Judicial Independence in Light of the Basic Principles on the Independence of the Judiciary: Who has the Right Idea?

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Who Has the Right Idea?

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Abstract

Judicial independence is a crucial component inherent in the proper and effective administration of any government. Critical to this doctrine is the larger requirement of a separation of powers, which must be established before attempting to affect any concept of judicial independence. Judicial independence essentially represents a judiciary’s ability to render decisions free of improper influences, both internal and external. The United Nations has set forth a minimum standard of judicial independence with which States should seek to comply in order to protect civil liberties and in a greater sense, human rights. Evaluating the jurisdictions of Canada, Jamaica, and the Islamic Republic of Pakistan against this minimum standard will determine the level of their compliance and any shortcomings. Recognizing these shortcomings is the first key step to reforming policies that run afoul of this doctrine. States should strive to comply with this international standard in their quest for true judicial independence.
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I. Introduction

Protecting personal liberties has been a compelling interest of States in recent years; a smaller, focused aspect this greater process involves reforming the judicial components.\(^1\) The wave of reform that currently has been sweeping entire continents is a reflection of an earlier ideal, recognized in the Universal Declaration of Human Rights (UDHR).\(^2\) Specifically, Article 10 of the UDHR states the necessity of a “fair and public hearing by an independent and impartial tribunal …”\(^3\) It may not be intuitive as to how an independent judiciary can benefit society. The advantages only become apparent when they directly involve natural persons.\(^4\)

Awareness of this need for reform and continued vigilance against any encroachments thereto will strengthen not only the rule of law and judicial legitimacy, but also serve to protect the citizenry from any abuse of power or discretion. The involvement of bureaucracy in reform processes should not deter individuals from exercising due diligence in achieving true judicial independence. Indeed, the final product is theoretically free of any bureaucratic shackles. Moreover, while the ideal may not be as visible or glamorous, it is just as much an undertaking of protecting human rights as might be outlawing arbitrary detention or extrajudicial killing.

Without this protection, faith in judicial authority and legitimacy would be compromised, and this could likely lead to anarchy and vigilantism as individuals attempt to settle their own disputes. Therefore, it is significant for States to establish and maintain this doctrine of judicial independence in order to protect its inhabitants and preserve a balance of power in the government.

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\(^4\) As an example, suppose a defendant appears before a tribunal for purposes of determining culpability of a particular crime. Nobody would argue that in rendering decision, a judiciary acting on orders from an executive – as opposed to considering the facts of the crime and the underlying law – would *not* be a miscarriage of justice.
This paper first defines the doctrine of judicial independence, particularly as it is used hereinafter. It then surveys the *Basic Principles on the Independence of the Judiciary* to determine what constitutes the international model for States as they adopt the doctrine of judicial independence into their respective legal systems. Using this as the proverbial measuring stick, the paper then looks to the constitutions of three common-law jurisdictions to determine their level of compliance with these principles, irrespective of whether these States have agreed to adopt formally the *Basic Principles*. The jurisdictions analyzed herein are Canada, Jamaica, and the Islamic Republic of Pakistan. Their respective constitutions will be analyzed to determine if there is any possibility of extrajudicial tampering, taking particular note of the selection and removal processes. Additionally revealing as to the effectiveness of these constitutional measures will be historical practices outside the judicial context.

II. Judicial Independence and the Separation of Powers

In order to evaluate State compliance with the *Basic Principles on the Independence of the Judiciary*, the doctrine of judicial independence must be understood. Historically, the concept of judicial independence has existed for a significant period. James McClellan recounts the story of Sir Edward Coke, the Chief Justice of the Court of Common Pleas and the Court of the King’s Bench under King James I of England. In the famous of *Case of Commendams* (1616), the king’s right to grant commendams to ecclesiastical officeholders was challenged. The king called the members of the court, including Coke, to conference with him before they rendered their

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5 Relevant to mention is that this paper is written following the appointment of United States Supreme Court Justice Sonia Sotomayor in August 2009. While judicial independence of the United States is not analyzed here, the backdrop of this highly-politicized appointment process should serve as an event that is evaluable in light of the discussion of judicial independence. As an example, note that Justice Sotomayor’s appointment was almost entirely along party lines. She was nominated by Democratic President Barack Obama and confirmed in both houses of the Congress in the same partisan manner, facing no opposition from Democratic legislators.

decision. Among other things, he ordered the judges to cease the trial and rule that his decision was legal. Despite the king’s command, Sir Edward Coke stated that his oath of office compelled him to continue the proceeding, and that he would do “that should be Fit for a Judge to do.” Coke stood in defiance of an extremely intrusive and belligerent executive, recognizing that justice could only be served if it was done impartially. Coke’s actions represented an early advocacy for judicial independence. His position was the framework for judicial independence in England, which was achieved by the end of his century.

Analysts generally differ as to the specifics of what constitutes judicial independence, but it appears three definite characteristics emerge to describe an independent judiciary. These are (1) impartiality, (2) finality and respect for decisions, and (3) freedom from outside influence. Impartiality commands a judge to make decisions based on the facts of a case and the relevant law. The judge should preclude, as much as possible, any personal opinions and biases that may motivate a decision outside the judicial context. This is also known as decisional independence. The concept of finality and decisional respect means that a court’s decision must be deemed final (or the decision may be self-reviewable by the same institution, i.e., a higher court, but not another agency), and parties to the decision must respect the decision and follow through with court orders. Possibly most crucial is that judges must be free from outside influence, and this generally includes all manner of agencies, organizations, and individuals that

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7 Id.
8 Id.
9 Id.
10 Id.
14 The World Bank Group, supra note 11.
may seek to either curry the court’s favor, or bully the court into submission. Interested parties must not be able to interfere with court proceedings through any means of manipulation; therefore, the court must be incorruptible and insusceptible to coercion.\textsuperscript{15} While these three characteristics are inherent to the foregoing discussion, it is the third characteristic that requires special consideration, as it falls under the purview of separation of powers – a \textit{sine qua non} to judicial independence.

\textbf{A. Separation of Powers}

Separation of powers is a crucial component of judicial independence. As James Madison observed in \textit{Federalist} No. 51:

\begin{center}
"In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others."\textsuperscript{16}
\end{center}

Behind this doctrine is the notion that no one sector of government should become so dominant as to wield total power; there must be a system to check any rampant or swelling authority.\textsuperscript{17} Separation of powers requires that certain enumerated powers should be exclusively exercised by only one branch or sector of government. For example, the power to declare war or appropriate funds should only be a legislative function. An executive should not be able to exercise these powers. With respect to the judiciary, arbitration over party disputes should be a function of the courts. Implicit in the separation of powers doctrine is a prohibition against legislative or executive encroachment. Specifically, the legislature or executive could essentially exercise the

\begin{itemize}
\item \textsuperscript{15} \textit{Id.}
\item \textsuperscript{16} The Federalist No. 51 (James Madison) \textit{available at} http://www.avalon.law.yale.edu (last accessed Nov. 30, 2009).
\item \textsuperscript{17} \textit{Id.}
\end{itemize}
power of the judiciary indirectly if they were to implement means to influence judicial decision-making.\textsuperscript{18} This institutional independence must not be compromised.

Taking the United States as an example, the doctrine of separation of powers enjoys a great deal of protection as a foundational element to the American Constitution and the main ingredient to the enduring government. According to Madison, separation of powers requires four elements: (1) three separate, independent branches of government, (2) recognition that unique functions of the government need to be delegated to each branch, (3) recognition that each branch’s personnel must be distinct, and (4) disallowing legislature from delegating strictly legislative functions.\textsuperscript{19} The first three criteria are particularly important to a judiciary that seeks to maintain its independence. The executive and legislative branches in the U.S. government are charged with exercising restraint in their relationship with judicial authority. The American Judicature Society recognizes several means through which the separation of powers doctrine can be violated as the two other co-equal branches may seek indirectly to influence judicial decision-making. The executive may appoint partisan Justices, lodge allegations of judicial response, line-item veto Congressional appropriations for the judiciary, or align a particular judge with a partisan motive, essentially direction the aggression of lobbies and the attention of the media towards this judge.\textsuperscript{20} The legislature could influence the judiciary as well and influence judicial non-partisanship through curtailment of jurisdiction, Congressional underfunding of the judiciary, and failing to remunerate properly judges in light of increasing cost-of-living expenses.\textsuperscript{21}

\textsuperscript{18} McClellan, \textit{supra} note 6 at \textit{The Separation of Powers}.
\textsuperscript{19} The Federalist, \textit{supra} note 16.
\textsuperscript{20} AJS Center for Judicial Independence, \textit{supra} note 13.
\textsuperscript{21} \textit{Id}. 
The executive threat of politicizing justices and legislative diminution of jurisdiction are likely the most effective means through which these branches could invade the judiciary. The judiciary is called upon to render decisions in cases in the U.S. that will have far-reaching effects, chief of which is the establishment of a new precedent. They are tasked to make these decisions based on the underlying facts and applicable law, or where there is no applicable law, an interpretation of how the law should dispose of the issue. There have been many circumstances in which the decision is unpopular or runs contrary to the wishes of the executive. A primary example of this is the famous Steel Seizure Case.\(^{22}\) When efforts to stabilize steelworker wages failed, a nationwide steel-mill strike ensued, and President Harry Truman opted to seize production of steel at these mills.\(^{23}\) The prevailing executive interest was national defense during the Korean Conflict.\(^{24}\) The Supreme Court ruled that President Truman’s seizure of the steel mills was an unconstitutional exercise of power, as no Constitutional provision nor statute “expressly or impliedly authorizes the President to take possession of this property …”\(^{25}\) This decision was contrary to the actions of the President, even during a time where national security may have been an issue, but the decision of the Supreme Court stood, and the President was forced to withdraw the seizure. Had the President lodged allegations of judicial activism against one of the Justices of the Supreme Court, or alternatively aligned one of the Justices with a political agenda, he might have succeeded in completely undermining judicial authority and the separation of powers doctrine. The Justices of the Supreme Court would be reluctant ever again to issue a holding contrary to the demands of the President, fearing their individual legitimacy would be at stake. Moreover, a true separation of powers would have become a distant memory,\(^{25}\)

\(^{22}\) *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 570 (1952).
\(^{23}\) *Id.* at 579.
\(^{24}\) *Id.*
\(^{25}\) *Id.* at 585 – 86.
for if a President could justify encroachment into the judicial province, future executives might do the same.

Similarly, legislative invasion into the judicial province would be achieved by removing original jurisdiction of lower federal courts and appellate jurisdiction of all federal courts.\(^{26}\) Congress may essentially do away with lower federal courts, giving the state courts a heavier caseload. However, though this possibility exists, many theorists argue that the possibility is too remote and simply relegate it to academic discussion.\(^{27}\) Other analysts dispose of the issue by stating that the power of Congress to “close the door” of jurisdiction is plenary.\(^{28}\) Thus, these theorists might be inclined to say that such diminution of jurisdiction would not represent undermining of separation of powers, as the power to do thus is explicitly granted in the Constitution. This would be an irresponsible end to the inquiry; absolute authority to exercise a particular power does not necessarily mean it is correct. If lower federal justices are influenced by this threat of essentially losing their jobs, they may be unwilling to act impartially. The larger threat to judicial independence is found within Article III, Section 1 of the Constitution, which implicitly allows for the removal of judges if determined not to be acting in accordance with good behavior.\(^{29}\) While the threat of arbitrary impeachment always exists, the protection inherent against this, in practice, is the “good behavior” clause – an allegation that must be formally determined in House and Senate hearings. Given this, and given that the House and Senate are comprised of multi-partisan individuals, the threat of legislative encroachment in this manner may also be minimal. However, in similar vein to the dim possibility of legislative diminution of jurisdiction, this does not mean that the United States should sit idly and allow such a

\(^{26}\) U.S. Const. art. III, §§ 1, 22.


