

A ‘defining year’: Munir Malik shares thoughts on Pakistan’s judiciary, politics and democracy movement

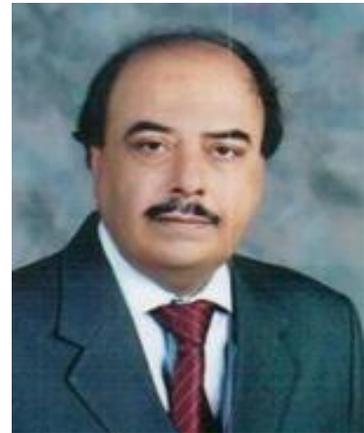
Baber Ayaz, for the Asian Human Rights Commission

Then president of Pakistan’s Supreme Court Bar Association, Munir Malik, launched the incredible lawyers’ movement in March 2007 for the independence of the judiciary and the reinstatement of Chief Justice Iftekhar Chaudhry. On 20 July 2007, its victory was celebrated by all democratic forces in the country, when the Supreme Court ruled that Justice Iftekhar’s removal by President Musharraf was unconstitutional, and he was reappointed. But the gains of the movement were short lived. On November 3, President Musharraf imposed emergency rule in Pakistan and got rid of all the independent judges. The struggle started again, with a long way to go.

Munir Malik was imprisoned immediately after emergency was declared, and given drugs under the pretext of painkillers, which caused him renal failure and liver damage. He has since been released and undergone treatment, and continues to be an inspiration for the independence of the judiciary and the rule of law in Pakistan. His insights will be helpful in understanding the movement of lawyers as well as the movement of democracy that is taking place in Pakistan now. He was interviewed by Baber Ayaz on behalf of the Asian Human Rights Commission.

Baber Ayaz (BA): The removal of the Chief Justice was not an issue when you were elected to the Supreme Court Bar Association; what was your agenda at that time?

Munir Malik (MM): Well, I had contested the [Bar Association] election precisely because I thought that this would be a defining year. There were a number of issues that were likely to come up in this defining year, for instance, elections were supposed to be held; the issue of whether an army general can be elected as a president, whether he can hold two offices of the president and army chief at the same time, was to be decided. There was also the issue of the holding of dual nationality by members of parliament and cabinet ministers, and whether they could swear allegiance to two constitutions. There was the issue of madaris’ degrees [degrees from Islamic seminaries]; whether these graduates were at par with regular college graduates.



Furthermore, by this time Malik Qayyum [the sitting Attorney General] and Sharifuddin Pirzada [legal advisor to the President] were recognized as supporters of the establishment. They were very close to Chief Justice Iftekhar. On the other hand, there was a feeling that the Supreme Court is trying to improve its moral or public image by taking *suo motto* notices [taking cases on the court’s own initiative] of popular issues, including the Steel Mills case, where a decision was given against the government. It was feared that with this improved image, the Supreme Court would give decisions favoring the government on crucial petitions, like those related to the President’s election or prices of pharmaceutical products.

So I was certain that we need an independent Bar to keep a watch on the Supreme Court itself. I was certain in my mind that it would be a defining year. The very first step was that the Bar Association passed a resolution demanding the restoration of the constitution as it was before Musharraf’s takeover in 1999.

At that time, the Chief Justice was largely unpopular within the legal community, mainly because of his arrogance, as well as the perception that he dispenses cases according to the lawyers appearing before him. If the lawyer was Sharifuddin Pirzada, he was all sugar and honey, whereas if the lawyer was not an important figure, he would be otherwise. I think he was overzealous in clearing the backlog of cases, even at the cost of miscarriage of justice. Lawyers from Karachi, Quetta, Peshawar and Lahore would be given notice in the evening that their cases are fixed in Islamabad tomorrow. This roster problem was agitating the lawyers, so I was ready to raise this issue with him, as I believe justice hurried is justice buried.

BA: But you had condemned the letter written by lawyer Naeem Bokhari [to the Bar Association and the judges of the Supreme Court in complaint of the Chief Justice] before the President took action against the Chief Justice; why?

