

Judicial Independence Abroad

The Struggles Continue

While we in America question the extent of encroachment on judicial independence in terms of the influence of monetary contributions by interest groups on state judicial elections, or politicians spouting about “activist judges” and threatening to “rein judges in,” or the severe budgetary constraints under which courts function, the struggle for judicial independence around the globe presents a different series of challenges. These can range from the suspension of the state constitution altogether, to the rigging of the judiciary so that it delivers decisions demanded by the executive, to riots in the streets after elections when disgruntled citizens do not use the available judicial mechanisms because they do not feel the judiciary is independent or trustworthy enough to adjudicate such matters. With such differences in mind, the editorial board of *Human Rights* thought it would be interesting to present two reports regarding the problems pertaining to judicial independence, and to the progress being made, around the world. We offer two accounts, one from Pakistan and another from Kenya, both of which reiterate just how essential judicial independence is to the foundations of modern societies.

A View from Pakistan

By Hon. Nasira Iqbal

Judicial independence in Pakistan is perhaps best understood through the prism of military intervention and multiple revisions of the Pakistani Constitution. When Pakistan was created in 1947, its founders envisioned a state where the constitution would be supreme. It would provide for a division of powers among the executive, the legislature, and the judiciary, each able to function independently in its own sphere. In 1949, Pakistan’s Constituent Assembly passed the Objectives Resolution, which stated that the territories included in Pakistan would form a federation; that those internal units would be autonomous and would guarantee fundamental rights, equality before law, status, opportunity, social, economic, and political justice, freedom of thought, expression, belief, worship, and association; and that the independence of the judiciary would be fully secured.

However, Pakistan has been under martial law for more than half of its sixty-one years, and its constitution has been rewritten several times dur-

ing that period, notably in 1956, 1962, and 1973. These constitutions, in turn, were abrogated or suspended by military adventurers when they imposed martial law. Nonetheless, the Objectives Resolution formed the preamble of the three successive constitutions and in 1985 became a substantive part of the constitution. The constitutional provisions regarding the powers and composition of superior courts—those delineating the qualifications, appointment, and terms and conditions of service of judges—in theory guarantee judicial independence.

Fighting for citizens’ rights.

While Pakistan has witnessed its share of dubious court decisions, it likewise has seen an honest and determined effort to seek judicial decisional independence. Among the former, the Supreme Court on three occasions relied on the doctrine of “state necessity” to declare that martial law had been validly imposed in *State v. Dosso* (1958), *Begum Nusrat Bhutto v. Chief of Army Staff* (1977), and *Zafar Ali Shah v. General Pervez Musharraf* (2000). Yet in 1972, after General Yahya Khan resigned and handed over power to the popularly elected government of Zulfikar Ali Bhutto, the Supreme Court, headed by Chief Justice Hamoodur Rahman, held in *Asma Jilani v. Government of*

Punjab (1972), that the assumption of power and the martial law proclaimed by Khan in 1969 was unconstitutional and invalid. These contradictory judgments demonstrate that whenever the constitution is abrogated or suspended, the independence of the judiciary goes into eclipse, yet when there is a civilian, democratic government, the courts assert their independence as guardians of the constitution.

For the most part, courts have worked independently and for the good of the citizenry, providing relief against excesses of the executive. They have held that when a statutory functionary acts in an oppressive and unjust manner, courts have the power to grant relief to the aggrieved party. *Murree Brewery Ltd. v. Government of Pakistan* (1972). Similarly, courts have held that all legal steps taken by citizens are meant to advance the cause of justice, not to entrap litigants in a blind corner so as to frustrate the purpose of law. Thus a mere slip up on procedure cannot operate as an impediment to the dispensation of justice. *Mir Mazar v. Azim* (1993). In *Shehla Zia v. WAPDA* (1994), the Supreme Court expanded the fundamental rights to life and dignity by including protection of the environment and quality of life. In *Mohtarma Benazir Bhutto v. President of Pakistan* (1998), it held

that tapping of telephones and eavesdropping by government authorities was immoral, illegal, and unconstitutional. In *Sh. Liaquat Hussain v. Federation of Pakistan* (1999), the Supreme Court declared that the establishment of military courts for the trial of civilians was beyond the powers enumerated in the Pakistan Constitution.

