

"INDEPENDENCE OF JUDICIARY IN THE AGE OF SOCIAL MEDIA"

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Honourable judges, ladies and gentlemen.

At the outset, I extend my gratitude to the 'International Institute for Justice Excellence,' for giving me an opportunity to share my thoughts with a distinguished audience and eminent jurists. It is indeed an honour and a privilege. I am grateful to Professor Palma for giving me the liberty to speak on a topic of my choice. The emergence and popularity of social media platforms is a recent phenomenon. The non traditional sources of information have undermined and diminished the efficacy of the traditional sources globally. Television, Radio and newspapers are facing competition from undefined, unregulated and freely accessible sources of information. The world of social media has dramatically impacted human lives and societies across the planet. The use of internet based social networking platforms has become a necessity or rather, an addiction. All that it requires to instantly give access is a smart phone and an internet connection. In this age of technology a judge cannot avoid direct or indirect access to and receiving information relating to the happenings on the social media platforms. It undoubtedly offers many advantages but, simultaneously, it has given rise to enormous challenges. The focus of my paper are the challenges to the administration of justice and judicial officers. Rule of law and administration of justice are intertwined and depend on each other. But they do not operate in a vacuum. Rule of law can only be ensured if the administration of justice is effective, impartial and

confidence inspiring. The quality and effectiveness of the administration of justice is inconceivable without an independent judiciary and independent judges. Both are inseparable because without independent minded judges the independence of judiciary is a myth. Likewise, independent judges lose their relevance when the judiciary as an institution lacks independence. What then is the essence of the independence of the judiciary and its relevance with social media?

A judge, whether conducting a trial or hearing an appeal, is expected to be fair, impartial, incorruptible, competent and fearless. It is the duty and function of a judge to decide disputes, safeguard life and liberty and enforce other rights regardless of race, colour, religious or political beliefs. A judge must have the ability to perform functions without being influenced in any manner.

The efficacy and professional ability of an independent judge to discharge constitutional obligations is founded on the 'rule of law' and institutional independence. The essence and meaning of an independent judge is embedded in the oath administered before entering upon the office. Before entry upon the office as a Judge of the Islamabad High Court, I was administered the oath prescribed in the Third Schedule of the Constitution of the Islamic Republic of Pakistan, 1973. A judge swears to discharge duties and perform functions honestly to the best of his or her ability, in accordance with the Constitution and to abide by the code of conduct prescribed for a judge. The judge swears not to allow personal interest to influence any official conduct or official decision. A judge, therefore, solemnly commits himself to do right to all manner of people, according to law, without fear or favour, affection or ill will and to preserve, defend and protect the Constitution. Every

word of the oath describes the attributes of an independent judge. Commitment and allegiance to each word of the oath is the hallmark of an independent judge and compromise is its antithesis. The will and faithfulness to uphold the oath may present challenges if the independence of the judiciary as an institution is under stress or compromised. Rule of law is the bedrock of the independence of the judiciary and pivotal for enabling independent judges to fulfill their duties and obligations in accordance with their oath. Weak rule of law becomes a major impediment in maintaining order in society and consequently it has a profound effect on independent judges and the independence of the institution as a whole. In a nutshell, the ability of an individual judge to decide matters brought before him or her, as the case may be, impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interference, direct or indirect from any quarter or for any reason are characteristics of being independent. I have borrowed these expressions from the Resolution adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Improper influences and pressures may be in various forms.

The relevance of "social media" and its challenges in the context of independence of the judiciary and independent judges are rooted in the assurance that a judge will be protected against improper influences, pressures or threats while discharging judicial functions. Justice should not only be done but must be seen to be done and, thus, as a corollary judges and the judiciary as an institution should not only be independent, impartial, incorruptible and competent but should be seen as such.