MM: When Naeem Bokhari's letter appeared in mid-February 2007, it was applauded in the Bar rooms. My view however, was that he should not weaken the judiciary by making these allegations in the press.

But I was still trying to get my pound of flesh; I wanted the Chief Justice to fix the roster problem troubling the lawyers, in return for which I would vocally support him. I gave a statement of support that became front page news in *Dawn*. In one of his speeches in February, Chief Justice Iftikhar said that Munir Malik has promised to give me his unconditional support. When it was my turn to speak, I said that my support was there as long as the court moves in the direction of judicial independence.

Then came the bolt of 9 March 2007; the President's removal of Chief Justice Iftikhar. I was in Islamabad then, it was a Friday, and I was contacted by the press at about 5:30pm or so, asking for my views. The television had broadcast pictures of Chief Justice Iftikhar at the Army House, where the President, in military uniform, asked him to resign. It was clear to me that this is a direct assault on the third organ of the state, and we must resist it.

BA: The President has a constitutional right to send a reference [a constitutional provision under which any complaint against judges of the senior court is to be sent to the Supreme Judicial Council, who will decide how to proceed] against a judge of the superior court. Was your reaction against the inappropriate manner in which it was done, or because of the reference itself?

MM: My reaction was based on three grounds. First, the manner in which he was summoned and detained at the army camp office; the message it sent was that the judiciary is not an independent organ of the state and a uniformed President can do as he pleases. Furthermore, by implication, the legal community was also helpless. The second reason was that Pervez Musharraf could not constitutionally make a judge dysfunctional. An executive order was issued, by the 'royal secretary' at 5:03pm, stating that Chief Justice Iftikhar had been suspended and an acting Chief Justice sworn in. This was a complete negation of the principle of separation of powers. Every judge would have felt insecure; all you had to do was send a reference. While it would be subsequently determined whether the reference was of substance or not, the harm to a judge's reputation would have been done. The third reason was that the Supreme Judicial Council was convened on the same day with unholy haste; one of the judges was flown in via special plane, while another was tipped off in Lahore. Without any hearing, the Council imposed a restraint upon the Chief Justice.

BA: So if the President had acted in a constitutional manner, you would have had no objection?

MM: He should have sent the reference to the Supreme Judicial Council to handle, as and when they saw fit. Another issue was the manner in which the Chief Justice was held incommunicado, together with members of his family. His entire domestic staff was replaced by ISI [military intelligence] agents; about

20-25 of them were in his living room, in his lawn. His cars were fork lifted, no visitors were permitted, only those who had security clearance; I think Asghar Khan was the first to be permitted.

BA: There was a tremendous response to the call of the Supreme Court Bar Association when you launched the movement for the restoration of the Chief Justice. Were you confident of such strong public support or was that also a pleasant surprise?

MM: There was a wave of indignation at the manner of his dismissal; everyone I talked to from the legal community said that although the Chief Justice was not a nice man, what had been done to him was not right. I simply channelled this boiling wave of indignation; the Supreme Court Bar coordinated it, and the master strategy of having everyone gather around the Supreme Court building everytime Chief Justice Iftakhar was produced, worked. The administration over-reacted, they sealed all roads leading to the Supreme Court, and I had to walk two kilometres before I could get into the building.

On March 13 the Chief Justice was supposed to be produced at 1:30pm and at 1pm images were shown on TV of him being dragged by his hair. This agitated the lawyers practising in Islamabad, Rawalpindi and other adjoining courts, and they all started converging at the Supreme Court. I had given a call for a sit-in at the Supreme Judicial Council, but I was not sure where it would meet because it was supposed to be in camera.

BA: So one of the reasons that your movement received such a big response could be the contribution of the media?

MM: Absolutely, this was the difference between 2000 and 2007. In 2000, when six Supreme Court judges resigned, they were also detained in their houses and prevented from coming to the Supreme Court building. But at that time the print media had not given much importance to this and there was no independent electronic media. I don't think Chief Justice Iftakhar would have been reinstated without the support of the media.

