Promoting an Independent Judiciary as a Rule of Law Principle: A Brief Commentary on the Supreme Court of Pakistan

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# PROMOTING AN INDEPENDENT JUDICIARY AS A RULE OF LAW PRINCIPLE: A BRIEF COMMENTARY ON THE SUPREME COURT OF PAKISTAN

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I. Introduction

For many years, the rule of law is a set of principles that has been promoted in developing nations as a means to build democracy. In the context of governance, the rule of law has a useful application within the three branches of government (executive, legislative, and judicial). However, in order to secure the rule of law, stability and fairness is required among the ruling executive that respects the judiciary, a process that appears to be missing in several countries. For many decades, political instability in Pakistan has adversely affected the Supreme Court of Pakistan by way of excessive intrusion by the executive. This situation has created an unbalanced separation of powers among Pakistan’s three branches of government, and since its independence in 1947, Pakistan’s judiciary has suffered major setbacks due to executive acts, and is still not fully independent as an institution.

This paper argues that an independent judiciary is essential in promoting the rule of law in an unstable political climate in Pakistan, and that a modern approach should be pursued in fulfilling this goal. The modern approach includes the establishment of a multi-partisan enforcement body that protects the judiciary from harsh executive actions and changing political regimes. For the purpose of this paper, the rule of law principles relating to the: (1) independence of judiciaries, (2) transparency and accountability, and (3) supremacy of the law, will be discussed in the context of Pakistan’s constitutional and political history. This discussion will illustrate the current challenges faced by the Supreme Court of Pakistan in becoming an independent branch in order maintain the rule of law in a country marred by changing political regimes.
II. Guiding Principles for the Rule of Law

The rule of law involves several concepts rooted in democracy, one of which is the independence of judiciaries. The United Nations adopted the *Basic Principles on the Independence of the Judiciary* in 1985, which outlined the following characteristics: (1) establish a separate and impartial judiciary that could decide matters without political interference; (2) have a nation provide adequate resources to allow the judiciary to perform its vital functions; and (3) have such power to be enshrined in a nation’s constitution.\(^1\) Drawing from these international principles, several countries seek to promote the following democratic ideals:

- civil liberties and access to justice (equality of citizens);
- law and order;
- independent judiciaries (free from the executive and legislature)
- transparency and accountability of executive and legislative branches; and
- the supremacy of law (constitution);

Aside from the above principles, in the framework of the separation of powers doctrine, independent judiciaries are encouraged because justices can make decisions free from influences of the executive and legislative branches of government, thereby acting as a check upon these branches. But the judiciary’s check upon the executive and legislative branches is premised on upholding the supremacy of law based on a nation’s constitution. In this way, an associated feature of independent judiciaries, transparency and accountability, can be achieved on the part of government for any illegal political acts committed by political leaders or members.

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\(^1\) United Nations Office of the High Commissioner for Human Rights, online: Basic Principles on the Independence of the Judiciary <http://www.unhchr.ch/html/menu3/b/h_comp50.htm>. This document is tied to the Universal Declaration of Human Rights dealing with concepts such as adjudicative fairness and right to a public hearing before a competent and independent tribunal established by law.
III. Rule of Law Principle: Independent Judiciaries

An essential feature of modern courts is their independent function, which is based on the separation of powers doctrine.\(^2\) Separation of powers refers to a model of governance whereby the three branches of government (executive, legislative, and judiciary) function separately and equally, while acting as checks on each other. Under the rule of law, judicial independence is generally defined as “freedom from direction, control, or interference in the operation or exercise of judicial powers by either the legislative or executive arms of government.”\(^3\)

Independent judiciaries are characterized by the following: (1) judges are free to make impartial decisions without outside political interference; (2) a judiciary acts as a check upon the executive and the legislature; and (3) judges are not arbitrarily removed or threatened.\(^4\) The integrity of a court therefore depends upon the degree of insulation from external political actors, and their decisions would be honored even if they involve the executive or legislative bodies. As former U.S. Supreme Court justice Sandra Day O’Connor stated:

> Judicial independence allows judges to make decisions that may be contrary to the interests of other branches of government. Presidents, ministers, and legislators at times rush to find convenient solutions to the exigencies of the day. An independent judiciary is uniquely positioned to reflect on the impact of those solutions on rights and liberty, and must act to ensure that those values are not subverted.\(^5\)

Independent courts would exercise their authority by interpreting matters before them in deference to the values in a nation’s constitution. In this sense, the courts are seen to be

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\(^4\) Ibid.

the guardians of the constitution, and thereby serve to protect civil liberties of citizens. From a political perspective, an independent judiciary could give a voice to citizens who are traditionally ignored or left out of the political process. For minority groups, this is particularly relevant when the ruling government representing the majority ignores their rights, or fails to apply constitutional protections for them.

