

## **Musharraf's Bed of Nails: Might It One Day Be Ours?**

**FRANCIS BENNION\***

### *The draftsman of Pakistan's first Constitution sees a lesson for Britain in President Musharraf's problems*

#### **Introductory**

An article by the respected commentator Irfan Husain on President Musharraf's decision last March to suspend the Chief Justice was headed "Pervez Musharraf's bed of nails"<sup>1</sup>. The Pakistan constitutional crisis has since deepened. In the present article I draw some lessons for Britain from the President's plight. Some joined-up thinking is required (and I do not say that lightly).

#### **Events in Pakistan last March**

The crisis now afflicting Pakistan began when on March 9 the President suspended Iftikhar Mohammad Chaudhry as Chief Justice of the Supreme Court. It is doubtful whether he had power to do this, and that is the first question that arose under the rule of law that Western nations think Pakistan should observe (about which more later). Irfan Husain said:

"Pervez Musharraf's beleaguered government has begun a desperate attempt to defuse the crisis that the president himself precipitated . . . Around him is a country in uproar over this peremptory use of executive power, with lawyers and opposition activists and leaders battling the police outside courts in Islamabad, Lahore and Karachi . . . The crisis comes at an already difficult time for Musharraf. He faces major problems on the Afghan border, mounting American pressure to crack down on Islamic extremists, and tricky elections to manoeuvre . . . Musharraf has made for himself a bed of nails. But the whole sorry episode reflects more than the arbitrariness and unaccountability of power he wields. It highlights too the fragility of Pakistan's institutions. It is difficult to see how the government can wriggle out of this self-created crisis."

This is an odd way of putting it, though it is typical of how Pakistan's plight is currently reported around the Western world. In fact Musharraf did not "himself precipitate" the crisis: it already existed. The "country" is not in uproar: only those comparative few who support Chaudhry. The "already difficult time" was not something fortuitous and extraneous, but part of the ongoing scenario. And so on.

The ultimate reason why Musharraf suspended Chaudhry in March was that he felt the latter's actions were increasing the grave danger Pakistan was in, and still is in, from the growing number of threatening Islamist Jihadists in Pakistan itself and neighbouring states.

#### **Actions by the Dismissed Chief Justice**

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<sup>1</sup> *Open Democracy*, March 19, 2007.

Irfan Husain said that, while Pakistan's higher judiciary has not exactly covered itself with glory over the years, Chaudhry has gained a lot of personal respect for his refusal to toe the official line. He continued:

“In taking a number of decisions that have embarrassed the government, Chaudhry has broken with the tradition of predictable pro-establishment judgments established by his recent predecessors. President Musharraf and his prime minister Shaukat Aziz have been smarting from his tough, independent and proactive stance.”

That could be a description of how our New Labour government has reacted to similar decisions by the UK judiciary over measures such as the Terrorism Act 2000 and the Human Rights Act 1998.

Unlike our own judiciary, Chaudhry faced accusations of personal misconduct. These came from a barrister, Naeem Bukhari, who alleged that Chaudhry regularly humiliated lawyers who appeared before him - often threatening them with contempt proceedings. He was also accused of abusing his position by getting his son appointed to the police despite having failed qualifying examinations.<sup>2</sup>

In Pakistan this is small beer. Such peccadilloes, even if proved, would not have caused Musharraf to act as he did. The suspension of the Chief Justice was obviously due to the adverse judgments and other actions that Chaudhry had been responsible for, or that were threatened. In Western eyes, these adverse judicial actions might appear well-founded; and here we approach the kernel of the argument I am about to put forward.

One area of anti-Musharraf judicial action concerned “the disappeared”. The law gives insufficient time for suspects to be held for questioning, so Pakistani government agencies have secretly kidnapped hundreds of alleged Islamist activists and without trial imprisoned, even tortured, them, contrary to that rule of law I have mentioned, and

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will mention again. (In the UK the New Labour government has by forethought ensured that the law does allow sufficient time for this purpose; and has been widely criticised for doing it.)

Some of the “disappeared” were Pashtun tribesmen thought to be helping the Taliban and al-Qaida. Others were young men alleged to be members of the Baluchistan Liberation Army attacking electricity pylons, rail lines and gas pipelines in the attempt to gain independence for that remote Pakistani province. Relatives of these “disappeared” persons, after obtaining no information about them from the police, and receiving no assistance from the lower courts, adopted the practice of appealing in the Chief Justice's court and obtaining favourable treatment there. Irfan Hussein says:

“Chaudhry began holding regular hearings that subjected the behaviour of the intelligence agencies to scrutiny in the dock. As a result of his intervention, around a score of the ‘disappeared’ were released. Other families, encouraged by this outcome, thronged to the Supreme Court.”