Another key factor was that even though before March 9 the Chief Justice was only paying lip service to the cases of missing persons, their families and other concerned persons continued to demonstrate at the Supreme Court daily. This issue attracted civil society.

BA: Benazir Bhutto and Nawaz Sharif both humiliated and attacked the judiciary in their second terms of power, but there was no massive movement then. What was different this time?

MM: Historically, the judiciary has always been a collaborator with the ruling elite. It has been the 'B' team of the army. It retains the old, imperial mindset that it is there to serve the government. If a high court judge was called by the president, he would probably put on his best suit and take a camera with him; it would be an event for him to remember, that he has been summoned by the president or prime minister. In Bhutto's white paper published after 1977, Zulfikar Ali Bhutto in one of his side notes remarked, 'they [judges] will come to you for petty favours'; for a diplomatic passport, an admission for a child, a posting for a relative. Basically, the judges were part of the establishment, they had no moral credibility. If a man in uniform said something, it was the law. You could sense that if there was a case involving the core commanders [senior military officers] or cantonment land [land under military control], the judge would think that before the commander says something to me, I should oblige him. Such judges did not inspire public support.

This time however, the media brought to our drawing rooms a man saying 'no' to the establishment, a man standing up to the military, saying 'I will not resign, I am innocent'. So I think both the legal community and civil society felt they had to support him.

BA: You mentioned earlier that there was a scheme to build up the image of the Chief Justice and the Supreme Court, and then getting crucial cases such as the presidential election through; this means that the Chief Justice was cooperating. So then why did the establishment decide to remove him?

MM: The Chief Justice was cooperating with the President, but not with the government. The conspiracy against Justice Iftikhar as he tells me, was drawn out by Prime Minister Shaukat Aziz, General Javed Hamid, the then Chief Justice of Lahore High Court Iftikhar Hussain, his brother who was a Cabinet Minister and Law Secretary Mansoor. The Chief Justice had stopped Mansoor's appointment to the Commonwealth, he was not on speaking terms with Justice Hussain and Shaukat Aziz was very upset with the judgement quashing the Steel Mills' privatization. Furthermore, Chief Justice Iftikhar would humiliate civilian officers. Although he never summoned General Musharraf, he would summon the inspector general of police or other senior civil officers, who would take their gripes to Prime Minister Aziz.

According to President Pervez Musharraf, he had good family relations with Chief Justice Iftikhar; so this reference came from the civilian section of the establishment. The President was given the impression that this man is going to be Pakistan's Chief Justice until 2013 and he has already started showing his colours. I think Musharraf was misled. What was Shaukat Aziz doing in the army camp office? He was there on March 9, before the Chief Justice had arrived.

BA: After July 20, when the Supreme Court was restored, you said the next struggle would be to bring independence to the lower judiciary and to remove corruption. However, then came the slogan for removing the president. There is a view that this was an ambitious call without consolidating the gains; that the judiciary and legal community became too adventurous and ended up with the situation of October 9 [when the court suggested that election results could not be announced until after the court had decided upon Musharraf's eligibility to stand for elections]. How do you see this?

MM: Yes, I was very conscious of that. As a matter of fact, I have stated that if the Supreme Court is burdened with political cases, it will collapse under its own weight. The problem was that the politicians always wanted to fire from the shoulder of the Supreme Court, they wouldn't take the battle to the streets of Pakistan. So you had Qazi Hussain Ahmed and Imran Khan's petitions before the Court, challenging the holding of dual offices by the President. The Chief Justice cannot dismiss petitions without hearing them.

BA: Is it correct that Musharraf was worried that Justice Iftikhar would give a judgement against him?

MM: You will notice that neither the Supreme Court Bar Association nor the Pakistan Bar Council intervened in these proceedings. We had held out an olive branch; we said the Chief Justice was not a vindictive man, he will not sit on benches hearing cases against Pervez Musharraf, and counsels who had been his lawyers during his removal would not appear before him.