\(^{28}\) Id. at 1410.

\(^{29}\) U.S. Const. art III, § 1.
circumstance to rise; rather, consistent with the *Basic Principles on the Independence of the Judiciary*, the U.S. should seek to improve its protections to the judicial system.

Understanding now that separation of powers is a key precursor to judicial independence, it is pertinent to turn to the international standard of this doctrine in the *Basic Principles of the Independence of the Judiciary*. The document serves as the guideline by which States’ compliance should be measured.

**B. Relevant Provisions of the International Standard**

The *Basic Principles on the Independence of the Judiciary* (hereinafter *The Principles*), drafted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, was an attempt to reach out to a global constituency to bring into focus the multifarious lens of States whose ideas of an independent judiciary may not have coincided. Signatories to United Nations have thus agreed to adopt the provisions of this resolution for many reasons, some of which are outlined in the preamble to *The Principles*.30 The primary purpose, as espoused in the UDHR, is to achieve “… equality before the law … the presumption of innocence and … the right to a fair and public hearing by a competent, independent, and impartial tribunal established by law.”31 The problem lies in the fact that there “… exists a gap between the vision underlying those principles and the actual situation.”32

The truth of the matter is intimated in the disparity between this vision and reality. In reality, both signatory (and non-signatory) States suffer some degree of political manipulation in their respective judicial sectors. This will always affect the ability of the judiciary to render balanced verdicts, and the burden will ultimately fall on the citizenry. Recognizing this, the Seventh U.N.

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31 *Id.*
32 *Id.*
Congress required that its member States adopt some basic principles. Paramount is the provision that calls for a guarantee by the State that an independent judiciary not only be established, but remain undisturbed. This would be achieved through constitutional entrenchment of the doctrine.

“The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”

This provision is of particular interest to States that have may have some questionable powers delegated to other branches of government that may be used as tools to attack a judiciary. This provision calls for making near absolute those powers, which, if altered, could affect judicial independence, and similarly, advocates a *laissez-faire* approach to those branches that may have plenary power to affect the judiciary. Essentially, the document implicitly commands “all governmental … institutions” to exercise restraint.

The *Basic Principles* continues guiding States to a foundation necessary to achieve entrenchment of the doctrine by further requiring a separation of powers. Section 2 makes plain the notion that a judiciary should remain impartial in its decision-making. They shall be free of “… any restrictions, improper influences, inducements, pressures, threats or interferences …” from anyone for any reason while performing the functions of their office. Institutional independence is clearly implicated here, as an analogous, but more specific aspect of the doctrine of separation of powers. Section 4 states that the judicial decisions will not be reviewed except by the courts themselves or some other competent authority. This is essential to institutional independence; were judges to understand that their decisions could be overturned arbitrarily or easily, they would lose the motivation to put effort into the decision-making process. Section 7

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33 *Id.* ¶ 1.
34 *Guidelines, supra* note 12 at 3.
35 *Id.* ¶ 2.
36 *Id.*
37 *Id.* ¶ 4.
illustrates the U.N.’s recognition that lack of resources could be a potential choke point that could inhibit judicial capacity for neutrality, and thus it imposes upon the State the obligation to provide “… adequate resources to enable the judiciary to properly perform its functions.”

Possibly the archetypical clause that a State seeking to achieve an independent judiciary is the clause regarding tenure. Section 12 establishes the very basic notion of guaranteed tenure and the non-diminution of remuneration to prevent political tampering by a rogue executive or squabbling legislature. Also somewhat intuitive is the idea that judges will “… enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.” Finally, sections 17, 18, and 19 delineate the criteria and process for discipline and removal of a federal judge. Charges made against a judge acting in his official capacity may only be lodged through the proper channels and such hearings will be fair and expeditious. Judges will only be removed “for reasons of incapacity or behavior that renders them unfit to discharge their duties.” What constitutes fair disciplinary proceedings, the thrust of section 19, will be determined by the State’s prevailing, established standards of judicial conduct. These are particularly relevant in light of any removal procedures a State may have in place; removal may not be arbitrary, capricious, or retaliatory. As in the United States, cause must be shown.

It is plain then that the U.N. recognizes the need for an independent judiciary in order to affect a true administration of justice. A framework was constructed as the yardstick for member states who envisioned the same need as the United Nations, with the option (and perhaps

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38 Id. at ¶ 7.  
39 Id. at ¶ 12.  
40 Id. at ¶ 16.  
41 Id. at ¶ 17 – 19.  
42 Id. at ¶ 17.  
43 Id. at ¶ 18.  
44 Id. at ¶ 19.
compulsion) for improvement being open. The question that follows is whether the States have recognized this same idea as it was envisioned by the U.N.

III. Judicial Independence in Canada - An Introduction

Canada does tend toward the example of The Principles with regard to its recognition of judicial independence. Article VII is the section of the Canadian Constitution that empowers a judiciary at all levels.\(^45\) In it are some of the same basic principles of the Seventh U.N. Congress that are the hallmark of an independent judiciary such as guaranteed tenure and salary.\(^46\) Section 99(1) establishes that Judges of the Superior Court will “… hold office during good behavior, but shall be removable by the Governor General on Address of the Senate and House of Commons.”\(^47\) Section 99(2) places a mandatory retirement age of seventy-five on Justices, somewhat limiting the lifelong tenure that the Justices would otherwise enjoy.\(^48\) Equally important is section 100 of the Canadian Constitution which essentially fixes Justices’ salaries by an act of Parliament.\(^49\)

The qualifications for a justice of the Supreme Court have been set forth in the Supreme Court Act. The Chief Justice and the eight puisne (or inferior in rank) justices are all appointed by the Governor General.\(^50\) In order to be considered qualified to sit as a Supreme Court Justice, the appointee must either be a judge of a superior court within a province, or a barred attorney

\(^{45}\) Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), as reprinted in R.S.C., No. 5 (Appendix II 1985) art. VII.

\(^{46}\) The Principles, supra note 30 at ¶ 11-12.

\(^{47}\) Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), as reprinted in R.S.C., No. 5 (Appendix II 1985) art. VII, § 99, cl. 1. The removal of Justices of the Supreme Court of Canada requires an extraordinary agreement of both houses of the legislature. This proffers to the Justices of the Supreme Court an almost impenetrable shield behind which they can calmly adjudicate without fear of reprisal; see also Supreme Court Act, R.S., 1985, c. S-19, s. 9(1). Dispositive of this protection is the fact that no Supreme Court Justice has ever been removed in history. (Microsoft Encarta Online Encyclopedia 2008, “Supreme Court of Canada,” <http://encarta.msn.com>).

\(^{48}\) Id. art VII, § 99, cl. 2. This does not conflict with The Principles; it allows for a mandatory retirement age. (The Principles, at ¶ 12); see also Supreme Court Act, R.S., c. S-19, s. 9(2).

\(^{49}\) Id. art VII, § 100. The Judges Act of 2001 has been met with some controversy from the Canadian Bar Association. See Canadian Bar Association, infra text accompanying note 91.

\(^{50}\) Supreme Court Act, R.S., 1985, c. S-19, s. 4.
for ten years within a province.\textsuperscript{51} Finally, the Court will be constituted of at least three members who are barred attorneys or sit on a high court within the province of Quebec.\textsuperscript{52}

The appointment and removal of Justices is the key issue here – the Governor General directly appoints them. The Governor General is comparable to the chief executive of other common law nations, such as the Queen of England. Justices can only be removed on recommendation by the Governor General with the subsequent approval of the bicameral legislature.\textsuperscript{53} Such is again equivalent to many other Common Law jurisdictions, including the United States.

What may seem controversial is Canada’s Supreme Court Justice appointment process, discussed at length in the following sections. The Canadian Constitution seems to leave the appointment process in the hands of the executive. In reality, the Governor General is merely a representative of the crown and does not have anything more than ceremonial authority over such matters. He follows the advice and consent of the Queen’s Privy Council in Canada, of whose relevant part is the Cabinet.\textsuperscript{54} The real power to appoint, however, lies with the Prime Minister.\textsuperscript{55} The Prime Minister makes his recommendation (as the Head of the Cabinet and representative of the Queen’s Privy Council in Canada) to the Governor General who will adhere

\begin{itemize}
  \item \textsuperscript{51} \textit{Id.} at s. 5.
  \item \textsuperscript{52} \textit{Id.} at s. 6. Quebec has the highest population of any province of Canada. In order to have a Supreme Court that is a reflection of the Canadian citizenry and the population density as per each province, this provision was written into the Supreme Court Act.
  \item \textsuperscript{53} \textit{Id.} at s. 9(1).
  \item \textsuperscript{54} Jay Makarenko, \textit{Process of Supreme Court of Canada Appointments}. Judicial Systems and Legal Issues, 2008 available at \texttt{http://www.mapleleafweb.com/features/supreme-court-canada-appointment-process#process}. The Governor General is more of a figurehead leader, while the Prime Minister is the true office of a “chief executive.” As the Governor General follows the recommendation of the Prime Minister in Supreme Court appointments, simplicity warrants considering the offices merged for the remainder of the discussion.
  \item \textsuperscript{55} \textit{Id.} at Power to Appoint the Supreme Court of Canada, Judicial Systems and Legal Issues, 2008. The Cabinet has little veto power over the Prime Minister’s choice; the Prime Minister may ask those Ministers opposed to his choice to resign so that he may appoint someone who will favor his pick, or he could simply dominate the decision-making altogether with his authority as Head of the Cabinet.
\end{itemize}
to the unwritten convention that the Prime Minister’s pick is to be confirmed unchallenged.\textsuperscript{56} In recent years, this somewhat unilateral authority of the Prime Minister to have the final word in the appointment of Supreme Court Justices has doused the flame of judicial independence and has created tumult in the ideals of federalism, particularly running afoul of the doctrine of separation of powers.\textsuperscript{57} There is no official parliamentary check on the Prime Minister’s nomination; there is no vote submitted to the House of Commons or the Senate, nor is there any requirement that calls for provincial leaders’ agreement to the nomination.\textsuperscript{58} The Canadian Bar Association (CBA), recognizing this, called for reform in a letter to Prime Minister Paul Martin in 2004.\textsuperscript{59} Indeed, the CBA has been quite the activist organization in preserving judicial independence which it believed was “… the cornerstone of our system of government, and, by extension, Canadian democracy itself.”\textsuperscript{60} The CBA’s 1985 McKelvey Report, citing various reasons, was the first step in a movement by the CBA to reorganize the process of judicial appointment to address the concern of extensive political patronage within the system.\textsuperscript{61} As a result of the study, the then-Canadian government agreed to establish Judicial Advisory Committees (JACs) in 1988 for the purpose of recommending and reviewing superior and provincial court appointments.\textsuperscript{62} Unfortunately, a like initiative was not implemented for the Supreme Court at the time, nor were the concerns of the CBA regarding the Supreme Court duly noted until 2005.\textsuperscript{63}

