was in fact the creation of the constitution itself, is nothing less than forwarding a boot strap argument by our honorable judges to show their sting of first instance.

Regarding the question of losing of office of the Judges of Supreme Court either by not taking oath or the oath was not administered to them under the Oath of Office (Judges) Order, 2000 (Order 1 of 2000), the Court held that it amounts to acquiescence since none of the judges concerned have challenged or taken any remedial steps against it. Although the court took it as a basic ground, it seemed that the court was not mindful of the legal limitation of this argument.[29]

> basis of cast, creed, color, culture, gender or place of origin, etc. It is indeed such a legal and judicial environment, which is conductive to economic growth and social development".

[27] Al Jehad Trust vs. Federation of Pakistan (PLD 1996 SC 324)

[28] Id.

[29] Syed Zafar Ali Shah Vs Pervez Musharraf (Chief Executive of Pakistan), PLD 2000 SC 869 at page 1211 that:

> "We have held in the Short Order that the cases learned former Chief Justice and Judges of the Supreme Court, who had not taken oath under the Oath of Office (Judges) Order, 2000 (Order 1 Of 2000), and those Judges of the Lahore High Court, High Court of Sindh and Peshawar High Court, who were not given oath, can not be reopened, being hit by the doctrine of past and closed transaction. The practical effect of the above observation is that the action of the Chief Executive in this behalf has been validated.....Clearly, the Judges of the Superior Judiciary enjoy constitutional guarantee against arbitrary removal. They can be removed only by following the procedure laid down in Article 209 of the Constitution by filing an appropriate reference before the Supreme Judicial Council and not otherwise. The validity of the action of the Chief Executive was open to question on the touchstone of Article 209 of the Constitution. But none of the Judges took any remedial steps and accepted

In making and articulating such an assumption, our honorable judges have, of course, demonstrated their immersion in their context of an independent organ, for which the primacy of the individual institution- both in a metaphysical sense and in a political sense- can be seen as devoid of truth and originality. One must confess that the precedent set by this judgment establishes itself only at the cost of losing itself. The concepts and theories articulated in this judgment are met by circularity, paradoxes and blindness. Trying to build a castle in roving waters, judiciary in the guise of being optimistic, generously open-minded, and responsive to rational persuasion[30] has conveyed to us its pessimistic, murderously intolerant and dogmatic approach. The doctrine of necessity which has been referred to in detail in the pages of the verdict along with the elaboration of corruption in

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> pension as also the right to practice law and thereby acquiesced in the action. Furthermore the appropriate course of action for this Court in these proceedings would be to declare the law to avoid the recurrence in future, but not to upset earlier actions or decisions taken in this behalf by Chief Executive, these being past and closed transactions. The principle is well settled that the Courts can refuse relief in individual cases even though the action is flawed, depending upon the facts and circumstances of each case. The action of Chief Executive in the context given above has not encroached on the judicial power or impaired it in the process…."

And at page 1212 it was held that:

> "We, therefore, declare that the Judges of the Supreme Court and High Courts cannot be removed without resorting to the procedure prescribed in Article 209 of the Constitution, but the cases of Judges who ceased to be Judges of the Supreme Court and High Courts by virtue of Oath of Office (Judges) Order, 2000 (Order 1 of 2000) is hit by the doctrine of past and closed transaction and cannot be reopened.."

[30] Id at page1206:

> "It is the duty of the Superior Courts that they recognize the evil , suggest remedial measures therefore and lay down infrastructure for a journey leading to the restoration of the democratic processes/ institutions as expeditiously as possible. If those responsible for achieving these objectives fall short of the measure within the contemplation of the law during their tenures respectively, then the remedy lies in identifying the facts on the ground and taking remedial measures to suppress the evil. The action of 12th October, 1999 being what it is, qualifies for validation on the ground of State necessity/survival. It is for the representatives of the people to see to it that everything is in order and nobody can raise his little finger when their actions are in line with the fundamental of the Constitution. NO rule except that by the representatives of the people within the contemplation of the Constitution and the law has the support of the Superior Judiciary. We are firmly committed to the governance of the country by the people's representatives and we reiterate the definition of the term 'democracy' to the effect that "it is Government of the people, by the people and for the people" and not by they Army rule for an indefinite period. It has already been emphasized in the Short Order that prolonged involvement of the Army in civil affairs runs to grave risk of politicizing it, which would not be in national interest and that civilian rule in the country must be restored within the shortest possible time after achieving the declared objectives as reflected in the speeches of the Chief Executive, dated 13th and 17th October, 1999, which necessitated the military takeover. (Underlining is by way of emphasis)

our system has become a tool in the hands of our judiciary; thereby creating an inconsistent but well crafted case law and a joker in a pack of cards ready to use at will.