The one issue in which we took a firm stand however, was the cases of disappearances, so the Chief Justice was under considerable pressure to hear these cases. In the aftermath of the March 9 movement, he stated that it was the responsibility of the state to account for every disappeared person. It was not so much that we went after Pervez Musharraf that antagonized Washington DC, but that we went to look for the disappeared persons; they thought that the courts would now be throwing a spanner in the war on terror.

All the signals that came from the Chief Justice--that is the way he constituted benches on these constitutional cases--suggested that he would go slow. The 6-3 verdict that came against the Qazi Hussain and Imran Khan petitions was inevitable; one could have looked at the bench and said that it would be in favour of Musharraf. Even in Justice Wajihuddin's case against Musharraf standing for election, we would have lost that petition because we didn't have a majority. However, the reports that went to President Musharraf from his intelligence people said the Supreme Court would decide against him—that is why he imposed Emergency.

In a sense you are correct; certain political issues for which the Supreme Court was not ready were brought before it, but the momentum of the events were such that if the Court did not make an attempt to address them, it would have become like the old Supreme Court, which was not worth fighting for.

Also, it must be noted that from March 9 to July 20 we were able to rally lawyers of different political persuasions on the largest common denominator--independence of the judiciary, restoration of the Chief Justice and supremacy of the rule of law. After July 20 though, lawyers belonging to different political parties brought their own political agendas forward, and over that we had no control.

Chief Justice Iftekhar's attitude was that I have reached the position of the Chief Justice, now I don't care what they do to me. His words to me were, "I will go down in history as the Chief Justice who took a stand, the title is something that comes and goes, I will remain in history."

BA: Had everyone moved more cautiously, do you think the November 3 onslaught on the senior judiciary could have been avoided?

MM: This was a catch-22 situation. If the judiciary did nothing, its public image would suffer, with the impression that this was a fight only for the Chief Justice, not for the independence of the judiciary. This would result in a weakening of the judiciary. The expectations from the people and the legal community were such that there was no turning back without eroding your credibility; once your credibility was eroded, they would attack again.

In retrospect, perhaps the Court should not have stayed the notification of the presidential elections. Fifty per cent of the battle had been won with the reinstatement of the Chief Justice and the President's assurance that he will take off the uniform before taking oath. The stay order suggested to the President's camp that the Court's next step would be to declare the elections invalid.

BA: Most of the judges who refused to take oaths under the emergency Provisional Constitution Order in November, had taken the oath in February 2000, when Musharraf overthrew a constitutional government. Why does everybody support them now?

MM: Even Chief Justice Iftekhar had taken an oath under the Provisional Constitution Order in February 2000. Though judges say that they are not influenced by public opinion, that is not in fact true. Judges do not sit in ivory towers. One of my favourite quotes is from the New York Court of Appeal's Chief Justice Cardozo, who said, "the great tides and the currents which engulf the rest of men do not in their course turn aside and pass the judges by". On March 9 no one came to meet the Chief Justice, but when the movement started, it had a domino effect. As soon as people started coming out on the streets, one fell, then another, then another.

The courts themselves say that they interpret the constitution according to the changing times; it is an organic document, not a static one. When the people came out on the streets, they showed them that these are the changing times. There is an old dictum: 'Better late than never'.

BA: Do you see any chance of the restoration of these judges, and how would it be constitutionally possible under the current situation?

MM: I think the ball is now in the parliament's court. Historically, usurpers have sought parliamentary indemnity for their deviant behaviour. We cannot now go before the present Supreme Court and expect a restoration of judges. In fact, it has already been ruled that November 3 Provisional Constitutional Order amendments are a valid part of the constitution, and will not require further parliamentary approval. Moreover, the onus has been shifted onto the parliament: removing the amendments requires a 2/3 majority.

So this war will now be fought in the new parliament or in the streets.

BA: In other words, if the political parties don't get a 2/3 majority, they cannot repeal the amendments?

