

**Syed Mansoor Ali Shah, J. –** In the short opinion dated 6 March 2024, we unanimously opined that '[i]n its advisory jurisdiction under Article 186 of the Constitution, this Court cannot reappraise the evidence and undo the decision of the case'. Furthermore, it was observed that '[t]he advisory jurisdiction under Article 186 of the Constitution requires this Court to render an opinion on any question of law of public importance referred by the President', and that in the present Reference, 'the question of law, in essence, is whether the requirements of due process and fair trial were complied with in the murder trial of Mr. Zulfiqar Ali Bhutto ("Mr. Bhutto"), the former Prime Minister of Pakistan, by the trial court (the Lahore High Court) and the appellate court (the Supreme Court)'. The reason for so restricting the scope of inquiry in the present Reference was grounded in the settled jurisprudence on the advisory jurisdiction of this Court, which holds that in its advisory jurisdiction, this Court cannot undertake a fact-finding inquiry, adjudicate a *lis* between parties or review its judgment rendered in its adjudicatory jurisdiction.<sup>1</sup>

2. I have gone through the detailed opinion authored by the Chief Justice and find that certain discussions and observations made therein, in my view, verge on reappraisal of the evidence in a case that has already been finally decided by this Court in its adjudicatory jurisdiction, thus going beyond the scope of inquiry set in the short opinion. With respect, I find myself unable to associate with such discussions and observations. Therefore, I add this note to briefly underscore the violations of the fundamental right to procedural due process and fair trial that occurred in the murder trial of Mr. Bhutto, as per the question of law taken up and answered in the short opinion. The facts forming the background of the present Presidential Reference and the questions of law referred to this Court for its advisory opinion have been comprehensively mentioned and discussed in the detailed opinion authored by the Chief Justice, and therefore, need no reiteration. While addressing the said violations of procedural due process and fair trial, I have drawn support from the theoretical framework of "transitional justice", which is employed to remedy the injustice caused by "political trials."

3. Around the world, authoritarian regimes use "political trials", writes Shen-Bayh,<sup>2</sup> to legitimize their seizures of power, delegitimize opponents and consolidate authority. A political trial is one whose disposition—the determination of guilt or innocence, followed by punishment—depends

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<sup>1</sup> Reference No. 1 of 2012 PLD 2013 SC 279 (5MB), Cauvery Water Disputes Tribunal case AIR 1992 SC 522 relied upon; Al-Jehad Trust v. Federation of Pakistan PLD 1997 SC 84 (5MB); Reference No. 1 of 1988 PLD 1989 SC 75 (11MB) and Special Reference No.1 of 1955 PLD 1955 FC 435 (5MB).

<sup>2</sup> Fiona Shen-Bayh, Undue Process: Persecution and Punishment in Autocratic Courts, (2022).

primarily on the accused's professed attitudes and activities in relation to the ruling regime.<sup>3</sup> In such trials, the legal process is not employed to ensure justice or minimize errors but rather to discredit and punish political opponents. These trials often rely heavily on statements obtained during investigations from former allies or associates of the accused, who may be coerced or induced to turn against the accused. Such evidence, which would usually hold limited weight in a fair trial, becomes a convenient basis for conviction in a political trial, supporting the alleged criminality of the accused. Political trials thus serve as a potent and notorious "judicial tool" for authoritarian regimes, aimed at suppressing political resistance and eliminating opposition.<sup>4</sup> These trials frequently violate due process and fair trial requirements to produce politically desirable outcomes.

4. In post-authoritarian regimes, "transitional justice" forms a crucial part of the transition from repressive authoritarianism to constitutional democracy. It involves uncovering the crimes of former authoritarian rulers and holding them accountable for past human rights violations, including unlawful detentions, imprisonments and politically motivated trials. Transitional justice, however, is not about vengeance or retribution but about a principled approach to healing and justice. Courts globally have affirmed that they must address the demands of victims for truth and justice while laying the foundation for societal reconciliation and systemic transformation. This dual focus on accountability and restoration is what sets transitional justice apart from ordinary judicial processes. Transitional justice, therefore, encompasses a set of methods through which states that have experienced fundamental human rights violations seek to distance themselves from that past and move forward in a manner consistent with the need for justice for those who have suffered from these violations.<sup>5</sup> These methods of transitional justice include truth and reconciliation commissions and the criminal prosecution of former authoritarian rulers.<sup>6</sup> Furthermore, holding both executive and judicial institutions accountable for their actions during the period of authoritarian repression, as well as exonerating past victims of state repression and miscarriages of justice, is essential for facilitating the transition of these state institutions toward greater respect for, and promotion of, the rule of law and fundamental human rights.<sup>7</sup>

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<sup>3</sup> Raymond Suttner, Political Trials and the Legal Process, (1985).

<sup>4</sup> Anthony Pereira, Persecution and Farce: The Origins and Transformation of Brazil's Political Trials, 1964-1979, (1998).