The judgment is unenforceable because it is the re-making of Nusrat Bhutto's case. Three years time period (given only in Short Order of the court, which finds no mention in the detailed judgment) is just like making an owl out of a straw hat. Since so much is not clean in the country, in a way no such relief from corrupt personals has been given. There is a legal order followed by a vacuum, or a decree making Army default, or simply a bounced judgment.

To cure some chronic cases of epilepsy, surgeons sometimes resort to a severance of the *corpus callosum*.[31] Though the cure is revolutionary, as in all brain surgeries, but on the whole it is completely successful. Except, that is, for some very unusual side effects. One of the side effects could be a disjunction between the right and the left hemispheres of a man's brain i.e., information processed by one hemisphere is unavailable to the other. From the armed forces to judicial tycoons and from the people's representatives to the electorate, ours is a legal system, which has been ripped apart and molested by every possible component of our state. Our judges should have at least tried to explore the destructive practical consequences of the surgeries committed on our society by our institutions and individuals. This has resulted into side effects of a different kind of severance in our legal order: the severance of the link between the political order and legal order effected by precedents, set by the judiciary itself.

The 12th May's doctrine of necessity and new legal order in our legal system, with its sharply defined split between concept and factuality seems to do away with any such split by overwhelming all concept with situation specific factuality. Judiciary's portrayal of an independent institution becomes a relentless counter-statement of its own views and ambitions.[32] This counter-statement will forever pursue itself, ceaselessly tearing down what it has already rebuilt. The reflections of individual bias could be seen when taking up the issue of ridicule of judiciary at the hands of deposed government, Irshad Hassan Khan , CJ held that:

> "The debates of the Parliament for the relevant period clearly demonstrate that the integrity and independence of the Judiciary of Pakistan were challenged which had the effect of defaming and bringing the Judges into ridicule. The observations made in the Short Order to the effect that "where the Judiciary was ridiculed, leaving no stone unturned to disparage and malign it by making derogatory and contemptuous speeches by some of the members of the previous ruling party inside and outside the Parliament and no Reference was made to the Chief Election Commissioner for their disqualification as

[31] The substance that holds together, and forms a crucial link between the two hemispheres of the brain

[32] Supra note 23

> members of the Parliament under Article 63 (2) of the Constitution; where the disparaging remarks against the Judiciary crossed all limits with the rendering of judgment by this Court in the case of Sh. Liaquat Hussain v. Federation of Pakistan PLD 1999 SC 504, declaring the establishment of Military Courts as ultra vires the Constitution, which resulted into a slanderous campaign against the Judiciary launched by the former Prime Minister registering his helplessness in the face of the Judiciary not allowing him the establishment of Military Courts as a mode of speedy justice; where the image of the Judiciary was tarnished under a well conceived design" are fully supported by the material on record which we have carefully scanned."

Furthermore it was asserted that:

> "We also take judicial notice of the fact that the decision of this Court in Liaquat Hussain's case was treated by the former Prime Minister, his government and supporters as a stumbling block in their way and consequently the Judiciary was maligned all over again through electronic media under the control of the Prime Minister. The Pakistan Television often showed bereaved old women pleading delay in justice and discontentment with the judicial system of the country whereby the image of the Judiciary was attempted to be tarnished under a well-conceived design. The statements made by the former Prime Minister and the members of his Government in and outside the Parliament hardly support the plea of Mr. Khalid Anwar that the former Government had great regard for the Judiciary. We have also seen the material placed on record relating to tapping of telephones and eavesdropping, which clearly establishes that the telephones of the Judges of the Superior Courts and other personalities were tapped. It is indeed very shocking particularly, because this Court in the case of Mohtarma Benazir Bhutto (supra) declared such acts as most detestable, immoral, illegal and unconstitutional."[33]

This is a cut off reflection of bad taste in the pages of verdict. This judgment is nothing more than a sword of decoration in the hands of judges. Kant in his *Copernican Revolution* stressed that its not the object that makes the representation possible but it's the representation that makes the object possible, one may observe that it's not the judiciary which is making this judgment, it is this judgment which is putting the pieces of judiciary together. Thus our judiciary needs to emerge as an active originator of experience rather than a passive recipient of perception.