Another fundamental feature of the independent judiciary is the administrative law concept of judicial review. In the context of separation of powers, judicial review allows a court to closely review acts of the executive and legislative branches (such as legislation or regulations) without being subjected to unnecessary threats or interference. Without judicial review, a court cannot adjudicate matters in an objective manner, and carefully tailor their judgments in line with constitutional principles. Indeed, judicial review is essential feature in a democratic nation’s constitution, and, as some commentators have noted, it represents the ultimate expression of an independent judiciary.⁶

IV. The Rule of Law Situation in Pakistan

a. The Legal System, the Supreme Court, and the Constitution

Pakistan’s legal system is inherited from the English common law tradition, after establishing its independence from British colonial rule in 1947. The legal system is comprised of both common law principles and Islamic law principles (which is prevalent in family law and criminal law).⁷ Throughout its history, Pakistan has had three constitutions (1956, 1962, and 1973), whereby the Supreme Court of Pakistan was

formally created in 1956. After replacing the Federal Court of Pakistan (which was created in 1949), the Supreme Court of Pakistan officially became the highest court in the nation, and since then has original and appellate jurisdiction on all federal matters, including provincial matters. The President formally appoints justices to the Supreme Court of Pakistan.

Since 1947, the Supreme Court of Pakistan has seen its authority being undermined in the wake of changing executive regimes, where the ruling leaders would deny the Supreme Court from exercising its constitutional authority on matters relating to the arrest and detention of political prisoners, and the setting of term limits, compensation, and core responsibilities. These situations have damaged the substance of the rule of law in the form of little independent judiciaries, and the constant derailment of basic judiciary rights under Pakistan’s constitution.

**The Constitutions of 1956, 1962, and 1973**

The 1956 constitution was drafted with the intent of creating a modern parliamentary democracy with rule of law principles, and specifically under the Objectives Resolution, the concept of an independent judiciary was first proposed that designated the executive to regulate judicial appointments, tenure, compensation, and removal. In particular, the

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9 Supreme Court of Pakistan, online: History of Supreme Court of Pakistan <http://www.supremecourt.gov.pk/web/page.asp?id=113>. The Supreme Court of Pakistan, located in Islamabad is comprised of a Chief Justice and 16 judges, and was formally established on March 2, 1956. See generally, Supreme Court of Pakistan, online: <http://www.supremecourt.gov.pk/web/page.asp?id=113>. Along with the Supreme Court of Pakistan, there are special courts for Islamic law (Federal Shari’a courts) and Anti-Terrorism. The 1956 constitution in Pakistan was later amended in 1962, and to its current form in 1973.

10 1956 Constitution of Pakistan. The Objectives Resolution specifically states: “Wherein the independence of the Judiciary shall be fully secured.”
1956 constitution was amended to ensure the independence of the judiciary so that “justice could be dispensed in Pakistan in a real and unpolluted form.”¹¹ That is, the judiciary should be permitted to exercise its authority without interference from the executive or legislative bodies. The 1956 constitution was considered the “supreme law of the land”, and made the Supreme Court of Pakistan as the guardian and interpreter of the constitution.

During the 1960’s, and under the military rule of President Ayub Khan, a constitution commission was established in order to examine the failure of the parliamentary system, and the overall role of democracy in Pakistan.¹² Although the constitution commission made recommendations to strengthen the role of the parliament and judiciary in order to provide more equal footing with the executive branch, President Ayub Khan ignored this recommendation. As such, there was an opportunity to balance the executive branch with the legislative and judicial branches, but no formal action was taken to achieve this goal.

The 1962 constitution was amended into Pakistan’s most recent 1973 constitution, which has affected the judiciary in two ways. First, under the Fourth Amendment, the writ powers of the High Courts were curtailed in that the courts were not permitted to grant freedom or bail to those persons who were arrested or detained.¹³ Second, under the Fifth Amendment, higher courts were restricted in that the terms of office for judges were determined by fixed terms (and not by age), while judges in the High Court could be transferred to any High Court without their consent.