\textsuperscript{56} Id.
\textsuperscript{58} Makarenko, \textit{supra} note 54.
\textsuperscript{59} Canadian Bar Association, \textit{supra} note 57 at Appendix 1.
\textsuperscript{60} Id. at 1.
\textsuperscript{61} Id. at 2-3. Among the reasons for the reform were, “Public perception of too much political influence; Lack of consistency in developing a true consultation process between the Minister of Justice, Attorneys-General, and Chief Justice of the various provinces; Frequently, too long a delay in appointing judges.”
A. The Controversy of Superior and Provincial Judicial Advisory Committees

The provincials JACs underwent a host of changes since their inception. Initially, membership on a JAC was comprised of the following:

1. One nominee of the Chief Justice
2. One nominee of the provincial Attorney General or territorial Minister of Justice
3. One nominee of the CBA
4. One nominee of the Law Society in the jurisdiction
5. One nominee of the federal Minister of Justice\(^64\)

Additionally, the recommendation categories into which the JACs would classify candidates were “qualified” or “unqualified.”\(^65\) In 1991, this system was changed for the purpose of granting greater discretion to the JAC in selecting what it determined to be exceptionally qualified candidates.\(^66\) The new categories therefore became “unable to recommend,” “recommended,” or “highly recommended.”\(^67\) The addition of the “highly recommended” category was hoped to communicate to the (provincial or federal) Minister of Justice that this particular candidate had exceeded the threshold of “recommended” as to be truly exceptional and should be the candidate given most preference for selection.\(^68\) In 1994, the JAC membership was revised to include two more nominees of the federal Minister of Justice.\(^69\) This seemed to expand the indirect power of the Minister of Justice in stacking the JAC with members who would have served his political motives; fortunately, he was limited by the fact that there were three discretionary selections versus four nominated selections. The burden would be on each of the four members, however, to not fall sway to a potentially unilaterally-aligned three-member discretionary minority, for if one of the nominated appointees agreed to vote with the

\(^{64}\) Canadian Bar Association, supra note 62.
\(^{65}\) Id.
\(^{66}\) Id.
\(^{67}\) Id.
\(^{69}\) Canadian Bar Association, supra note 62.
three-member minority for political reasons, judicial independence would be dealt a staggering blow.

In 2005, the CBA enlisted four recommendations to further reform the JACs and judges that would stand for appointment. Citing Chief Justice Lamer’s opinion in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*,70 and Justice Major’s opinion *Ell v. Alberta*,71 the CBA called for a “cooling-off” period of two years for those candidates seeking to be justices who were formerly involved in any political activity.72 The CBA reasoned that

“If judicial candidates were intimately involved in the political sphere close to the time when they were appointed, public perception of patronage is heightened and judicial independence suffers through the politicization of the relationship between the judiciary and the branches of government.”73

The “cooling off” period would be required to elapse before a potential candidate would be permitted to apply. Political activity is explicitly defined to avoid any vagueness; note that not all political activity subjects a candidate to the two-year cooling off period.74

The CBA further recommended that if a JAC submitted an “unable to recommend” evaluation of a potential candidate, that the Minister of Justice should adhere to this determination.75 Their third reform recommendation was to request the Minister of Justice to acknowledge that “highly recommended” was a very high threshold to be met, and only those candidates that were “… so far beyond this threshold as to be truly exceptional” should warrant

70 3 S.C.R. 3 (1997). Chief Justice Lamer wrote that “Independence of the judiciary implies that a judge … should be removed from the financial or business entanglements likely to affect or rather to seem to affect him in the exercise of his judicial functions.”
71 1 S.C.R. 847 (2003). Justice Major wrote, “Judicial independence serves not as an end itself, but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice.”
72 Canadian Bar Association, supra note 68 at 4.
73 Id. at 5.
74 See Id. at 6.
75 Id. at 7.
this distinction. Finally, to ensure the citizenry’s equal access to justice in their preferred language, the CBA recommended that the Minister of Justice add bilingualism as a criterion for certain appointments. To date, all the 2005 CBA proposals have been rejected. In June 2008, in rejecting a “cooling off” period, Justice Minister Rob Nicholson stated, “I think the position of a judge should be open to all individuals. We’ll take them as we find them.” The recommendation category was wholly reformed, as discussed below, by the Harper conservatives in 2006. Finally, bilingualism never became an explicit criterion for judges, as evidenced in Senator Maria Chaput’s address to the Secretary of State Marjory LeBreton in April 2008.

The height of the controversy is recent though, as Prime Minister Harper has instituted some potentially problematic changes to the JAC as late as 2006. Among these are 1) an eighth appointee of the JAC who is a member of the law enforcement community; 2) relegating only a tie-breaking vote to the judicial (i.e., the Chief Justice-nominated) appointee; and 3) a return to simply the “qualified” and “unqualified” recommendation categories. Since these changes have been invoked, the legal fraternity in Canada has issued their outcry on the matter, criticizing the Harper conservatives for not consulting them before making the decision. There was also an allegation that diluting the judicial chair’s vote only to break ties combined with a law

76 Id.
77 Id. at 8.
79 Maria Chaput, Appointment of Bilingual Judges, Apr. 1, 2008 available at http://sen.parl.gc.ca/mchaput/nouvelles.php?ID=107 (last accessed Nov. 30, 2009). Said Senator Chaput, “Quite recently in the Supreme Court of Nova Scotia, two bilingual judges were replaced upon their departure by two unilingual anglophone judges. In my opinion, this is unacceptable … Please, could you inform the Canada's Minister of Justice that what has just happened in Nova Scotia is unacceptable and that bilingualism should be a mandatory selection criterion used by the committees of every province and territory?”
80 Canadian Bar Association, supra note 62 at 1.
81 Id.
82 Id. at 5. The CBA was particularly incensed. “When the CBA met with Ministerial staff the next day, we were led to believe that there would an opportunity for further input. Instead, the changes were announced hours later … We were extremely disappointed that these fundamental changes were made without consultation with the CBA, the judiciary, and other groups interested in the administration of justice.” Id. at 2.
enforcement addition to the JAC both stacked the commission in the favor of the Minister of Justice. The CBA opposed additionally the removal of the “highly recommended” category, asserting that this neutered the special influence that the JAC could have had in the judicial selection process. The CBA contended that although members of relevant communities should be involved in the JAC, they should not be so to the disadvantage of the legal fraternity, as they are more qualified to make sophisticated assessments. The community perspective is heard loud and clear in the original three ministerial-discretionary appointments to the JAC, they wrote. Rainer Knopff fired back in a University of New Brunswick Law Journal article entitled “The Politics of Reforming Judicial Appointments,” asserting that the law enforcement addition to the JAC was not a fourth discretionary addition; it was actually a fifth nominated addition. Thus, even with the judicial chair’s vote demoted to only breaking ties, the nominees maintained a majority over the ministerial discretionees on a JAC. Knopff staunchly claimed the real travesty with which the legal fraternity was troubled was the reduction of non-lawyers on the JAC. Finally, Knopff attacked the notion that the Harper reforms were a movement away from a merit-based selection system and toward a political one. “[T]he distinction between apolitical merit and political judgment is not nearly as clean and clear as the rhetoric implies.” Impartiality from partisan politics tends to dissipate, especially at upper-level appellate decisions, but there can never be impartiality between “right” and “wrong” as long as objective

83 Id. Members of the law enforcement were seen to be generally conservative, like-minded with the Harper administration.
84 Id. A more expert nominee on the JAC (i.e., members of the legal fraternity) would be able to distinguish more clearly between “recommended” and “highly recommended”, while the comparatively lay-appointments would not, lending a sense of politicization to the process.
85 Id. at 4.
86 Id.
88 Id.
89 Id.
90 Id. at 3.
people (the judges in this instance) can reasonably disagree. Knopff contends that the legal fraternity critics of the Harper reforms are calling for an impossible standard of impartiality, for democratically-elected and independently-appointed representatives will always have reasonable disagreements as to what constitutes right or wrong – bar completely the “hurly-burly of partisan politics within the political branches [which are] less likely to produce the right answer …”

Nevertheless, in a letter to the Chairman of the Standing Committee on Justice and Human Rights, representatives of the CBA wrote in their recommendations to address the problems they foresaw resulting from the Harper reforms to the judicial selection process. Their first premise was that the law enforcement addition to the JACs represented an interest group. “Mandating a representative of a particular special interest group on the JACs could lead reasonable people to conclude that candidates are being assessed on criteria related to that group’s interest rather than solely on merit.” Removing this objectivity in the eyes of those concerned would be removing transparency, accountability, and of course, the independence of the judiciary. Their second premise was that a law enforcement officer should not have such significant impact on the justice system because superior courts’ caseload is only 5% criminal, while the rest is presumably civil. As law enforcement officers generally only have familiarity in this area of the law, there is a disparate impact between the officers’ ability to assess and the impact they would make in selection.

The CBA also maintained that the additional recommendation category “highly recommended” was essential in not only shortening a list of candidates further – hence speeding

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91 Id. at 3-4.
92 Id. at 4.
93 Canadian Bar Association, supra note 62 at 1.
94 Id. at 4.
95 Id.
96 Id.
97 Id.
98 Id.
the process of selection – but also served as an “institutional pressure on the Minister of Justice to select from a list of exceptional candidates provided by the JACs [and was] an added check on the influence of partisanship.”\textsuperscript{99} There is a split in the legal community regarding whether the Harper reforms were innocuous or malignant to the judiciary. Nonetheless, the reforms that the Prime Minister has instituted have yet to be overturned.

B. The Slow Reform Process of Judicial Appointments for the Supreme Court of Canada

The Supreme Court appointment process was left largely unaffected by the reforms called for in the McKelvey Report of 1984. It was briefly considered in the Meech Lake Accord, a series of legislative proposals that included reforming the process of judicial appointment for the Supreme Court.\textsuperscript{100} The CBA addressed its concern to the proposals in the Meech Lake Accord, particularly regarding the idea of having provincial governments submit lists of potential candidates, which the federal government would subsequently narrow to appointment.\textsuperscript{101} The problem the CBA foresaw was an increased political influence in the process overall; fortunately for them, the Meech Lake Accord was wholly defeated.\textsuperscript{102}

The process was not revisited again until the CBA wrote a letter to the Prime Minister (then Paul Martin) in 2004 calling for increased transparency in the Supreme Court justice selection process.\textsuperscript{103} The CBA did communicate their hesitancy in involving Parliamentarians during the process of reviewing potential candidates; however, they compromised by calling for the commissioning of an advisory committee (modeled after the JACs already in place) which

\textsuperscript{99} Id.
\textsuperscript{100} Canadian Bar Association, \textit{supra} note 63 at 1.
\textsuperscript{101} Id.
\textsuperscript{102} Makarenko, \textit{supra} note 54 at \textit{Reaction to Meech Lake Accord}.
\textsuperscript{103} Canadian Bar Association, \textit{supra} note 57 at Appendix 1.
would include Parliamentarians. Of key importance too was the call for confidentiality surrounding any advisory committee decision-making.