Other actions by Chaudhry worried Musharraf, for example his reinstatement of leaders of the radical Red Mosque in Islamabad and allowing it to challenge Musharraf's demolition of its subversive madrassa (Islamic school).

But the biggest threat Chaudhry posed was that of ruling against the constitutional validity of Musharraf's own position.

### **On a Collision Course**

On November 1 Bronwen Maddox of *The Times* reported that the Supreme Court was on a collision course with President Musharraf on four different counts, adding “the stakes are so

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<sup>2</sup> *Ibid.*

high now that the court is beginning to seem like a political actor itself — and to enjoy the role”<sup>3</sup>. Maddox gives an interesting picture of the court:

“In its appearance the court is a bastion of order in an unruly country. The gleaming white concrete building, set near the Parliament and President’s House (where Musharraf will have to move once he relinquishes his uniform), is one of those structures, neat as an architect’s model, by which Islamabad hopes to show that it is a proper capital city and Pakistan a country with proper institutions . . . It could be a modern European courtroom but the eleven justices sit under a portrait of Muhammad Ali Jinnah, founder of Pakistan, and attendants in white “Jinnah caps” squat or lounge on the side steps. All proceedings are in English, one of the two official languages but surely unsustainable as it is intelligible only to a tiny fraction.”

The court had postponed two vital judgments, on whether Musharraf was re-elected legitimately in October while remaining head of the Army and whether in granting Benazir Bhutto an amnesty from corruption charges he acted within his powers.<sup>4</sup> Advance reports indicated that the judgments, when they came, would almost certainly be against the President.

Musharraf made his next move on November 3, when he declared emergency rule and suspended the constitution.<sup>5</sup> Again it is not clear whether he had legal power to do this, but his command of the army ensured the move was effective. It was his second coup d’etat, the first having been in 1999 when the generals ousted Prime Minister Nawaz Sharif and Musharraf took over the government. He formally became President in 2001.

In explanation of his latest move Musharraf said in a television broadcast that Islamic militancy and “the paralysis of government by judicial interference” had forced him into making some very painful decisions, adding:

“I suspect that Pakistan’s sovereignty is in danger unless timely action is taken . . . Extremists are roaming around freely in the country, and they are not scared of law-enforcement agencies . . . Kindly understand the criticality of the situation in Pakistan and around Pakistan. Pakistan is on the verge of destabilisation . . . Inaction at this moment is suicide for Pakistan and I cannot allow this country to commit suicide.”

Musharraf’s television address followed the text of the declaration of emergency rule, which opens with a reference to the grave threat posed by the “visible ascendancy in the activities of extremists and incidents of terrorist attacks”. It ends by saying that the constitution is in abeyance. In effect this means that martial law was imposed.

Chief Justice Chaudhry and eight other judges refused to endorse the emergency order, declaring it unconstitutional. Chaudhry and other dissenting judges were then dismissed by the President, who appointed as the new Chief Justice the Supreme Court Judge Abdul Hameed Dogar, a supporter of his and a member of the special tribunal appointed to investigate allegations of wrongdoing by Chaudhry.

Police arrested opposition politicians and senior lawyers including the Chief Justice’s lawyer, Aitzaz Ahsan. This man, who leads the Supreme Court Bar Association, said that lawyers would launch a series of nationwide protests. On television police were seen bundling senior lawyers unceremoniously into vans. A columnist in the *Pakistan News* wrote “The people arrested now are the intelligentsia!”<sup>6</sup> The exclamation mark is deserved because for years it

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<sup>3</sup> *The Times*, November 1, 2007.

<sup>4</sup> The relevance of this is that Bhutto has been negotiating with Musharraf over the possibility that she might join his government as Prime Minister after the elections due to be held early in 2008.

<sup>5</sup> The text of the proclamation is too long to be set out here, but should be read by anyone seriously interested in the argument. It is given at [www.cfr.org/publication/14728](http://www.cfr.org/publication/14728).

<sup>6</sup> *The Observer*, November 18, 2007.

has been the intelligentsia in many countries, including Britain, who have disloyally undermined their own states.