¹¹ Hamid Khan, Constitutional and Political History of Pakistan (Oxford University Press 2001), at 113 [Khan].
¹³ Ibid. at 185.
Thus, the supremacy of law is firmly entrenched under Pakistani law. However, since 1947 Pakistan has experienced several changes in government, alternating between civilian and military rule. On several occasions, martial law has been imposed when civilian governments would fail to maintain power. This is why the military establishment has grown powerful and has managed to rule as the executive for many years, almost becoming a fourth branch of government. Under martial law, Pakistan’s National Assembly (legislature) would be dissolved, and the constitution would be suspended in favour of law and order, a situation which has created devastating consequences for the Supreme Court of Pakistan.

But even during civilian rule in recent times, the Supreme Court of Pakistan has seen its constitutional powers usurped by leaders who would immediately suspend the constitution, and severely limit the activities of the judiciary. The lack of respect for the nation’s constitution has raised concerns about the role of the supremacy of law. Therefore, a discussion of specific examples of a lack of independent judiciaries (where judges were removed) in the context of transparency and accountability of executive and legislative actions sheds light on the role of the supremacy of law.


In 1980, the military government of President Zia-ul-Haq was concerned about a case involving a High Court’s review of martial law regulations that were instituted in 1977 as part of the military takeover of the civilian government under former Prime Minister Zulfiqar Ali Bhutto. Although this was a trial court case, Pakistan’s Chief Justice of the
Supreme Court, Maulvi Mushtaq, represented the full bench, which was leaning towards ruling against martial law. As such, the military government made a constitutional amendment on May 27, 1980 that barred the court from making any Order relating to the validity of martial law regulations. Moreover, the executive prohibited any court from reviewing judgments passed by recently established military courts.

Along with the constitutional amendment, the military government removed Chief Justice Maulvi Mushtaq, and replaced him with another judge appointed by Zia-ul-Haq himself. Here, the President felt that the Supreme Court of Pakistan was interfering in his attempt to establish martial law. The removal of Chief Justice Mushtaq serves as an example of how the military executive completely disregarded the role of the judiciary, and how the judiciary was severely restricted in its powers to adjudicate matters directly involving past actions of the ruling executive.


The most recent and controversial example of a threat to judicial independence involved President Pervez Musharraf’s removal and detention of Pakistan’s Chief Justice of the Supreme Court, Iftikhar Chaudhry, in March 2007. After denying Musharraf’s suspension of the constitution and declaration of a state of emergency in 2006, Musharraf had removed Chief Justice Chaudhry by sending him a “reference” under Article 209(5) of the Pakistani constitution, a provision that allows the executive to remove a Chief

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14 Khan, *supra* note 11 at 360.
Justice for misconduct and misuse of authority. The basis for the removal was that the Supreme Court of Pakistan had ruled that Musharraf had overstepped his authority as an executive leader when he planned to rewrite the constitution.

However, after the removal of Chief Justice Chaudhry, Musharraf faced intense pressure from local bar associations and the global community to reinstate him. The Chief Justice was eventually reinstated on July 20, 2007, but this event confirmed two things: (1) public sentiment played a significant role in convincing the executive that the judiciary was a respected institution that should be functioning on its own; and (2) the executive branch had undermined the authority of the judiciary by circumventing the constitution. The removal and detention of Chief Justice Chaudhry deepened the judiciary’s subservient position among the institutions of government, and confirmed that politics trumped the rule of law.

The removal of Chief Justice Iftikhar Chaudhry served as an example of how the executive had prevented the highest court in the land to conduct judicial review for actions related to the executive. As Gerber notes,

Judicial review is the ultimate expression of judicial independence, because without judicial independence no court could safely void an act of a coordinate political branch. Bluntly stated, the risk to a judge who exercises judicial review when he or she is not independent of the executive and the legislature is either removal from the bench or a reduction in salary.

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V. Rule of Law Principle: Transparency and Accountability

As the highest court, any decision from the Supreme Court of Pakistan can act as a check on the executive and legislature. For political reasons, the executive tends to fear an independent judiciary because of their potential ability to remove rulers from power. An independent judiciary thus holds the executive and legislative branches transparent and accountable for their actions, a situation which produces a sense of fairness among the citizens towards the nation’s highest court. The judiciary, in effect, becomes an extension of the public sentiments towards government actions.