The advisory committee would consist of:

1. One nominee of the federal Minister of Justice
2. One nominee of the Attorney General
3. One nominee of the Chief Justice
4. One nominee of the Law Society in the jurisdiction from which the candidate would be selected
5. The President of the CBA
6. Four Parliamentarians elected from and by the House of Commons Committee on Justice and Human Rights

This proposal was not quite implemented. To the chagrin of the CBA once again, Prime Minister Martin appointed an all-Parliamentarian ad hoc committee to deliberate the selection for the two vacancies in the Supreme Court. Controversy compounded when it was revealed that there would be a televised Parliamentary review of the Prime Minister’s picks. Minister of Justice Irwin Cotler, speaking at the first ever Parliamentary review of Supreme Court nominations in August 2004, said:

“This public hearing … marks an … added dimension in the interests of increased transparency, Parliamentary participation, improved public awareness and understanding, and a better appreciation of the merits of the individual nominees and the strengths that they bring to the Court.”

The CBA breathed a partial sigh of relief that the candidates themselves (particularly the feminist, liberal, pro-same-sex marriages Rosalie Abella) were not subject to the televised parliamentary scrutiny that Justice Minister Cotler underwent in their stead, but they still called for increased openness and transparency in the process. Particularly, they again advocated

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104 Id.
105 Id.
106 Id.
107 Canadian Bar Association, supra note 63.
110 Canadian Bar Association, supra note 63.
their recommendation for an advisory committee, a proposal that was initially met with resistance by Cotler but was followed with subsequent approval.\textsuperscript{111} The advisory committee was composed of the following:

1. Members of Parliament of each recognized political party
2. One retired judge from the province where the vacancy arises
3. One nominee of the Attorney General
4. One nominee of the Law Society of the region where the vacancy arises
5. Two prominent laypersons\textsuperscript{112}

This victory of the CBA was shattered in 2006 when the new Prime Minister Stephen Harper announced that the nomination of Justice Rothstein (who was selected by the Supreme Court Advisory Committee) would undergo review during a televised question-and-answer session in Parliament.\textsuperscript{113} The CBA had already indicated its hostility toward the idea of “American-style” confirmation proceedings.\textsuperscript{114} “Exposing judges’ personal opinions in a public forum increases the risk of a party attempting to gain political points by supporting or opposing a candidate on the grounds of his or her apparent ideology, rather than considering only merit.”\textsuperscript{115} The CBA proposed instead that Justice Rothstein, rather than undergo political review in Parliament, stand in a press-conference in which a leading journalist would ask him questions using those submitted by the public, media, and legal experts – all, of course, under the supervision of the CBA.\textsuperscript{116} This proposal was summarily rejected and in February 2006, Justice Rothstein underwent what had the makings of a politically charged confirmation hearing. To his credit, he


\textsuperscript{112} Canadian Bar Association, \textit{supra} note 63.

\textsuperscript{113} \textit{Id.} at 3.

\textsuperscript{114} Canadian Bar Association, \textit{supra} note 57 at 8. In the United States, a nominee to the Supreme Court undergoes an interview with members of the Senate Judiciary Committee. The CBA’s reasons for uneasiness include the appearance of an inquisition, biased selection along party-lines, and a misconception by the public that the judiciary is inferior to the legislature. \textit{Id.}

\textsuperscript{115} Canadian Bar Association, \textit{supra} note 68 at 4. The CBA added that their fears were more well-founded because they acknowledged that Canada “… lack[s] the same internal checks that would ensure turnover of the official authorized to nominate [relative to the US].” \textit{Id.}

\textsuperscript{116} Canadian Bar Association, \textit{supra} note 63 at 3.
refused to answer questions that would reveal his political leanings, though everyone knew that he was conservative.\(^{117}\) While welcoming the appointment of Justice Rothstein, the CBA warned that such political maneuvering could compromise the independence of the judiciary by adding a forbidden element of partisanship.\(^{118}\) The CBA undoubtedly is in the midst of developing a more acceptable and benign method of televised interviewing of Supreme Court nominees.\(^{119}\)

C. The Canadian Constitution Revisited

It seems thus far that the Canadian Constitution runs in sync with *The Principles*. Justice LeDain of the Canadian Supreme Court outlined what he deemed essential elements, similar to that of *The Principles*, to pass the judicial independence test:

1. Security of tenure
2. Financial security
3. Institutional independence\(^{120}\)

The Supreme Court of Canada seems to enjoy at least two of the three elements\(^{121}\). These are provisions within Article VII of the Canadian Constitution that are firmly entrenched by virtue of Part V, sections 41(d) and 42(d) of the Constitution Act of 1982, the latter of which makes reference to the amending procedures of Part V, section 38(1).\(^{122}\) Section 41(d) mentions that the composition of the Supreme Court of Canada will not be amended except through extraordinary measures.\(^{123}\) These procedures involve a “… proclamation by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of

\(^{117}\) *Id.* at 4.
\(^{118}\) *Id*.
\(^{119}\) *Id*.
\(^{121}\) Canadian Bar Association, *Submission on Judges’ Compensation and Benefits*, 2007. The CBA makes reference to reforms that are required in the process of submitting changes for judicial compensation. The trepidation surrounded § 26 of the *Judges Act* which gives a committee of Parliament the power to review recommendations made by an independent commission regarding judicial compensation.
\(^{122}\) *Constitution Act*, 1982.
\(^{123}\) *Id.* at part V, § 41(d).
Commons and of the legislative assemblies of each province.\textsuperscript{124} This is taken to mean that the executive must first make the recommendation and then must seek approval through a majority vote in the bicameral legislature \textit{and} all the provincial legislatures.\textsuperscript{125} Except in extreme circumstances, such uniformity in the voting may never achieved. All other matters involving the Supreme Court, presumably tenure and salary, may be amended through the procedures outlined in Part V, section 38(1), which has only a slightly lower burden by which it can be amended.\textsuperscript{126} This requires a

\begin{quote}
\textquotedblleft… proclamation by the Governor General under the Great Seal of Canada only where so authorized by (a) resolutions of the Senate and the House of Commons; and (b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the latest general census, at least fifty per cent of the population of the provinces.\textsc{"}127
\end{quote}

It appears that the Supreme Court is firmly protected from shrinkage or packing of its members.\textsuperscript{128}

A stark difference between the higher courts of Canada and the Supreme Court of the United States is the control of their administration. Prior to World War II, the American Bar Association understood the need for the Supreme Court of the United States to be independent in the administration of its day-to-day affairs, to include resourcing.\textsuperscript{129} Higher state courts also followed suit, understanding that true judicial independence would only be achieved without the restriction of an executive agency’s puppet strings.\textsuperscript{130} Unfortunately, Canada does not completely enjoy this distinction, even at the very top. The institutional independence that Justice LeDain envisioned has not completely been achieved, as the administrative affairs are left

\textsuperscript{124} Id.\textsuperscript{.}\textsuperscript{125} Id.\textsuperscript{.}\textsuperscript{126} Id. part V, § 42(d).\textsuperscript{127} Id.\textsuperscript{.}\textsuperscript{128} But see the historical context of the United States. President Roosevelt attempted to pack the Supreme Court with up to fifteen Justices in order to secure passage of New Deal legislation he felt necessary for the nation at the time. He was ultimately unsuccessful in this venture.\textsuperscript{129} Fred Phillipe, Commonwealth Caribbean Constitutional Law 270 (2002).\textsuperscript{130} Id. at 271.
to the Ministry of Justice.\textsuperscript{131} This hurdle has not been left unaddressed; the 1980s saw significant opposition to the idea that a non-judicial office of the government would essentially manage the affairs of the Supreme Court.\textsuperscript{132} Though today the Ministry of Justice exercises formal overview of the financial and administrative business of the Supreme Court, in practice, the latter has the option to review certain logistical matters.\textsuperscript{133} For example, although the official appointment of the Registrar of the Treasury Board still remains the province of the executive, his appointment and removal are subject to the review of the Supreme Court in reality, finally preserving a more appreciable measure of its autonomy.\textsuperscript{134} Unfortunately, matters of finance and logistics all fall under the supervision of departments of the Attorney General for the provincial courts.\textsuperscript{135}

D. Conclusion

What does this ultimately mean for Canada? Canada does stand as quite the epitome of judicial independence in many respects and has almost completely adhered to the fundamentals instituted in \textit{The Principles}. What remains for Canada, like the United States, is some touching up of small scuffs of control that other branches of government may still exercise over the judiciary, and perhaps a tidying up of the JACs and the Supreme Court appointment review hearings. Without these silhouettes of oversight, the courts, especially those other than the Supreme Court could truly administer impartial decisions without the even the slightest hazard of retaliation from an alienated executive or fickle legislature. Canada, like the United States, seems

\textsuperscript{131} \textit{Id.} Institutional independence is the idea that the judiciary should be free from external influence, a central tenet to separation of powers. AJS Center for Judicial Independence, \textit{supra} note 13.

\textsuperscript{132} \textit{Beauregard v. Canada}, [1986] 30 DLR 481, 491. Chief Justice Dickson wrote, “[Judicial independence] has grown and been transformed to respond to the modern needs and problems of free and democratic societies. The role of the courts … requires that they be completely separate in authority and function from all other participants in the justice system.”

\textsuperscript{133} Phillipe, \textit{supra} note 129 at 272.

\textsuperscript{134} \textit{Supreme Court Act}, R.S., 1985, c. S-19, s. 12; Phillipe, \textit{supra} note 129 at 272. The Registrar of the Treasury Board has the role of approving budgetary issues as it pertains to the Supreme Court. He is officially appointed by the Cabinet and answers to the Attorney General in the Ministry of Justice.

\textsuperscript{135} Phillipe, \textit{supra} note 129 at 272.
to come the closest to achieving the goals envisioned in *The Principles*. A combination of entrenched Constitutional protections for apportionment, appointment, and removal, in addition to a vigilant bar association has made this possible. Other states seem to have a steep learning curve to emulate this ideal. Allowing Canada to be an example and adhering to the basic provisions of *The Principles* would be the most logical, and in some cases, revolutionary first step.