In the words of Lord Atkin in the case of *Ambard v. Attorney General for Trinidad and Tobago* [1936] All ER 704, "Justice is not a cloistered virtue, she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men". No wrong is committed when a member of the public exercises the right of criticizing in good faith, whether in private or public, because the path of criticism is a public way. But imputing improper motives to those taking part in the administration of justice or when the criticism is based on malice or intended to impair the administration of justice, it inevitably causes prejudice and is likely to undermine the independence of the judiciary and the authority of an independent judge. Judges are indeed not above the law. They ought to be held accountable. Accountability is one of the most important pillars of independence of the judiciary and a crucial mode for rewarding independent judges because it gives them an opportunity to be tested. But for accountability to be effective it has to be genuine, for proper purposes across the board and not selected or targeted. Criticism in good faith is an accepted and welcome form of accountability but if it is based on improper considerations the right to a fair trial is threatened, besides the rule of law being undermined. This makes it a herculean task for an independent judge to uphold the oath of office. How does social media influence an independent judge or the independence of the judiciary as an institution?

"Social Media" refers to the internet based applications, which allows users to instantly create, organize and distribute messages, voice recordings, pictures and videos. The social media platforms such as Twitter, Facebook, YouTube and many others have the ability to spread comments, views and videos globally. The absence of editorial controls and pre screening of the content enables a user to successfully upload any material. There is no

check on putting fake, misguided or harmful material on the social media platforms, so much so that even hate material can be uploaded without any restriction. By the time the material is reported to and is subsequently removed by the managers of the platform, the damage has already been done. Those involved in politics in any corner of the world have discovered the magical prowess of the social media platforms for running campaigns to influence public opinion. The unscrupulous enjoy the liberty to use it as an effective means for vilification and propaganda campaigns. It is alleged that attempts were made to influence electoral outcomes in the United Kingdom, the United States and several other countries. The Brexit referendum also witnessed the potential of social media. The 'social media platforms' have rendered the right to privacy redundant while the laws of defamation unenforceable. Cyber stalking, bullying and harassment is not uncommon. Many accounts are not even operated and managed by humans. Engagement through automated programs called 'social media bots' has encouraged States and its institutions to use the platforms for engaging in proxy wars. The bots are designed to imitate humans. They can effectively be used for malicious and nefarious propaganda campaigns. It has provided an opportunity to repressive forces across the globe to undermine democracies and threaten human rights. This undefined, unregulated and effective propaganda tool has profound consequences for the right to fair trial, independent minded judges and the administration of justice. Fake, misguided and malicious propaganda campaigns can harm individuals involved in the judicial proceedings including the judicial officers. Political forces have established organized social media entities, which are used for running campaigns in order to influence public opinion.

The administration of justice and judges become targets of organized campaigns when the matter being adjudicated involves political content. It becomes more complex when the litigant, whether an accused or a victim, has a significant political following. When the proceedings are pending, political rivals become active on social media in an organized manner. The pending judicial proceedings become the focus of rival affray. Attempts are made to influence the proceedings and the judicial officers. The aftermath of the culmination of judicial proceedings witnesses a vilification campaign by the side which does not approve of the decision, regardless of its merits. The aggrieved party strives in an organized manner to impute motives and make the judge and the institution as a whole controversial. In a politically polarized environment the challenges become more intense. How should a judge react? What would be the most apt response institutionally? Abuse of social media platforms has an intense effect on the actual stakeholders of the administration of justice and the people. Their confidence in the judicial system and judicial officers is pivotal.

In Pakistan, independent judges had put up a courageous resistance against repressive forces which led to the historic lawyers movement just over a decade ago. It ended with the restoration of the Constitution. Hon'ble Justice Tassaduq Hussain Jilani, who is with us today, was one of those who had inspired the legal community to stand up and struggle for the rule of law. I am honored because he had recommended and elevated me to the Bench. The political turmoil in Pakistan has persisted since then and the judiciary has been at the epicenter. The Islamabad High Court has remained in focus because of the litigation involving political content. In 2014 political forces were asserting their rights to freedom, association and free speech by claiming relief against the actions of the then elected executive.

The aggrieved ended up by invoking the jurisdiction of the Islamabad High Court. They walked away with issuance of writs that guaranteed their constitutional rights. The tables turned after the general elections held in 2018 and so did the expectations of the rival parties. A favourable verdict becomes landmark relief for one party while the followers of the other vigorously starts a vilification campaign by imputing motives to the Judge.