Two seminal events in Pakistan demonstrate how the judiciary creates transparency and accountability in the actions of the executive. First, in 1998 the civilian government under Nawaz Sharif had decided to use the Pakistan Armed Forces to forcibly detain members of the MQM (Muttahida Quami Movement), a political party who were allegedly responsible for the growing sectarian violence in Pakistan. Here, the civilian government acted under a Civil Power Ordinance, and decided to establish a military court in order to conduct trials of civilians arrested under this Ordinance. The Supreme Court of Pakistan held that such an Ordinance was unconstitutional, and that all sentences decided but not yet enforced should be transferred to Anti-Terrorist Courts. Thereafter, the executive under Nawaz Sharif decided not to pursue the matter as they felt it would damage them politically.

Second, in November 1997 several parliamentary members stormed the Supreme Court of Pakistan building to protest the Court’s contempt proceedings against Prime Minister

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18 Khan, supra note 11 at 482.
19 Ibid.
Nawaz Sharif.\textsuperscript{20} In this highly charged environment, members of the Pakistan’s National Assembly (elected political officials) viewed the Supreme Court’s proceeding against the executive as a direct threat to their establishment. Although Prime Minister Sharif was later acquitted, the Supreme Court of Pakistan found seven legislative members guilty of gross contempt of court, and held that their actions were deliberately planned to disrupt their proceedings against the Prime Minister, and were not part of a spontaneous demonstration.\textsuperscript{21} This event illustrates not only a blatant disregard on the part of some legislative members towards the judiciary, but reflects the physical vulnerability of the Court during periods of political instability.

VI. \textbf{Recommendations for Improving Pakistan’s Independent Judiciary: The Multi-Partisan Enforcement Body}

Building a conceptual model for the rule of law is not enough in Pakistan. Rather, a modern enforcement body should be created within a fluid and dynamic system of governance to allow the Supreme Court of Pakistan to promulgate essential rule of law principles without interference from changing political regimes. At minimum, rule of law norms need to be firmly entrenched among the psyche of government officials (and the military) to enable executive or legislative members to respect the integrity of the Supreme Court of Pakistan. This indoctrination process will be slow and gradual.

Understanding that the executive makes judicial appointments, perhaps a neutral, multi-partisan enforcement body (comprised of elected officials from each political party, including senators) can streamline the process of selecting justices, and to protect the

\textsuperscript{20} Khan, \textit{supra} note 11 at 484.
Supreme Court of Pakistan from intrusive acts of the executive body. If given special constitutional powers, the multi-partisan body could appoint or remove Supreme Court justices by voting in a unanimous fashion, while ensuring that any potential military or civilian takeover does not affect these selections.

The members of this multi-partisan enforcement body should be drawn from each political party in order to avoid political controversy (while also choosing a few laypersons), and to ensure that the justices selected for Supreme Court duties are not tainted with personal bias. Perhaps this new enforcement body can foster a healthier relationship between the executive and the judiciary, and help provide additional resources from the federal budget to the Supreme Court by ensuring the security and physical protection of judges. The goal of the multi-partisan enforcement body should be to continually seek improvements to the Supreme Court of Pakistan, and to ensure that the Court is unaffected by changing political regimes.

In this sense, strengthening the independence of the judiciary is not meant to glorify the position of Supreme Court justices, or to fulfill abstract theories in law and philosophy, but to restore the confidence of the people in their nation’s legal system and constitution, knowing that one institution of governance will monitor and discipline another equally important institution. As Carothers noted, rewriting constitutions and laws is the easy part, but applying institutional reforms is a slow and arduous process. This statement clearly applies to the present condition of the judiciary in Pakistan.

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VII. Conclusion

The rule of law is a resounding theme in the context of international development law, particularly with respect to independent judiciaries. An independent judiciary is the embodiment of several democratic ideals of governance, including the promotion of civil liberties, impartial decision-making by court justices without pressure from the executive and legislative branches; and promoting transparency and accountability for government actions. The Supreme Court of Pakistan has experienced turbulent times with respect to executive and legislative transgressions (from military dictators, civilian leaders, and legislative assembly members). The historical absence of a balanced separation of powers concept and changing political regimes have severely distorted the nature of governance, resulting in a weakened judiciary and a general disregard for Pakistan’s constitution.

The executive in Pakistan has routinely disregarded the written constitutional principles that were meant to protect Pakistan’s judiciary from adverse political influences from the ruling executive, and the supremacy of the constitution. Such utter disregard for the authority of the Supreme Court of Pakistan tramples on the constitutional principles that encourage a separate but equal judiciary branch. However, a prerequisite for independent judiciaries in any developing nation requires stability in society and political vision. Hopefully, future leaders in Pakistan will acknowledge the concept of an independent judiciary and its role in rehabilitating the rule of law in the context of good governance.