MM: No sir, let's take this scenario, supposing the Pakistan People's Party (PPP) gains a simple majority, forms the government and the speaker asks to lay the constitution of Pakistan before the house, which one will they present, the amended one, or the old one from before Musharraf took over?

BA: Can they do it legally?

MM: Illahi Baksh Soomro (former speaker of the national assembly) did it when the 2002 Parliament sat; he asked for the 1973 Constitution to administer the oath. So this is a political leadership game.

BA: The government says the Supreme Court was getting in its way of fighting terrorism. We all know that the problem of terrorism is there and that the executive needs certain powers or a certain space to deal with this extraordinary issue. How should we fight terrorism, and how can the judiciary contribute?

MM: The executive should not shift the entire onus to the judiciary. I concede that citizens' rights need to be balanced against the interest of state security. The question is, where do we draw this balance and who draws this balance? The balance is to be drawn by the parliament, and then the executive will implement the law. If the law states that they can keep a suspect incommunicado for seven days, fine, keep me incommunicado for seven days, but on the eighth day I should be produced before a magistrate. To decide whether the executive has transgressed the law is the function of the judiciary.

In England they had the same problem, but their parliament enacted a law, they have adopted specific regulations after 7/7. We, on the other hand, haven't been able to define terrorism yet. What is terrorism? What is a terrorist act? The definition we have, as found in the Anti Terrorist Act, is something liable to scare the general public.

The classic definition of terrorism is state terrorism, where the state uses its coercive power to repress its citizens. Assuming that Al-Qaeda is a state within a state and it has to be dealt with, then the international community must come up with a framework of rules. Now tell me, supposing they pick you up on a charge of national security, doesn't your family have a right to know that they have you in their custody? The state must account for persons. When they pick you up on preventive detention it is not a substantive charge, but they say we have picked him up. They don't present you before a court but at least a person doesn't disappear.

BA: In the aftermath of November 3, the movement is gradually dying down. How do you see its future?

MM: Well, we've gone off the front pages for several reasons. Important events such as the return of exiled leadership, the assassination of Ms Bhutto and presidential elections are getting prominent newspaper space. The problem is that we have few legal options without a court to turn to. Before July 20, the struggle was inside and outside the courts; the movement outside the courts focused on pressuring and sensitizing them.

We are now rethinking our strategy. The entire leadership of the Bar Association was arrested; Aitzaz Ahsan, Tariq Mehmood and Ali Ahmed Kurd are still under detention.

BA: Let us move to a more personal question. Were you mistreated during your arrest and detention?

MM: I was not mistreated at Adiala Jail, I only had the inconvenience of being shifted at 3am to Attock Jail on the third day. In Attock, the civilian jail staff bent over backwards to do anything for me, but it was the intelligence officers leading them. They would be present at every meeting, at every visitation; they decided when the cell would open and when it would be closed. They would supervise and torture me psychologically. The medical treatment facilities were inadequate; I would get medicines after three days. At that time I was on painkillers and according to my doctors from the Pakistan Institute of Medical Sciences (PIMS) and the Sindh Institution of Urology and Transplantation (SIUT), the painkillers given to me would have killed a healthy man.

BA: Were you on any medication then?

MM: No, just painkillers. My problem was that they'd shut me in at 4pm and open the cell at 7am. There was only enough space to lie on a mattress and the bathroom was right there too. There was nothing to do, all reading and writing material was confiscated, there was no newspaper and for the first four days I was in solitary confinement. I would go to the toilet to urinate every hour on the hour. I went to the jail doctor and he gave me some medicine, which he changed after there was no improvement in two days.

Eventually my kidneys shut down, and my liver was also not functioning properly. This resulted in the accumulation of fluid in my body. Fortunately, I was not disoriented mentally, although I don't recall the events after November 23. I only remember an SSP came and called Islamabad saying my health was bad and I should be transferred. I recall being in an ambulance. I don't think I would have survived Saturday. Once I recovered partially with the help of the PIMS doctors in Islamabad, I was moved to SIUT in Karachi where I recovered pretty fast and now I am off dialysis.