On a positive note, our judiciary's altruism and its open mindedness need imperceptibly be proved, and its analytical acumen and cool headedness are proportionately patent. Above all is judiciary's passionate commitment to

[33] Syed Zafar Ali Shah Vs. General Pervez Musharraf, Chief Executive of Pakistan PLD 2000 SC 869 at pages 1168 and 1169 para 250 and 251.

the search for truth, with the assistance of perceptive interpretation of conceptual enigma. Our judges leave little doubt that it is the truth that they long for. Moreover, their function of pointing to truth is educed from the fact that they contain, in an obscure and deceptive configuration, certain truths about some substantial attitudes and direction of law. Perhaps, this is what has always preoccupied our honorable judges' mind. But even more striking than this preoccupation with the truth is the technique and dexterity with which our judiciary advances for building on what it has already established.

The 12th May's judgment delivered to us that if the old disgraced legal order, with its pious sublimity and its monstrous vindictiveness, had received its highest expression in the form of our Constitution, the new legal order could have been captured most gracefully in the tolerance, reasonableness and eloquence of our judicial minds. It is sheer forgetfulness if we stick to this understanding because our judges' passion for truth has to find its expression in a balanced and conciliatory form. We must realize that the (conflicting) doctrines, expressed in 12th May's judgment instead of being one true and the other false on the premise of our political turmoil, share the truth between them. All we need at this juncture is a non-conforming opinion to supply the remainder of the truth, of which the ideas expressed or doctrines relied upon in this judgment constitutes only a part. Our judiciary is free to turn its back on history, but it must not cease trying to make new history. It is this "secularized ideal of originality" that we all need to affirm.

The amendment theory given in the 12th May's judgment can be adhered to only by blinding oneself to its aporias. The court held that the Chief Executive could not amend the constitution against its basic features enumerated in Achackzai's case[34]. Hence, it provides "guidelines" to General Pervez Musharaf for making any future changes in our legal system to ensure accountability, stability and rule of law.[35]

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[34] Mehmood Khan Achackzai v. Federation of Pakistan, PLD 1997 SC 426

[35] Zafar Ali Shah v. Pervez Musharaf, Chief Executive of Pakistan PLD 2000 SC 869 at p. 1220, the Short Order has been provided, which is to be read as a part of the judgment. It says:

> "(i) That General Pervez Musharraf, Chairman, Joint Chiefs of Staff Committee and Chief of Army Staff through Proclamation of emergency dated the 14th October, 1999, followed by PCO 1 of 1999, whereby he has been described as Chief Executive, having validly assumed power by means of an extra-constitutional step, in the interest of the State and for the welfare of the people, is entitled to perform all such acts and promulgate all legislative measures as enumerated hereinafter namely:-
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> (a) All acts or legislative measures which are in accordance with, or could have been made under the 1973 constitution, including the power to amend it ;
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> b) All acts which tend to advance or promote the good of the people;
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> c) All acts required to be done for the ordinary orderly running of the state; and

It must be noted that once the question has been posed in terms of whether judges should seek to preserve legal order or acquiesce in its destruction, it became oratory, though still productive because of the way in which it would have framed further inquiry. It required the judges to engage in what the values of a legal order are, to which all participants of legal order must be faithful. It asked them, to use Lon Fuller's terminology, to articulate an "inner morality" of law to which all those who occupy official roles in the legal order owe an obligation of fidelity.[36]

Nusrat Bhutto's case is, of course, the fount of authority in Pakistan for the proposition that constitutional order could be set aside on the face of grave necessity. However, the presumption continues that the Constitution cannot intend any organ of the government (judiciary in the present circumstances) to have unlimited power. Hence, the presumption that Article 6 of the Constitution limits the court's power, and it is there to interpret the law and not to decompose the intent of the framers of the constitution. However, even if Nusrat Bhutto's case supplies grounds on

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d) All such measures as would establish or lead to the establishment of the declared objectives of the Chief Executive.
(ii) That constitutional amendments by the Chief Executive can be resorted to only if the Constitution fails to provide a solution for attainment of his declared objectives and further that the power to amend the Constitution by virtue of clause 6 sub clause (I) (a) ibid is controlled by sub-clause (b)(c) and (d) in the same clause.
(iii) That no amendment shall be made in the salient features of the Constitution i.e. independence of judiciary, federalism, parliamentary form of government blended with Islamic provisions.
(iv) That Fundamental Rights provided in Part II, Chapter I of the Constitution shall continue to hold the field but the State will be authorized to make any law or take any executive action in deviation of Articles 15, 16, 17, 18, 19 and 24 as contemplated by Article 233 (I) of the Constitution, keeping in view the language of Article 10, 23 and 25 thereof.
(v) That these acts, or any of them, may be performed or carried out by means of orders issued by the Chief Executive or through Ordinances on his advice.
(vi) That the Superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Armed Forces, if challenged, in the light of the principles underlying the law of state necessity as stated above. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as theretofore, notwithstanding anything to the contrary contained in any legislative instrument enacted by the Chief Executive/or any order issued by the Chief Executive or by any person or authority acting on his behalf.
(vii) That the courts are not merely to determine whether there exists
any nexus between the orders made, proceedings taken and acts done by the Chief Executive or by any authority or person acting on his behalf, and his declared objectives as spelt out from his speeches dated 13th and 17th October, 1999, on the touchstone of State necessity but such orders made, proceedings taken and acts done including the legislative measures, shall also be subject to judicial review by the superior courts".