<sup>5</sup> Juan Méndez, Constitutionalism and Transitional Justice, (2012).

<sup>6</sup> Vinjamuri and Snyder, Law and Politics in Transitional Justice, (2015).

<sup>7</sup> Hakeem Yusuf, Transitional Justice, Judicial Accountability and the Rule of Law, (2010).

5. Transitional justice serves as a vital tool for addressing injustices perpetrated under authoritarian regimes. It encompasses broader mechanisms, including revisiting flawed judicial decisions made during such regimes through compromising due process and fair trial requirements. This process helps restore fairness and legitimacy in the legal system. By revisiting and rendering opinions on the fairness and legitimacy of such decisions, the Court delivers justice to affected individuals and sends a powerful message: judicial complicity with authoritarianism will not be shielded from scrutiny. This approach reinforces judicial independence, ensures accountability for regime-orchestrated injustices, and establishes a precedent for discrediting flawed judicial decisions rendered under oppressive regimes. Such actions underscore the judiciary's commitment to constitutional principles, reminding past and future judges of their duties and the need to resist authoritarian pressure. Ultimately, this helps safeguard democracy, the rule of law and human rights.<sup>8</sup>

6. The silent application of transitional justice in Pakistan, aside from the present Reference, can also be found in several notable cases. These include the case upholding the conviction and sentence of General Pervez Musharraf,<sup>9</sup> the case of the Sindh High Court Bar Association,<sup>10</sup> which declared the proclamation of emergency and promulgation of PCO by General Pervez Musharraf unconstitutional, and the case of Nawaz Sharif,<sup>11</sup> another former Prime Minister of Pakistan, which reversed his conviction in the Army Chief's Aircraft Hijacking case. These cases demonstrate the importance of ensuring accountability for both executive and judicial officeholders for their actions during periods of authoritarian rule. They also serve as a reminder that transitional justice will remain a vital tool in addressing any future instances of authoritarianism and political trials.

7. The murder trial of Mr. Zulfikar Ali Bhutto, a former Prime Minister of Pakistan, serves as a classic example of a political trial, illustrating how such trials can be manipulated to advance authoritarian designs. Bhutto's trial effectively served as a potent and notorious "judicial tool" for strengthening General Zia's authoritarian regime, aimed at suppressing political resistance, eliminating opposition and ensuring the consolidation of power. It helped to entrench the repressive military authoritarian regime

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<sup>8</sup> I acknowledge and appreciate Mr. Yasser Kureshi's valuable contribution as *amicus curiae* in shedding light on the crucial concepts of transitional justice and political trials. His *amicus* brief has been instrumental in navigating these complex topics. Mr. Yasser Kureshi is a departmental lecturer at University of Oxford, UK.

<sup>9</sup> General @ Pervez Musharraf v. Federation of Pakistan PLD 2024 SC 497 and Taufiq Asif v. General @ Pervez Musharraf PLD 2024 SC 610.

<sup>10</sup> Sindh High Court Bar Association v. Federation of Pakistan PLD 2009 SC 789 (short order) and PLD 2009 SC 879 (detailed judgment).

<sup>11</sup> Nawaz Sharif v. State PLD 2009 SC 814

under which it was conducted. Instead of independent, substantive evidence, the prosecution relied heavily on confessional statements given by, or procured from, Bhutto's former associates—accomplices turned approvers.

8. Likewise, several violations of procedural due process and fair trial requirements were committed to achieve politically desirable outcomes. These included the unauthorized reinvestigation of the case, which had previously been closed by an order of the Magistrate concerned; the surreptitious and unlawful transfer of the investigation from the regular investigating agency (Provincial Police) to the Federal Investigation Agency; the transfer of the trial from the regular trial court (Sessions Court) to the High Court without adherence to legal requirements; the unjustified cancellation of bail previously granted to Bhutto by a Single Bench of the Lahore High Court; the determination of Bhutto's recusal application by judges other than the one whose recusal was sought, without addressing the instances cited to demonstrate the bias and prejudice of the judge (Justice Maulvi Mushtaq); the composition of the trial and appellate court benches, both of which were headed by judges (Justice Maulvi Mushtaq and Justice Anwar-ul-Haq) who harboured personal grievances against Bhutto due to being passed over for appointments as Chief Justice of their respective courts—the Lahore High Court (trial court) and the Supreme Court (appellate court); and the unwarranted reconstitution of the appellate court bench from nine judges to seven judges. It is an established principle that justice must not only be done but must also manifestly and undoubtedly be seen to be done.<sup>12</sup> The infringement of this fundamental principle also constitutes a violation of due process and fair trial requirements. Because of these glaring violations, Bhutto is rightly regarded as the victim of "unfair judicial proceedings" and "legalized political murder"—also referred to as "judicial murder".<sup>13</sup> Both the obvious procedural irregularities and illegalities in the reinvestigation and trial, as well as the biased composition of the trial and appellate court benches, rendered the verdict illegitimate and undermined the independence and impartiality of the superior courts (High Courts and the Supreme Court) for years to come.<sup>14</sup>

9. In fulfilment of our duty under the principle of transitional justice, and with the aim of distancing ourselves from past violations of fundamental human rights while moving forward in a manner consistent

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<sup>12</sup> *Rex v. Sussex Justices* [1924] 1 KB 256 per Lord Hewart.