**IV. Judicial Independence in Jamaica**

As a member of the Commonwealth Caribbean, Jamaica stands as a fine example of practical judicial independence. Its Constitution contains guarantees for a Justice in many of the same respects as called for in *The Principles*. Section 97 guards against the abolishment of the office of the Judge of the Supreme Court.\(^\text{136}\) The number of Judges can only be altered by an act of Parliament.\(^\text{137}\) Tenure is measured in terms of age, and seventy is the mandatory retirement year for a Judge.\(^\text{138}\) Particularly thorough is the addition of section 100(2), which allows for a Justice to “…continue in office for such period … as may be necessary to enable him to deliver judgment … to proceedings that were commenced [before he reached 70 years of age].”\(^\text{139}\) This peculiar provision does require approval from the Governor-General “… on advice of the Prime Minister.”\(^\text{140}\)

The appointment procedures of Justices of the Supreme Court deserve special address. In many respects, it is similar to the provisions of Canada; the Governor-General essentially appoints the Justices.\(^\text{141}\) However, the additional caveat in section 98(1) for the Chief Justice of the Supreme Court is that the Governor-General must appoint the Chief Justice “… on

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\(^\text{137}\) *Id.* § 97(2).
\(^\text{138}\) *Id.* § 100(1).
\(^\text{139}\) *Id.* § 100(2).
\(^\text{140}\) *Id.*
\(^\text{141}\) *Id.* § 98(1).
recommendation of the Prime Minister after consultation with the Leader of the Opposition."¹⁴² (emphasis added). In a way, this is a completely polarized version of an American President’s right to appoint Justices as befits his fancy. It is akin to a President affiliated with the Democratic Party having to consult with the House or Senate Republican Leader before going forward with his appointment. The notion, if practiced in the United States, would be somewhat radical, but it is Jamaica’s unique step towards judicial independence. The protection is that if the Leader of the Opposition opposes a Prime Minister’s primary pick, the latter will theoretically choose someone upon whom they can all agree.¹⁴³ The other Justices of the Supreme Court are to be appointed by the Governor-General “… acting on advice from the Judicial Service Commission.”¹⁴⁴ (Emphasis added). The substitution of the word “recommendation” in section 98(1) is quite telling; it is taken to mean that the Governor-General is to follow the advice of the Judicial Service Commission. This means that the real power to appoint other Justices lies with the Judicial Services Commission, an entity established by Part III of Chapter VII.¹⁴⁵

The removal procedures of a Justice of the Supreme Court in Jamaica are thorough and laud critical ideals of independence. Section 100(4) permits the removal of a Justice of the Supreme Court only for reasons of “… inability to discharge the functions of his office (whether arising from infirmity of the body or mind or any other cause) or for misbehavior …”¹⁴⁶ These,

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¹⁴² Id.
¹⁴³ The word “theoretical” makes plain the idea that although the Constitution has entrenched this unique safeguard, reality may determine a different result. It is entirely possible that the Prime Minister may override the advice of the Leader of the Opposition or ignore it entirely. It is further possible that this provision is more a formality than anything else. Consider also the constitutional language of “recommendation”, which may mean the Governor-General is to give ear to the Prime Minister’s choice, but not necessarily abide by it. These possibilities are not explored here.
¹⁴⁴ Id. § 98(2).
¹⁴⁵ Id. ch. VII part III. In the case of a temporary Chief Justice, § 99(1) requires the Governor-General to literally “act in accordance with the advice of the Prime Minister…” Id. ch. VII, part I, § 99(1). Such language seems to empower the Prime Minister with what is normally the Governor-General’s province. This can be viewed as an additional check on the power of the Governor-General in initially appointing the Chief Justice, especially since the Prime Minister may only merely recommend the said initial appointment.
¹⁴⁶ Id. § 100(4).
like many other States’ Constitution, and in accordance with *The Principles*, seem to be the only reasons for which an executive (or other agency) may pursue removal of a Justice of the Supreme Court in Jamaica. The following table illustrates the somewhat complex method of removal of Justices of the Supreme Court of Jamaica.\(^{147}\)

<table>
<thead>
<tr>
<th>Removal Proceeding Of</th>
<th>Initiator</th>
<th>Consulting With</th>
<th>Appoints Tribunal</th>
<th>Consulting With</th>
<th>Removal Invoked By</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chief Justice</td>
<td>Prime Minister</td>
<td>None</td>
<td>Governor-General</td>
<td>Prime Minister</td>
<td>Governor-General and JCPC(^{148})</td>
</tr>
<tr>
<td>Puisne Judge</td>
<td>Chief Justice</td>
<td>Prime Minister</td>
<td>Governor-General</td>
<td>Chief Justice</td>
<td>Governor-General and JCPC</td>
</tr>
</tbody>
</table>

For the protection of the Justices, Jamaica has understood that removal proceedings may not fall under the power of one person or even one entity. The only flaw in this system is versus the Chief Justice – the Prime Minister may use his political sway and have proceedings charged. The Prime Minister consults with the Governor-General to appoint tribunal members; the danger here is that the Prime Minister could appoint those who may favor his alleged agenda against the Chief Justice. Suspensions during proceedings also proffer some clout to the Prime Minister. The language of section 100(8) states:

> “If the question of removing a Judge has been referred to a tribunal … the Governor-General, *acting in accordance with the advice of the Prime Minister* (in the case of the Chief Justice) or of the Chief Justice after the Chief Justice *has consulted with the Prime Minister* (in the case of any other Judge), may suspend the Judge from performing the functions of his office.”\(^{149}\) (Emphases added)

Imagine the following possible scenario: A high-profile case comes before the Supreme Court in which the government has a significant stake. The Prime Minister lodges a charge

\(^{147}\) *Id.* §§ 100(5), 100(6)

\(^{148}\) The Amendment of this reference to the Judicial Committee of Her Majesty’s Privy Council has been the subject of much dispute. Attempts were made in 2005 to replace JCPC with the Caribbean Court of Justice, but that the procedures of for amending entrenched constitutional doctrine were ignored, the proposed amendments were denied. *Indep. Jamaica Council for Human Rights (1998) Ltd. and Others v. Hon. Syringa Marshal-Burnett and The Att’y Gen. of Jamaica*, [2005] UKPC 3.

\(^{149}\) *Jamaica Const.* *The Jamaica (Const.) Order in Council 1962*, chapt. VII, part I, § 100(8).
against the Chief Justice, which he may do at his behest without consultation from anyone.\textsuperscript{150} The high-profile case must still go forward, because judicial independence demands expeditious adjudication of trials.\textsuperscript{151} The Governor-General appoints a tribunal, conveniently consulting with the same Prime Minister who charged the Chief Justice in the first place.\textsuperscript{152} During the removal proceedings, the Governor-General, upon advice of the Prime Minister, can suspend the Chief Justice from performing the functions of his office.\textsuperscript{153} So the Chief Justice is now suspended from adjudicating the hypothetical high-profile case. The final “cherry on top”, if you will, is that the Prime Minister would advise the Governor-General on who to appoint in the stead of the suspended Chief Justice as per section 99(1).\textsuperscript{154} The high-profile case can now be swayed in the favor of the government.

The inconsistency is astounding. The potential for abuse of discretion by the Prime Minister goes somewhat unchecked, unless the Governor-General can step in at any of these stages. What guards against such an effrontery against judicial independence? Two things; first, common sense would hopefully prevail on some level. Perhaps the Governor-General would flex his political muscle; perhaps there would be some other non-Constitutionally defined measure to challenge the Prime Minister.\textsuperscript{155} Second, what truly happens in practice may subtly prohibit this hypothetical scenario from ever occurring. Nevertheless, considering the wide discretion given the Prime Minister afforded in the Constitution, it seems anything is possible.

\textsuperscript{150} Id. § 100(6).
\textsuperscript{151} The Principles, supra note 30 at ¶ 6.
\textsuperscript{152} Jamaica Const. The Jamaica (Const.) Order in Council 1962, ch. VII, part I, § 100(6).
\textsuperscript{153} Id. § 100(8).
\textsuperscript{154} Id. § 99(1).
\textsuperscript{155} Unless the situation is truly similar to Canada, where the Governor-General’s authority is largely ceremonial and he is charged through some unwritten convention to abide by the Prime Minister’s decisions. Makarenko, supra note 25.
A third measure that grants judicial inviolability is found in section 6(1) of the Judicature (Supreme Court) Act which evens the balance of power on the Supreme Court. Each Justice has the same authority to act. Further is the constitution of the Supreme Court: a minimum of sixteen Puisne Justices, one Senior Puisne Justice, and one Chief Justice. With so many Justices, it would be difficult for the Chief Justice alone to offer any real chance of a different outcome. This is not the concern that plagues the ideal of an independent judiciary, however. The doctrine requires impartiality by all Justices so that the case is decided equitably under the law. A State should never settle for less than full independence in seeking this ideal.

Deserving of mention is Part IV of the Constitution, which calls for the establishment of the Judicial Service Commission (JSC) largely for the purposes of recommending appointments for Puisne Justices. It is formed of the Chief Justice, the President of the Court of Appeals, the Chairman of the Public Service Commission, one current or former judge of a court having unlimited jurisdiction from anywhere in the Caribbean, and two from a list of six of former attorneys submitted by the General Legal Council. The latter three members of the JSC have a term of three-years. Removal of one of these three latter commissioners is done with the same method as appointing the Chief Justice: the Prime Minister submits his decision to remove to the Governor-General on consultation with the Leader of the Opposition. Reasons for removal of

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156 The Judicature (Supreme Court) Act, 1880, § 6(1).
157 Id.
158 Id. § 5(1). This section allowed for a minimum of sixteen and a maximum of twenty-four Puisne Justice. As recently as July 2008, the House amended the Act, allowing for a minimum of twenty-four and a maximum of forty Puisne Justices to deal with the high case backlog. Jamaica Labour Party, House Passes Bill to Assist with Backlog of Court Cases, Sep. 15, 2008 available at http://www.jamaicalabourparty.com (search “House Passes Bill” in search field, then follow second match) (last accessed Nov. 30, 2009). The constitution of the Supreme Court, unlike in Canada, is not an entrenched provision in the Constitution and thus was easily amended. Constitution Act, 1982, part V, §41(d) (Can). Indeed, § 97(2) of the Jamaican Constitution allows an act of Parliament to amend the number of Puisne Justices. Jamaica Const. The Jamaica (Const.) Order in Council 1962, ch. VII, part I, § 97(2).
159 Jamaica Const. The Jamaica (Const.) Order in Council 1962, ch. VII, part IV.
160 Id. § 111(2).
161 Id. § 111(4)(a).
162 Id. § 111(4)(d).
a commissioner are the same as a Justice: infirmity of mind or body, or for misbehavior. The variety of stakeholders in the appointment of commissioners, in addition to the three other “fixed” members of the JSC, allows for what hopefully amounts to non-partisan appointment of Puisne Justices. It is a far cry from the President of the United States, whose almost sole authority it is to appoint Judges of the Supreme Court in practice, or from the Prime Minister of Canada who still enjoys the final say in the appointment of a Supreme Court Justice.

As Canadian Supreme Court Justice LeDain mentioned, financial security is critical to achieve true judicial independence. Jamaica recognized this, as did the drafters of The Principles, and thus, remuneration for the Supreme Court, the Court of Appeal, and the JSC are all addressed within the Constitution. Particularly important for the Supreme Court is section 101(1), which guarantees that “the emoluments and terms and conditions of such a Judge … shall not be altered to his disadvantage during his continuance in office.” The initial salary rate seems to be fixed by law; following this, however, is the explicit protection that a Judge’s salary will not be diminished, presumably by almost any act of Parliament.

How can any of these sections be altered? Section 49(2)(a) protects judicial tenure, remuneration, appointment and removal proceedings via requiring that a two-thirds majority in both houses be achieved before any amendment can be made. Additionally, a bill amending these sections of the Constitution is required to be on the floor of the House of Representatives for at least six months (including debate time) before it can be submitted to the Governor-

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163 Id.
164 U.S. Const. art. II, § 2, cl. 2; Makarenko, supra note 54.
165 Valente, 2 S.C.R. 673.
167 Id. § 101(1).
168 Id. § 101(1). The modifier “almost” is added because entrenched provisions, of which this is one, enjoy special protections within the Constitution and require a higher than normal quorum to be amended. This does not include allowances. This is a seems a bit stronger than the relevant Canadian provision, which states that an act of Parliament fixes judges’ remuneration (and is subject to periodic review). See supra text accompanying note 91.
General for his signature.\textsuperscript{170} The Senate must also approve the bill amending the Constitution; if it alters the amendment or rejects the bill, the bill must be recycled to the House of Representatives.\textsuperscript{171} It now may only pass by a three-fifths majority vote of the electorate over the Senate’s rejection if it was initially debated, passed twice in the same session or once each in two consecutive sessions, and then subsequently rejected twice by the Senate.\textsuperscript{172} The time frame for the House to pass the bill following a Senatorial rejection is short: not less than two and no greater than six months.\textsuperscript{173} These complex rules, if abided, will afford institutional protection to certain parts of the Constitution. These are known as constitutionally “entrenched” provisions and thus require such measures to be amended; in the case of the judiciary, it is fortunate as it grants the Justices adequate protection against any compromise of their ability to adjudicate.