[36] Fuller, *The Morality of Law* (Yale University Press, New Haven, Conn, 1969)

which judges may legalize unconstitutional regimes in the face of Art.6, it is still not clear that these are to be found in the doctrine of necessity.

Inversely, Art. 6 is a direct (constitutional) command for the preservation of constitutionalism in Pakistan, however, in converse, it is an indirect command to all out there including organs of the government and functionaries of state to refrain from regarding themselves as the ultimate power holders. To invoke the aid of doctrine of necessity at time and again for legalizing unconstitutional regimes in order to evade the constitutional command of Art.6 not only begs the question of what authorizes this judicial exercise of power, but also seems incoherent on its face.[37] It is our judicial bankruptcy that Article 6 has not even been touched upon in a voluminous judgment[38] which otherwise is full of details. The article 6 being the 'Sleep ng Beauty' of our constitution needs a prince to wake it up. It could either ›e a Prime Minister with character, or a fearless much less to say an impartial judiciary. If none of this could be done, then we as a nation should better get ourselves adjudged as "morally bankrupt".

It is this reflection of our moral bankruptcy that the constitution of 1973 was either identified with politics or it simply became drowned in a cyclone of transitory expediency by our judiciary. Many of 1973's constitutional institutions were designed to protect the security of rights and expectations against their tampering by powerful forces, which seek to weaken the integrity of the legal structure for reasons public or private in nature. In order to realize this objective our constitution, in the form of Art.6, has provided a resistance to the impact of political or economic pressures that seek to convert their might into right. This however, never conveyed that the legal fabric could remain untouched by the play of social forces that shape and transform the texture of life in society. More particularly, even the constitution cannot escape the effect of changes in the moral and social consciousness of our society. Nonetheless, the inability of our judicial minds has resulted into a juristic dogmatism, which sets out to prove the inevitability of a legal result without any regard to its ethical and practical consequences, particularly in the form of 12th May's judgment, which in itself is self-defeating and deceptive.

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[37] Zafar Ali Shah v. Pervez Musharaf, Chief Executive of Pakistan PLD 2000 SC 869 at 1169 whereby it was stated that

> " We are of the view that machinery of the government at the Centre and the Provinces had completely broken down and the Constitution had been rendered unworkable. A situation arose for which the constitution provided no solution and the Armed Forces had to intervene to save the state from further chaos, for maintenance of peace and order, economic stability, justice and good governance and to safeguard integrity and sovereignty of the country dictated by highest considerations of state necessity and welfare of the people."

[38] Zafar Ali Shah Vs Pervez Musharraf (Chief Executive of Pakistan)PLD 2000 SC 869

In the present judgment the reference to incoherent precedents and the idealized concept of independence of judiciary has reduced the constitutional legal order to a system of mathematical or scholastic logic. Thus, failing us as a nation by misinterpreting greater and sacred concepts of constitutional jurisprudence. We have, by all definitions, failed to see the normative standards and generalizations specified in the constitution of 1973, that would prevent the legal order from becoming excessively fluid. Its arrangements are subject to periodic appraisals in the light of necessities of human-social life and the requirement of fairness and justice, but only by remaining within the constitutional limitations. However, any attempt to keep a legal system, which has been completely plagued with corruption, encased from the external forces, that are beating against the armor seeking to protect its internal structure, is obviously predestined to fail. Our political order, which is conditioned by excessive fluidity and chronic instability, is for sure incompatible with the very idea of rule of law. The 12th May's judicial understanding has made our legal system out of gear with the necessities or demands of the day. It has perpetuated the transient ideas of a past epoch and thus has left the new legal order with a little to recommend itself. The judges should have tried to bring about some reconciliation between the contradictory forces of instability and rest, salvation and innovation, perseverance and change. They should have perceived the constitutional legal order as cement, which holds the politico-socio-economic and legal structure together, and must have intelligently linked the past with the present without ignoring the pressing claims of the future.