<sup>13</sup> Ramsey Clark, *Injustice against Bhutto in 2 Courts*, (1979) and Ian Talbot, *Pakistan: A Modern History*, (1998).

<sup>14</sup> Paula Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan*, (1995).

with justice for those who suffered from these violations, we explored all possible options within the existing constitutional and legal framework. The Constitution and the law provide no mechanism to set aside the judgment by which Bhutto was convicted and sentenced, as that judgment attained finality following the dismissal of the review petition by this Court. Furthermore, in its advisory jurisdiction under Article 186 of the Constitution, this Court lacks the authority to reappraise the evidence or overturn a final decision. However, after carefully examining the record of the reinvestigation and trial proceedings, we concluded—and so stated—that the trial proceedings in the Lahore High Court and the appellate proceedings in the Supreme Court of Pakistan did not meet the requirements of the Fundamental Right to a fair trial and due process as enshrined in Articles 4 and 9 of the Constitution,<sup>15</sup> which were later reinforced as a separate and independent Fundamental Right under Article 10A of the Constitution. Our expression of this opinion reflects a commitment to confront past missteps and fallibilities during an authoritarian regime with humility, embodying a spirit of self-accountability and underscoring our dedication to ensuring that transitional justice shall be served with unwavering integrity and fidelity to the Constitution and the law.

10. In the end it needs to be said that the judiciary is a resilient institution, endowed with the remarkable ability to recover and rise above the shadows of authoritarianism. This resilience is not accidental but is deeply rooted in the courage and integrity of those judges who refuse to compromise and have the courage to speak truth to power. In the annals of judicial history, there are turning points when the judiciary is bold enough to confront its past mistakes and chart a course for a better future. Today marks one such moment—a testament to the judiciary's unwavering commitment to justice and the rule of law.

11. The independence of the judiciary is the cornerstone of justice, and its true test lies in a judge's ability to stand firm under authoritarian regimes. The essence of judicial independence is not found in passivity or retrospective correction but in resisting authoritarian overreach at the time it occurs. Transitional justice, while important, should serve as a sobering reminder to judges: justice delayed by decades is justice diminished. Judges must act as the first and last line of defence for the rule of law, refusing to compromise even under duress, so that societies do not have to rely on transitional processes to correct the damage inflicted by judicial

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<sup>15</sup> *Benazir Bhutto v. Federation of Pakistan* PLD 1988 SC 416; *Jubilee Insurance v. NBP* PLD 1999 SC 1126; *Nadeem Anwar v. NAB* PLD 2008 SC 645 and *Riaz-Ul-Haq v. Federation of Pakistan* PLD 2013 SC 501.

capitulation. Let the lesson of transitional justice be clear—judges must uphold their oaths with courage in the face of oppression, for only then can the judiciary truly safeguard democracy and the rights of the people. Transitional justice, however, often becomes necessary because, during oppressive rule, some judges fail to uphold their constitutional duty, succumbing to the pressure of illegitimate authority. This failure not only enables violations of due process and fair trial rights but also erodes public trust in the judiciary.

12. Judges serving under authoritarian regimes must remember that their true strength lies not in holding office but in steadfastly upholding their independence and principles. Justice Dorab Patel exemplified this ideal when he courageously dissented in the Bhutto case, acquitting Mr. Bhutto of the charges, and later refused to take the oath under the Provisional Constitutional Order (PCO) promulgated by General Zia, thereby relinquishing his impending eight-year tenure as Chief Justice of Pakistan. His actions remind us that losing a position is a small sacrifice compared to compromising one's integrity or leaving behind a legacy of submission or compromise. Judges must always bear in mind that a judge's valour is measured by his courage to resist external pressures, stand firm against interference and safeguard the independence of the judiciary without fear or favour. Delay in confronting authoritarian inroads can prove fatal to the rule of law—such incursions must be resisted and rectified immediately, for the judiciary's role is to defend justice, not enable its erosion. I find no more suitable words to close this note than those of Bhutto himself, reflecting both a powerful critique of authoritarianism and a firm belief in the judiciary's essential role as a guardian of democracy. He wrote:

An independent Judiciary is the antithesis of Martial Law. An independent Judiciary can only function under the umbrella of the Constitution and not under the shadow of the gun ..... An independent Judiciary exists side by side with an executive chosen by the people and a legislature elected by them. But the people's Executive is in jail. The assemblies ... have become as silent as the graveyards. Can one flower flourish in a garden turned into a desert?<sup>16</sup>

**Judge**

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<sup>16</sup> Stanley Wolpert, Zulfi Bhutto of Pakistan: His life and Time, (1993) p. 405.