So great is the protection afforded by the entrenchment of these provisions that even the adoption of the Caribbean Court of Justice as the court of last resort to replace the JCPC was challenged on the grounds that, in doing so, the Constitution was not amended according to the procedures required of such entrenched provisions.\textsuperscript{174} In the case, the Board disputed not only the procedures for amendment, but also the idea that the Agreement Establishing the Caribbean Court of Justice could be amended by extra-State action and be forced to have effect in Jamaica.\textsuperscript{175} This is testimony to the idea that amendments affecting the judiciary in Jamaica have to undergo special process for the purpose of protecting the independence of the judiciary. For the purposes of the Caribbean Court of Justice and perhaps unity in the Commonwealth Caribbean, this was somewhat of a step backwards; but the ideals outlined by the Seventh U.N.

\textsuperscript{170} \textit{Id.} § 49(2).
\textsuperscript{171} \textit{Id.} § 49(5).
\textsuperscript{172} \textit{Id.} This is very interesting as it allows participation by the electorate, i.e., those eligible to vote for the election of members of the House.
\textsuperscript{173} \textit{Id.}
\textsuperscript{175} \textit{Id.}
Congress are certainly crucial enough to justify strict adherence with procedure that will affect all peoples.

Jamaica does jive relatively well with *The Principles* in that it calls for a guaranteed tenure, salary, and allows for appointment and removal in fair accordance with the law. Jamaica’s recognition that the opposition party should have a stake in the appointment of Justices and JSC Commissioners is an important bipartisan step towards preventing political whiles from creeping into judicial incentive. However, the Prime Minister’s authority is still relatively unchecked in many respects, and this must be addressed. While Jamaica struggles with accepting the CCJ and amending its entrenched Constitutional provisions, judicial independence will continue to be a concern. Accepting the weaknesses and embracing the strengths are keys to truly achieving this crucial ideal.

V. Judicial Independence in the Islamic Republic of Pakistan

Of the three State analysis, Pakistan probably has the most interesting variations to notions of judicial independence and certainly one with the most blatant historical challenges to the doctrine. Part VII of the Pakistani Constitution establishes the Judicature; Chapter 2 specifically calls for the creation of the Supreme Court. Sections, 176, 177, 179, and 181 are of particular note, as they illustrate some of the key requirements called for in *The Principles*. Section 176 states, “The Supreme Court shall consist of a Chief Justice … and so many other Judges as may be determined by Act of Majlis-e-Shoora (Parliament) or, until so determined, as may be fixed by the President.” Parliament, it appears, has the power to expand or decrease the Judges on the bench of the Supreme Court while the President may fix it under his

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176 Jamaica Const. *The Jamaica (Const.) Order in Council 1962*, chapt. VII.
178 *Id.* at § 176.
discretion.\textsuperscript{179} At first glance, it seems the President has too wide a discretion in this matter; however, it is important to note that Parliament can adjust this not only before the President fixes this number, but impliedly, afterward also.\textsuperscript{180} This is because of Parliament’s ability to amend the Constitution.\textsuperscript{181} Section 177 covers the appointment of Judges of the Supreme Court.\textsuperscript{182} The Chief Justices is a direct Presidential appointee; the other Judges require the President’s ‘consultation’ with the Chief Justice in order to be appointed.\textsuperscript{183} Nothing in the Constitution indicates that the President requires approval from Parliament for the appointment of the Chief Justice. The only limitation is the clause that requires ‘consultation’ with the Chief Justice. The distinction here is pertinent; ‘consultation’ is not ‘consent’ or ‘approval’. This is somewhat troubling for the Supreme Court; the President could appoint Chief Justice at his discretion, and he could appoint all the Judges that he pleases, essentially circumventing the Chief Justice’s recommendations.

A. Judicial Tampering in the Islamic Republic of Pakistan

The Pakistani Judiciary has seen much strife as recently as 2007. Then-President and General Pervez Musharraf ran for reelection in October 2007 and won the most votes.\textsuperscript{184} However, it was the Supreme Court that questioned whether President Musharraf could even sit for reelection after having continuously done so since his October 1999 coup on the Nawaz Sharif regime.\textsuperscript{185} In a highly charged political move that completely undermined the authority of the judicature, President Musharraf dismissed the Chief Justice, Mr. Iftikhar Chaudhry, and the

\textsuperscript{179} Id.
\textsuperscript{180} Id. See also supra text accompanying note 128.
\textsuperscript{181} Id. part XI, § 238.
\textsuperscript{182} Id. part VII, ch. 2, § 177(1).
\textsuperscript{183} Id.
entire Court in November 2007, replacing them with compliant judges who dismissed any challenges to the President’s eligibility for reelection.\textsuperscript{186} This is quite possibly one of the most visible strikes against judicial independence made anywhere in the world. Other examples of such malign action also come from Pakistan.\textsuperscript{187}

Outside the historical context of the dismissal of the Judges, it is entirely possible that not only section 177 grants the President wide authority in appointment, but section 181 does also.\textsuperscript{188} It states, in relevant part

\begin{quote}
“At any time when …
\begin{enumerate}
\item [(b)] a Judge of the Supreme Court is absent or is unable to perform the functions of his office due to any other cause, the President may …. appoint a Judge of a High Court [including retirees from the High Courts] who is qualified for appointment as a Judge of the Supreme Court to act temporarily as a Judge of the Supreme Court.\textsuperscript{189}
\begin{enumerate}
\item [(2)] An appointment under this Article shall continue in force until it is revoked by the President.\textsuperscript{190}
\end{enumerate}
\end{enumerate}
\end{quote}

This section is especially dangerous taken literally, and it may arguably have been the legitimizing clause in the Constitution that afforded President Musharraf the authority to remove all the Judges and appoint replacements. The phrase “… any other cause …” is certainly one open to interpretation; combining it with section 181(2) - - - which states his appointments would

\textsuperscript{186} Id. It is important to note that President Musharraf’s dismissal of the Chief Justices and the Supreme Court was made during a self-declared state of emergency issued the same month. The compliant Judges were thought to be sitting in the interim, but while the state of emergency was lifted one month later, the prior Judges were not reinstated. A reinstatement could somewhat legitimize the executive’s invasion into the judicial province. Robinson, \textit{supra} note 184. The following August, after President Musharraf finally resigned from office after threat of impeachment, candidates Asif Ali Zardari, estranged widower of former Prime Minister Benazir Bhutto and opponent Saeeduzzaman Siddiqi both ran their campaign promising to reinstate the “sacked” Judges. Upon his victory, President-elect Zardari did not immediately reinstate the Judges, though by March of this year, he did. BBC News, \textit{Pakistan Reinstates Sacked Judge}, Mar. 16, 2009 available at \url{http://news.bbc.co.uk/2/hi/7945294.stm} (last accessed Nov. 30, 2009).

\textsuperscript{187} The author of this paper, a native of the Islamic Republic of Pakistan, is a signatory to a nationwide legal petition denouncing the sacking of the Supreme Court Justices.

\textsuperscript{188} \textit{The Constitution of Pakistan}, part VII, ch. 2, § 181.

\textsuperscript{189} Id. § 181(1)(b). The qualifier “… a Judge of the High Court …” is theoretically the only limitation on the President’s wide discretion in appointing interim Judges. The pool of qualified Judges of provincial High Courts will most likely be limited, and the President may not be able to appoint a Judge whose agenda follows suit.

\textsuperscript{190} Id. § 181(2).
continue until revoked - - - leaves open the possibility of indefiniteness in term.\textsuperscript{191} It has thus been established up to this point in the discussion that a President can appoint whom he chooses to sit on the Supreme Court and appoint interim Judges to sit on the Supreme Court indefinitely.

B. \textbf{To reconcile with The Basic Principles of the Independence of the Judiciary}

Section 179 follows the example of \textit{The Principles} in guaranteeing tenure of Judges until the age of sixty-five, unless he resigns first.\textsuperscript{192} Part VII, Chapter 4 also provides some additional guidance relating to the Judicature. One important provision that is somewhat innovative and would generally be found in a code of ethics is section 207, which prevents any conflicts of interest that a Judge may have by virtue of extra-judicial involvement or membership.\textsuperscript{193} Clause 1 states that a Judge of the Supreme Court should not have any other employment in which he would be entitled remuneration for his services.\textsuperscript{194} Clause 2 indicates that Judges of the Supreme Court and other such relevant officers in the same department may not hold other political offices for profit until two-years following the cessation of their term in the judicial office.\textsuperscript{195} These clauses are likely designed to prevent judicial tampering in decisions where the Judge actually has a stake other than mere adjudication. Section 208 leaves matter of administration in the hands of the Supreme Court; these include appointment of Court officers and terms of their employment.\textsuperscript{196} Unfortunately for the Courts, this authority is subject to the approval of the President.\textsuperscript{197} This could mean that the President, should he please, could hamper the judicial

\begin{footnotesize}
\begin{enumerate}
\item Id. §§ 181(1)(b), 181(2).
\item Id. § 179.
\item Id. § 207.
\item Id. § 207(1)(a).
\item Id. § 207(2). See \textit{Canadian Bar Association, supra} note 68 at 4 (proposing a “cooling off” period).
\item Id. § 208.
\item Id. Canada faces somewhat of the same problem. Many administrative matters fall under the Ministry of Justice, an arm of the executive. However, the problem is not nearly as blaring as it is in Pakistan, both constitutionally and historically; the Canadian Supreme Court and the Ministry of Justice have both attempted to address this abnormality. For example, in 1980, Chief Justice Bora Laskin called for administrative and fiscal autonomy in the courts; a year later, Quebec Chief Justice Jules Deschesnes reiterated the same. Philippe, \textit{supra} note 129 at 271. See
\end{enumerate}
\end{footnotesize}
process via blocking all Court-appointed officials from taking office, and resultantly force the Court to choose someone that would further his agenda. At the very least, he could presumably compel the Court to opt for a Court-appointed official who would keep him abreast of the Court’s activities - - - functioning as sort of the President’s overseer within the Court. The Supreme Court will be able, as per section 208, to exercise authority over this “overseer” once appointed, however, as it is stated that the Court may “… make rules providing for the appointment … of officers and servants of the Court and for their terms and conditions of employment.”\(^{198}\) Conclusively then, it seems extra-judicial forces will be limited in the manner in which they can meddle in the administrative affairs of the Court. Though the idea of “an overseer” may not quite comport with confidentiality requirements *The Principles*, the limitations on any potential executive intrusion can still be appreciated.\(^{199}\)

Theoretically, the Court should be able to prevent any sort of interference with the Parliamentary-regulated threat of punishing contempt; section 204(2) specifically calls for repercussions against

> “… any person who (a) abuses, interferes with or obstructs the process of the Court in any way … (b) … does anything which tends to bring the Court … into hatred, ridicule, or contempt … (c) does anything which tends to prejudice the determination of a matter pending before the Court.”\(^{200}\)

This protection is vital in preserving the orderly process of adjudication within a court; if the Court has the conferred power to regulate internally its operation, then judgments will presumably be fair and swift. Any invasion into the judicial province of deliberation can immediately be handled at the same level. Though this power is regulated by the Majlis-e-Shoora, it remains in the hands of the judiciary to exercise it against “any person” that is guilty

\(^{198}\) *Id.*

\(^{199}\) *The Principles*, supra note 30 at ¶ 15.