### **Outrage in the West**

Predictably, Western politicians and media registered outrage at Musharraf's affront to democracy and the rule of law. US Secretary of State Condoleezza Rice said the

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declaration of emergency rule was "highly regrettable" and called upon Pakistan to have free and fair elections. The New York-based Human Rights Watch said it was "a brazen attempt at muzzling the judiciary". Brad Adams, Asia director at Human Rights Watch, said "While Musharraf is charging lawyers fighting for the rule of law as 'terrorists,' armed militants are increasing their stranglehold over northwestern Pakistan".<sup>7</sup> UK Foreign Secretary David Milliband said it was vital that Pakistan's government "abides by the commitment to hold free and fair elections on schedule". The Director of the British section of the International Commission of Jurists (which calls itself JUSTICE) said Musharraf's arguments for seizing power are "risible",<sup>8</sup> but this is no laughing matter.

On November 12 the Commonwealth Ministerial Action Group (CMAG) issued a statement condemning Musharraf's actions and requiring him to reverse them by November 22. It added:

"In acknowledging the dangers of instability in the country, CMAG called on all in Pakistan to refrain from violence, respect human rights and help create a conducive environment in which credible elections could take place."

It is to be hoped that the hundreds of thousands of Jihadists, al-Qaida supporters and Taliban in and around Pakistan will heed this wise call from Commonwealth leaders, but clearly one should not count on it. Certainly President Musharraf does not count on it. He immediately rejected the CMAG ultimatum.

What are Western lovers of democracy, human rights and the rule of law to make of these events? Is the alleged affront to our cherished values, so readily assumed and hastily condemned by many in the West, really so intolerable? That is a question I now wish to examine. I begin with democracy, and approach it obliquely by considering similar events that have happened in northern Africa during recent times.

In 1992, just seven years before Musharraf's first coup d'état, Algeria, the largest state in northern Africa, was holding democratic elections. It became apparent that the victor in the elections would be the Islamist faction headed by the outlawed Islamic Democratic Front. At that point the army, fearing that Islamic rule would be catastrophic for the country, moved in. The Islamist leaders were arrested and army leaders took over the government.

That has remained the position. No further democratic elections have been held in Algeria and criminal Islamist violence has continued to this day. The latest incident occurred in April, when two explosions killed 33 people and injured hundreds more. The Algerian civil war triggered in 1992 has so far cost around 200,000 lives.

This struggle against the Jihadists has spread throughout northern Africa, as elsewhere. In his current crisis Musharraf is very aware of this. Craig S. Smith of the *New York Times* recently reported that every country on the continent's northern rim, from Egypt to Morocco, has outlawed extreme Islamist parties that would be likely to win large parliamentary blocs - if not majorities - were they allowed to participate in free and fair national elections.<sup>9</sup>

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<sup>7</sup> Human Rights Watch website. On reflection Adams might come to see that from his point of view his comment was too hasty, since it accepts that Musharraf's fears are justified.

<sup>8</sup> 157 *New Law Journal* (November 16, 2007), p. 1589.

<sup>9</sup> *New York Times* Week In Review, April 15, 2007.

So there we have the basic situation. Many countries are faced, to a greater or lesser degree, with the uncomfortable fact that if democratic elections are held the people may vote in, or pave the way for, fundamentalist Islamic governments that in the long run may destroy their democracy. This is because Islam is presented as being in itself a “total” religion which governs every aspect of adherents’ lives and leaves no room for other views and opinions. So non-Muslim minorities are doomed, as such minorities have found in countries like Saudi Arabia and Iran.

### **What is the Rule of Law?**

The Western response to Musharraf’s recent actions has been to condemn them as contrary to that modern Western shibboleth known as the rule of law. I will conclude by examining this charge.

The rule of law is a serious business. In Britain it has recently been enshrined in statute, though without a statutory definition.<sup>10</sup> Everybody is supposed to know what the term means, so a definition is taken to be unnecessary. The trouble is that, far from everybody knowing what the term means, no one knows what it means. So it can be bandied about with impunity.<sup>11</sup>

The rule of law is a slippery concept. Among other things it has been called “an exceedingly elusive notion”,<sup>12</sup> a “self-congratulatory rhetorical device”,<sup>13</sup> and a shout of “Hooray for our side!”<sup>14</sup> It is said to have originated with Dicey, who used the term “the rule *or supremacy* of law”<sup>15</sup>. This gives a clue to meaning. In England the law is supreme, particularly over the arbitrary whim of the Monarch. “Wherever law ends, tyranny begins”, as Locke said.<sup>16</sup>

The subject was exhaustively dealt with by Lord Bingham of Cornhill in a recent lecture.<sup>17</sup> He asserted that the core of the rule of law is that “all persons and authorities within the state, whether public or private, should be bound by and

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entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts”.

He added that the rule of law has eight sub-rules, but before giving them I would just point out that we don’t need a weighty concept like the rule of law to give us Lord Bingham’s above glimpse of the obvious. Furthermore the concept of the rule of law does not prevent people breaking the law whenever they think fit; it is sanctions and penalties, whether criminal or civil, that do that.