As a judge of the High Court, I have never experienced being approached nor been pressurized because my oath does not allow me to give access. My family members and a limited number of friends are my strength and support because they appreciate that a judge has no choice other than to demonstrate absolute commitment to the oath. Many of my judgments were not to the liking of the executive branch of the State but I remained immune from being subjected to any kind of influence because no one could gain access. I stopped using a smart phone so I remained oblivious of what was happening on the social media platforms. But despite all these self imposed restraints, I do get to know about what goes viral on the social media platforms. Initially, the fake allegations, intrusion of my privacy, imputing motives and the mystery of social media were irritating. But soon I realized that such malicious propaganda campaigns and personal vilification, based on fake and misguided information uploaded on social media platforms, manifested frustration and failure to influence the Court. As a judge i realized to accept it as a challenge. It reaffirmed and strengthened my allegiance and commitment to every word of the oath of my office. Fake, false and misguided propaganda campaigns are short lived because truth ultimately prevails. A petition was filed in my Court by a lawyer seeking initiation of contempt proceedings against a journalist who had commented about Hon'ble Judges of

the Supreme Court. I dismissed the petition in limine and the relevant portion of the order is as follows:

*"The abuse of social media platforms in a politically polarized society entails the risk of harming institutions and individuals. Fake, false, malicious and misguided propaganda, cyber bullying or cyber stalking, targeting the judiciary and its members on social media platforms has become a common phenomenon. The privacy of judges is not protected and messages, photos and videos relating to their personal lives or family matters are also uploaded in flagrant violation of the right to privacy. Fake, false and fabricated information and propaganda about judges and the administration of justice is resorted to in order to get desired verdicts. Motives are imputed when a verdict is not of liking. It definitely creates an intense challenge for an independent judge and the judiciary. But the dignity of a Judge or a Court is not dependent on resorting to the law of contempt. The judgments of a Judge and the latter's conduct is the measure of his or her integrity and independence. If contempt proceedings were to be initiated on the basis of a message uploaded on one of the social media platforms then it would open flood gates of petitions because of the number of allegedly contemptuous content-

The integrity and independence of the Hon'ble Judges, regarding whom the alleged tweet has been attributed, is beyond doubt. The dignity of an independent judge nor his or her integrity is so frail and vulnerable so as to be harmed by a tweet on the social media platform."*

I would like to share with you some of the social media vilification campaigns directed towards me. After deciding a case relating to a political personality, I was informed that a gentleman from outside the country had uploaded a video on social media platforms alleging that I was a beneficiary of a property gifted by the political appellant. The details of the apartment were narrated with such confidence that those who did not know me would have been justified in believing the story. It had gone viral. In September last year I was attending a Conference in Cape Town, South Africa. Judges of the Supreme Court and High Courts were also attending. Outside the hotel where we were staying, a Cobra sports car was on exhibition. I and a judge of the Supreme Court had our photograph taken in the car. The photo somehow went viral with the caption that I was in London and that the other person (Judge of the Supreme Court) was an office holder of a political party. The potency of social media platforms as a tool for spreading fake news and malicious propaganda became evident when after a few hours I received a call from my wife because she had also started doubting whether I was actually in Cape Town. The photograph became so popular that I had it enlarged and placed it in my study. There are several other instances but they are mere attempts to make a judge controversial. I certainly do not support banning the platforms or placing restrictions because free speech is one of the most valuable and cherished constitutional and human right. It makes humans distinct from other species. It is for the same reason that a judge must exercise restraint in invoking contempt powers. These challenges that threaten independent minded judges can only be effectively countered if the institution as a whole resolves to be seen as independent. Political leaders across the world have the ability to play a pivotal role in safeguarding the judicial independence and the authority of independent judges. Regrettably, this does not seem to suit

their adversarial politics. They realize the importance of independent minded judges and an independent judiciary when they are no more in power. Every political leader claims to be committed to "rule of law" and safeguarding independence of judiciary but their pursuit does not go beyond the rhetoric.

A judge must learn not to fear or to be influenced by the content on the social media platforms. The fake, malicious, false and misguided content and material on these forums should be ignored and the challenges be met on the basis of commitment and faith in the oath of office. It is commitment to the oath that a judge or the institution of judiciary can ensure independence and be seen as such.