\(^{200}\) *The Constitution of Pakistan*, part VII, ch. 4, § 204(2)(a)-(c).
of the enumerated acts. Unfortunately, the President may not merely be “any person” and very well fall outside the jurisdiction of these powers, as explored in the next section.

C. An Assault on The Principles – removal of Supreme Court Judges

The removal procedures of Judges of the Supreme Court are outlined in Section 209 of the Constitution of Pakistan. This section establishes a Supreme Judicial Council (SJC), which consists of the Chief Justice, the next two senior Judges of the Supreme Court, and the two most senior Judges of the provincial High Courts. It is the task of the SJC to initiate and administer removal proceeding of Judges of both the Supreme Court and the provincial High Courts. The grounds for removal are listed as “… [incapability in] properly performing the duties of his office by reason of physical or mental incapacity; or … [being] guilty of misconduct.” If upon inquiry into the Judge, the SJC finds incapability or a guilty determination and submits the recommendation of removal is to the President, it would be the President who would decide the ultimate fate of the Judge. This section does contain a clause that again grants the President wider discretion than he should perhaps enjoy. Section 209(5) states, “If, on information [from any source, the Council or] the President is of the opinion that a Judge of the Supreme Court … may be incapable of properly performing the duties of his office …”, then the President may initiate removal proceedings to the SJC. (Emphasis added). Like so many qualifying phrases within the Constitution, the “of the opinion” clause has been left undefined. The President’s

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201 Id. § 204(3). The power to amend the Constitution of Pakistan (ideally) lies solely with the Majlis-e-Shoora; a bill must pass by a two-thirds vote in both houses of the legislature before being submitted to the President for assent. Id. part XI, § 239. But see Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others, P.L.D. 2000 S.C. 869 (granting the power to amend the Constitution of Pakistan to the President).

202 Id. § 209(1)-(2).

203 Id. § 209(5).

204 Id. § 209(5)(a)-(b).

205 Id. § 209(6).

206 Id. § 209(5). The SJC also reserves the right to be “of the opinion” that a Judge may be incapable by reasons of mental or physical incapacity or guilty of misconduct in order to investigate the Judge’s ability to function in office.
opinion could be reasonably founded on some credible evidence; but then, as history has shown, it could also be challenged as unreasonable. The judiciary in Pakistan has much to fear from the executive; the Constitution itself allows as much. The following scenario has occurred and could occur again in Pakistan: a President, opposed to a Judge of the Supreme Court issuing decisions that run contrary to his own policies, states that he is “of the opinion” that the SJC should initiate removal proceedings to inquire into that particular Judge’s capacity to sit on the bench. In the interim, of course, the President has sole authority to appoint a replacement whose political ideologies will more than likely match his own. Because this appointment is indefinite under section 181(2), the President can effectively achieve his agenda.  

It is a scary portrait to paint for Pakistan over and over; redress is required immediately for this executive stranglehold over the judiciary to cease and faith to be restored in both branches. Section 211 seals the fate of a removed Judge permanently because “… the removal of a Judge under clause (6) of Article 209 shall not be called in question in any court.”

The Principles also specifically require adequate, fixed remuneration for a Judge to prevent any sort of economic coercion of the Judge’s decision-making. Unfortunately, Pakistan does not afford this same guarantee to Supreme Court Judges. The Fifth Schedule, appended to section 205 of the Constitution states that, “There shall be paid to the Chief Justice of Pakistan a salary of [7,900 rupees] per [month], and to every other Judge of the Supreme Court...”

\[Id.\] part VII, ch. 2, § 181(2). \See also Id.\] at part VII, chapt. 4, § 206(2) (requiring a High Court Judge to accept elevation to the Supreme Court or face resignation at his current post). Ostensibly, the President could have a Supreme Court Judge suspended, and, if removed, elevate a like-minded High Court Judge to the Supreme Court. If this High Court Judge is not like-minded, or refuses the promotion, he will be deemed resigned. This very provision flies in the face of The Principles. The Principles, supra note 30 at ¶ 19 (stating that Judges may only be removed for reasons of incapacity or such conduct that may compromise their function in office).

\[Id.\] at part VII, chapt. 4, § 211. \But see The Principles, supra note 30 at ¶ 20.\ (requiring disciplinary decisions to be subject to independent review).

\[The Principles, supra note 30 at ¶ 11.\]
Court a salary of [7,400 rupees] per [month].”\textsuperscript{210} Paragraph 2 of the Schedule also entitles Judges of the Supreme Court privileges and allowances, but those as determined by the President.\textsuperscript{211} Nowhere is there any guarantee against the legislature or the executive affecting the diminution of Judges’ salaries. Perhaps more alarming is that executive encroachment into the purse of each Judge of the Supreme Court is left unchecked; the legislature does not have the ability to review the privileges and entitlements so determined. Although it appears that the actual salary is legislatively set and granted, benefits such as pension, leaves of absences, privileges, and allowance are a matter of executive discretion, arguably wide enough authority to squeeze the judiciary and shape the outcome of a case favorably. A blaring departure from the provisions of \textit{The Principles}, this is a distinct vulnerability in the armor of judicial independence that should be corrected immediately to preserve the values sought after in the Seventh UN Congress’ ideals. Without such guarantees, a Judge will be highly reluctant to rule impartially in most proceedings if he is made to understand that his livelihood depends upon decisions made in office.

\textbf{D. Judiciary becomes a Pawn of the Executive}

The judiciary, particularly the Supreme Court, has seen many challenges to its independence in Pakistan. Many of these have occurred since the turn of the century and have only recently abated, but not to the extent that such independence can be said to be restored. In October 1999, then-Chairman of the Joint Chiefs of Staff General Pervez Musharraf ousted the sitting Prime Minister Nawaz Sharif.\textsuperscript{212} On October 14, 1999, General Musharraf issued a Proclamation of Emergency (hereinafter the Proclamation) which stated that “The Constitution of the Islamic Republic of Pakistan shall remain in abeyance.”\textsuperscript{213} The Proclamation goes on to

\textsuperscript{210} \textit{The Constitution of Pakistan}, Fifth Schedule, ¶ 1.
\textsuperscript{211} \textit{Id.} at ¶ 2.
\textsuperscript{212} See Mulaka, \textit{infra} text accompanying note 236.
\textsuperscript{213} \textit{The Proclamation of Emergency of the 14\textsuperscript{th} day of October, 1999.}
essentially fire all the incumbent executive officeholders and dissolve the Parliament; authority of government was transferred wholly and immediately to the Armed Forces. The next day, General Musharraf issued Provisional Constitutional Order No. 1, which reads in relevant part as follows:

2. (2) “... all courts in existence ... shall continue to function and to exercise their respective powers and jurisdiction provided that the Supreme Court or High Courts and any other court shall not have the powers to make any order against the Chief Executive or any person exercising powers or jurisdiction under his authority.”

4. (1) “No Court, Tribunal or other authority shall call or permit to be called in question the proclamation of Emergency of 14th day of October, 1999 or any Order made in pursuance thereof.”

4. (2) “No judgment, decree, writ, order or process whatsoever shall be made or issued by any court or tribunal against the Chief Executive or any authority designated by the Chief Executive.”

General Musharraf, pursuant to this order, effectively sterilized any constitutional challenge to his coup. Indeed, even a judiciary effectuating some non-constitutional, legal challenge to General Musharraf’s action as the Chief Executive would be banned from pursuing this course under the Provisional Order. The power to rule supreme was self-proclaimed by General Musharraf, and he was subject to no checks, balances, review, or veto. What happens next in the saga is more disturbing. There came before the Supreme Court several complaints disputing the constitutionality of General Musharraf’s actions. Particularly in Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others, the legitimacy of

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214 Id. According to the Proclamation, General Musharraf assumed the office of Chief Executive and required the President at the time, Mr. Muhammad Rafiq Tarar, defer to him in all matters. Id.; The Provisional Constitution Order No. 1 of 1999, ¶ 3(1). It was not until 2001 that General Musharraf fired Mr. Tarar and merged the office of Chief Executive and President and declared himself the holder thereof. The Chief Executive Order No. 3 of 2001, ¶ 3(1).

215 The Provisional Constitution Order No. 1 of 1999, ¶ 2(2).

216 Id. ¶ 4(1).

217 Id. ¶ 4(2).

218 Id. ¶ 4(1).

219 Id. ¶ 5(1). This particularly powerful provision allowed the President discretionary powers in repealing or amending past non-constitutional laws, including those made before the Proclamation was issued. Coupled with the provision in ¶ 4(1), the President has unchecked, overarching authority to alter laws without any fear of judicial reprisal.
General Musharraf’s actions were challenged on constitutional grounds. The counsel for the petitioners cited section 184(3) of the Constitution, which reads “… the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights is involved have the power to make an order of the nature mentioned in [Article 199].” Of particular import in the cited section is section 199(1)(b)(ii), which requires accountability of anyone holding public office; that is, they have the burden to prove that they legitimately hold the office. If the public officer fails to meet their burden, then section 199(1)(a)(i) allows the Court to issue an order to the person to refrain from doing “… anything he is not permitted by law to do.”

The Supreme Court, in a questionable and arguably political move, offered the following rationale in holding that the general was legitimized to pursue extra-constitutional measures in restoring democracy during a state of emergency. The Supreme Court held that the suspension of the democratically-elected body of the National Assembly required careful and thorough examination. Under normal circumstances, such an extra-constitutional action would be deemed contributive to instability and an atrophied political process. However, where the democratically elected voice of the people was itself corrupt, emergency measures could be the

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220 Shah, supra text accompanying note 200.
221 The Constitution of Pakistan, part VII, chapt. 2, § 184(3).
222 Id. part VII, chapt. 3, § 199(1)(b)(ii). Interestingly, the basis for a counter-argument is ostensibly found in the same section. Section 199(3) immunizes members of the Armed Forces from any such Supreme Court orders demanding accountability. Id. § 199(3). It is maintained that “An order shall not be made … in relation to a person who is a member of the Armed Forces of Pakistan … in respect to any action taken in relation to him as a member of the Armed Forces of Pakistan.” Id. This provision could have legitimiz ed the general’s actions entirely if taken at face value. However, this is not the underlying reason under which the Supreme Court affirmed the extra-constitutional actions of General Musharraf.
223 The caveat for § 199 as it pertains to the Supreme Court granted by § 184(3) is that the Court must be “… satisfied that no other adequate remedy is provided by law.” This compels the idea that the power under this section is granted to the Supreme Court as a final option. It could perhaps be the principle means through which challenges versus the wide, self-granted mandate of the executive could be made, i.e., that such extra-constitutional measures were too broad of an eraser with which to cleanse the intra-governmental corruption.
224 Shah, supra text accompanying note 200.
225 Id.
226 Id.
The Supreme Court of Pakistan cites an exhaustive list of reasons for immediate and emergency reform, as General Musharraf would have everyone to believe.