They do not always succeed, even among legislators themselves. The Right Honourable Lady Williams of Crosby (better known as Shirley Williams) recently declared that she would go to

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<sup>10</sup> The Constitutional Reform Act 2005 s 1 refers to ‘the existing constitutional principle of the rule of law’ and says that the Act does not adversely affect that principle or the Lord Chancellor’s constitutional role in relation to it. Section 17(1) of the Act requires the Lord Chancellor to swear to “respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible”.

<sup>11</sup> The alert reader will have noticed that to condemn President Musharraf for breach of the rule of law therefore offends the rule of law principle against doubtful penalisation.

<sup>12</sup> Brian Tamanaha, *On the Rule of Law* (Cambridge, 2004), p. 3.

<sup>13</sup> Judith Shklar, “Political Theory and The Rule of Law” in Hutchinson and Monahan (eds), *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987), p. 1.

<sup>14</sup> Jeremy Waldron, “Is the Rule of Law an Essentially Contested Concept (in Florida)?” in Bellamy (ed), *The Rule of Law and the Separation of Powers* (Ashgate, 2005) p. 119.

<sup>15</sup> Emphasis added.

<sup>16</sup> John Locke, *Second Treatise of Government* (1690), Chap XVII, s.202 (Cambridge University Press, 1988), p. 400.

<sup>17</sup> “The Rule of Law”, Sixth Sir David Williams Lecture, 2006. I am indebted to Lord Bingham’s lecture for the citations noted in footnotes 12 to 14.

prison rather than obey the projected law about identity cards.<sup>18</sup> Another Right Honourable, the Cabinet Minister Peter Hain, who in 1972 was convicted at the Old Bailey of criminal conspiracy connected with sporting events involving South Africans, said in 2005 that he was proud of what he did.<sup>19</sup>

Lord Bingham's sub-rules are: (1) the law must be accessible and so far as possible intelligible, clear and predictable; (2) questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion; (3) the law should apply equally to all, save to the extent that objective differences justify differentiation; (4) the law must afford adequate protection of fundamental human rights; (5) means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve; (6) ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers;<sup>20</sup> (7) adjudicative procedures provided by the state should be fair; (8) the state must comply with its obligations in international law.

This is a helpful summary for Western nations. It does not suit the Islamic Republic of Pakistan, where a description of Sharia law would be more fitting. As the BBC analyst Michael Gallagher said:

“Applied fully, the Sharia extends well beyond the sphere of criminal justice. It is a code for living that all Muslims should adhere to, including prayers, fasting and donations to the poor. Women must cover themselves, and the sexes are frequently segregated. In effect, the Koran becomes a country's constitution.”<sup>21</sup>

So a requirement to observe the rule of law immediately conjures up the question which law? Furthermore all systems of law provide for extreme defensive measures when the safety of the state is threatened, as I have pointed out in relation to the notorious decision in *Liversidge v Anderson*.<sup>22</sup>

## Conclusion

On November 13 I listened to President Musharraf speaking to the world (in very good English) about Pakistan's current crisis. He asked a number of rhetorical questions, which I carefully took down word for word:

“I would like to ask is democracy more important than the country? The country is going down and becoming a failed state. Is arresting that more important? Or running a democratic system – so called democratic system - more important? Which one is more important? Obviously, save the government, save the nation . . .”<sup>23</sup>

A recent leading article said of Muslims in Britain today:

“Fundamentalist imams continue to indoctrinate young Muslims with seeming impunity while moderate Muslim opinion remains reluctant to mobilise against the extremists in their communities.”<sup>24</sup>

Could we ever be reduced to Musharraf's plight in Britain? If so, would the arguments I have put in this article weigh with us? Should they weigh with us even now – in relation both to Pakistan and Britain?

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<sup>18</sup> BBC Radio Four, “Any Questions?”, November 9, 2007, repeated November 10.

<sup>19</sup> BBC Radio Four, Clive Anderson programme, December 11, 2005, repeated December 14.

<sup>20</sup> Lord Bingham says this sub-rule “reflects the well-established and familiar grounds of judicial review”.

<sup>21</sup> BBC News, *World: Africa*, June 21, 2000.

<sup>22</sup> [1942] AC 206. For my comments see [www.francisbennion.com/2004/006.htm](http://www.francisbennion.com/2004/006.htm).

<sup>23</sup> BBC Radio Four, *The World Tonight*, November 13, 2007.

<sup>24</sup> *The Daily Telegraph*, November 15, 2007.