1. The representatives of the people were corrupt in both the public and private sectors.
2. The Prime Minister, ministers, Parliamentarians, and provincial assembly members all had an extensive list of charges of corruption pending against them.
3. The above-mentioned political figures misrepresented their assets to tax authorities.
4. Approximately 356 billion rupees were owed to the State Bank of Pakistan as a result of defaulted loans.
5. The GDP did not keep pace with the growth of the population for the past three years.
6. Pakistan’s debt was roughly equal to its national income.
7. Institutions of Pakistan were rotting inside out due to self-serving policies of the former government.
8. The democratic institutions were not functioning as per the Constitution.
9. An attempt was made to undermine the Army and create dissension within its ranks.
10. The rule of Pakistan was essentially under the stewardship of one man.
11. The Judiciary was ridiculed.
12. Where a decision by the Judiciary to establish a Military Court was challenged as unconstitutional by the Prime Minister.
13. Members of the superior courts had their phones tapped.
14. The Supreme Court was stormed by leaders and activists of the Pakistan Muslim League.
15. Prime Minister Nawaz Sharif’s moral and constitutional authority had degenerated.

The list includes overwhelming accusations against the members of the legislature and others; these were the factors that the court cited as irreparable under the normal constitutional conventions. “The … taking over the affairs of the country … to prevent any further destabilization, to create a corruption free atmosphere … is validated, in that the Constitution offered no solution to the present crisis.” The Court went on to grant General Musharraf power

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227 Id.
228 Id.
229 Sh. Liaquat Hussain v. Federation of Pakistan, PLD 1999 SC 504.
230 Shah, supra text accompanying note 200..
231 Id. When General Musharraf instituted the coup of 1999, § 58(2)(b) of the Constitution had been amended by the 13th Amendment as of 1997. It stated that the President could at his discretion dissolve the Parliament when the Constitutional provisions could no longer be accorded deference in the administration of government. In such a case, an “… appeal to the electorate” would be the constitutional solution, requiring the civilian citizenry to become involved in reestablishing a working government. That this amendment was repealed barred then-President Tarar from instituting any legal changes necessary to address all the charges of corruption facing Prime Minister Nawaz Sharif. The Supreme Court of Pakistan, Judgments, Intervention by Armed Forces, Apr. 27, 2002 available at http://www.supremecourt.gov.pk/sub_links/judgements/J4.htm (last accessed Nov. 30, 2009).
232 Id.
to amend the Constitution for the welfare of the people and for the purpose of promoting order. The sliver of hope found in this fantastical opinion was that the Court, recognizing that the Army could become a political institution if in power too long, called for a return to civilian rule as soon as possible. Unfortunately for the people of Pakistan and the judiciary in the long run, the military rule would continue for eight years.

Legitimizing the General’s coup may have been unavoidable, given the extensive accusations of corruptions sweeping across the government. However, the extra step of granting the President full authority to amend the Constitution was a masochistic move by the Supreme Court. Now fully subservient to the executive, the Supreme Court essentially rendered decisions in favor of General Musharraf, hiding behind the façade of state necessity. Challenges to presidential authority were largely dismissed.

Baseer Naveed writes that the attack on the judiciary beginning in 2007 by the general was an important step in breaking the unholy alliance between the army and the judiciary. In his article entitled “A Blessing in Disguise,” he writes that this apparently marked the beginning

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233 Id.
234 Id.
235 Id.
236 See The Supreme Court Bar Association v. The Federation of Pakistan and others. Four provincial high court judges were elevated to the Supreme Court by the President. The appointments were challenged on the principle of seniority, as junior judges on these courts were elevated. Such practice was “…fraught with disastrous consequences undermining the independence of the judiciary.” Zulfiqar Khalid Mulaka, Restructuring the Constitution for a COAS President: Pakistan, 1999 to 2002, in Pakistan on the Brink: Politics, Economy, and Society 53, 74 (Craig Baxter, ed., 2004). The Court returned a dismissal of the petition, holding that “fitness and suitability” preempted seniority, and that furthermore, publicizing these nominations would be against the interests of the institution. Id. The decision was challenged on appeal, this time on the grounds that no decision had been instituted against the military regime. Id. Hamid Khan, President of the Supreme Court Bar Association, stated “It has been resolved by the Petitioner Association and the Pakistan Bar Council that in view of the oath taken by the judges under the Provisional Constitutional Order, and in view of recent verdicts upholding various orders and acts of the present military government, the judiciary has ceased being independent, and that no substantial question of constitutional importance should be argued before this honorable court in its present composition.” Id. at 74-5. These allegations are extremely powerful – Khan essentially questioned the competent and partiality of the court and stated “since the court is no more independent, we don’t want to proceed with the case.”
of a roused judiciary that would recognize the illegality pursued by the Musharraf Administration.\textsuperscript{238} It did, to an extent. The judiciary challenged the president’s eligibility for reelection, but was subsequently removed for its efforts.\textsuperscript{239} The judiciary has since been reinstated.

\textbf{E. Recent Attempts at Reform}

In 2009, the Supreme Court of Pakistan issued its National Judicial Policy, which contains some reforms as it pertains to an independent judiciary.\textsuperscript{240} These reforms, while not rising to the level of constitutional amendments, certainly are a step in the right direction. Three of the most relevant reforms are (1) restricting judges from holding multiple branch posts, (2) transferring control and administration of special courts/tribunals from the executive to the judiciary, and (3) advocating judicial non-involvement in elections.\textsuperscript{241} The first reform contemplates the same ideal as Madison did when he laid out the four principles of separation of powers.\textsuperscript{242} It also comports with the first characteristic of judicial independence, that is, decisional independence.\textsuperscript{243} Of the \textit{Principles}, section 2 is implicitly lauded.\textsuperscript{244} If a judge is appointed to multiple posts, clearly there will be a conflict of interest that inserts into a proceeding a drop of tainted partisanship.

The second reform is even more significant. Many of the weaknesses in the Pakistani Constitution point to executive interference with the judiciary. Removing administrative control of the executive and placing it back in the hands of the judiciary washes special court proceedings of any outside influence. This follows the larger sense propounded in the \textit{Basic

\textsuperscript{238} Id.
\textsuperscript{239} Id.
\textsuperscript{241} Id. at 11 – 12.
\textsuperscript{242} Federalist No. 51, \textit{supra} note 16.
\textsuperscript{243} See AJS, Center for Judicial Independence, \textit{supra} note 13.
\textsuperscript{244} \textit{The Principles}, \textit{supra} note 30 at ¶ 2. Decisional independence is essentially the call of paragraph 2, which requires impartiality and freedom from improper influences.
Principles. It also is comparable to the Canadian system, which recognizes the potential for influence through an executive’s administrative control and thus has enacted some measure of protection in the form of judicial review of administrative removal and appointments.

The third reform also runs tandem to the Principles in much the same way as the first; i.e., that a judge must be free from improper influences, which may be wrought through involvement in politicized processes as elections. The Canadian Bar Association might applaud this reform, as they have indicated they are opposed to any exposition of the personal opinions of judges. They also might appreciate this alienation from the political process on the level that the Pakistani judges would enjoy divorce from the inquisitorial forum present in jurisdiction as the United States. While this is the case in Pakistan, the Principles do allow for judges to form professional associations that represent their interests. Moreover, Pakistan has had a corruption problem in the past; too often, government officials fall sway to underhanded influence. The intent of the reform was to prevention “distract[ion] … from professional duties” and restore faith in the judicial system by removing any possibilities of “complaints of corrupt practices [which] tarnish the image of the judiciary.” The provision does allow for judicial involvement in politics when specifically requested in order to preserve just administration of the law during the process.

In the same vein as the third reform above, the Supreme Court explicitly acknowledged that corruption within the judicial branch was an area requiring reform. Therefore, in an unprecedented move, the Court has instituted many changes, which include investigations of

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245 Id. at ¶ 4.
246 The Supreme Court Act, supra note 134.
247 The Principles, supra note 30 at ¶ 2.
248 Canadian Bar Association, supra note 68 at 4. Justice Lamer might do the same, writing that relationships between the three branches should be depoliticized. Prince Edward Island, supra note 70.
249 The Canadian Bar Association, supra note 57 at 8.
250 The Principles, supra note 30 at ¶ 9.
those court officials whose lifestyle is beyond their obvious income, surprise investigations to monitor lower court officials, prevention of nepotism through requiring submission of judgments, immediate and harsh penalties to those found guilty, and, happily, incentives for those who maintain incorrupt and honest lifestyles.\textsuperscript{252} These are all excellent measures to restore faith and legitimacy in the judiciary and speak directly to decisional (and even institutional) independence called for in the \textit{Basic Principles}.\textsuperscript{253}

\textbf{F. Conclusion}

Speaking to learned members of the Pakistani national community will reveal that the citizenry had little faith in President Zardari to restore the sacked judiciary. Says Mohammed Raza Shah, “I didn’t think President Zardari would back the removed judges. He really didn’t have to; he and his administration are too focused on lining their own pockets anyway.”\textsuperscript{254} Shah affirmed also that this seemed to be the prevailing sentiment in Pakistan. Fortunately for Pakistan though, the State is moving in the right direction in reinstating these justices and instituting reforms. Whatever the situation, the judiciary too long has been caught in a vortex of uncertainty with regards to whether their tenure or decisions are guaranteed to be free of political posturing. Pakistan may very well be the most deliberate departure from \textit{The Principles}, and, if untreated, could be the formula that leads the country into another era of insecurity. Redress is mandatory for the Islamic Republic of Pakistan’s judiciary on all levels, direct and indirect, to release the entire country from a vicious cycle of corruption. The 2009 judicial reforms have laid a proper framework, what remains is the slow, steady progression in the same tone.

\begin{footnotes}
\item[252] Id. at 14 – 15.
\item[253] \textit{The Principles}, supra note 30 at ¶¶ 2, 4.
\item[254] Telephone interview with Syed Ali Shah, CFO, Matiara Sugar Mills in Karachi, Pakistan (Nov. 21, 2009).
\end{footnotes}
VI. Conclusion

It appears that all the jurisdictions mentioned herein, including the United States, have some homework as it pertains to achieving judicial independence. While Canada seems to have the right framework, it still has to iron out some proverbial wrinkles in order to stand as the pinnacle State that truly reflects the ideals in the *Principles.* Jamaica also has a decent system marked with constitutionally entrenched provisions to prevent amending portions of the Constitution that affect justices. Both Canada and Jamaica have some potential for tampering written into their Constitutions, particularly in the context of appointment and removal of justices. Moreover, as discussed, Pakistan has historically and constitutionally been the most apparent outlier from the *Principles.* As the doctrine of separation of powers is a key component to the administration of justice, these States must continue to institute reforms to achieve a desired level of protection for not only its citizens, but for its legitimate rule of law. Spearheading judicial independence as a crucial issue will restore national and international credibility in a State’s self-administration and will allow the State to pursue other objectives with this useful tool of an independent judiciary. Bear in mind, the *Principles* actually represents a minimum standard of compliance; thus, should States wish to enforce a higher standard of independence, they should be allowed to do so. In fact, they should be encouraged, because a step in the direction of an increasingly independent judiciary is beneficial to society as a whole, and it places the onus of justice on the judges themselves. This is the way States would want it.