Attempting to elevate the status of women, in *Ghulam Ali v. Mst Ghulam Sarwar Naqvi* (1990) the Supreme Court declared that no waiver by a female can deprive her of her right to inheritance of immovable property and the law of limitation would not operate as a bar to her claim. Supporting women's right to education, the court declared that if numerous girl students qualified for admission to medical colleges on the basis of merit, the provision of special seats for female students could not restrict their number. *Shirin Munir v. Government of Punjab* (1990). In 2001, the Lahore High Court declared the Pakistan Citizenship Act of 1951 was discriminatory and invalid to the extent that it provides that the foreign spouse of a Pakistani male is eligible for acquiring Pakistan nationality but the foreign male spouse of a Pakistani female citizen is not entitled to this benefit. That court also held that free consent of a woman is a prerequisite for a valid marriage (*Mst. Humaira Mehmood v. State* (1999)) and that murder in the name of "honor" is not merely the physical elimination of a man or a woman, it is at the socio-political level a blow to the concept of a free, dynamic, and egalitarian society (*Muhammad Siddique v. State* (2002)).

Thus, whenever the country was governed under a constitution, the judiciary acted independently to safeguard the rights of the citizens and to uphold the rule of law. But when judges were called upon to adjudicate on the imposition of martial law while the constitution was held "in abeyance," they thought it wiser to exercise judicial prudence. They were aware that if they delivered a judgment that was not acceptable, the military dicta-

tors could remove them with impunity and replace them with eager opportunists, precipitating a descent into chaos. Pressure by the public or media for upholding the independence of the judiciary was lacking. Against this backdrop, the courts tried to ensure governance according to law rather than to the whims of military commanders. This mode of reasoning represents one strain of Pakistani judicial thought, adopted by Chief Justice Muhammad

Rule of law must be upheld by an independent, impartial judiciary.

Munir, which may be termed "judicial pragmatism." It has been opposed by another, "judicial purism," espoused by Rahman and other eminent judges who have followed his example.

Recent encroachments on independence. The defining moment in the Supreme Court's move toward judicial independence came on March 9, 2007, when Chief Justice Iftikhar Muhammad Chaudhry was suspended by General Pervez Musharraf on alleged charges of misuse of power when he did not oblige Musharraf and refused to resign. He had worked hard to clear the backlog of cases while simultaneously taking suo moto notice and deciding thousands of human rights cases of poor and vulnerable victims of injustice across the country. He gave judgments against the excesses of public functionaries regardless of the consequences. In the Pakistan Steel Mills case, he declared that the Cabinet Committee on Privatization, headed by the prime minister, grossly violated the law in selling the mills. While pursuing the case of so-called "missing persons," he held the government responsible and observed that it was

the duty of the state to protect people's lives and to ensure their safety. He also canceled, as harmful to the environment, the New Murree Project and other urban development schemes undertaken by the government to benefit various members of the power elite.

Thousands of lawyers, citizens, and the media rallied to his support. Lawyers took to the streets in peaceful processions and boycotted the courts. Ultimately, Chaudhry was reinstated by the judgment of a fifteen-member bench of the Supreme Court on July 20 of that year. On November 3, however, Musharraf preempted an impending court decision against his reelection and invoked emergency powers, suspending the constitution. Under his directions, the chief justice and seven other judges were arrested. Musharraf replaced Chaudhry with Justice Abdul Hameed Dogar. Dogar promptly obliged by declaring Musharraf validly elected as president and by declaring valid Musharraf's National Reconciliation Ordinance, which provided immunity from prosecution to numerous corrupt public functionaries.

Martial law was lifted and a considerably disfigured version of the constitution was restored on December 15. General elections were held in February 2008. On March 24, the newly elected government released Chaudhry, his colleagues, and his family from incarceration. Musharraf resigned under pressure on August 18. Asif Ali Zardari, who promised to restore Chaudhry to office, was elected president on September 6, but the restoration of the judiciary to its pre-November 3, 2007, position has still not come to pass.

Those who have benefited from the judgments of a pliant judiciary, particularly by the validation of the dubious National Reconciliation Ordinance, are not eager to accept an independent judiciary. However, the lawyers' movement and the proactive media have forced average citizens to realize that good governance, economic and social justice, peace, stability, freedom from terror, and credibility in the comity of

nations cannot be achieved without an independent judiciary. The future destiny of Pakistan will be determined by the elected representatives of the people. Rule of law must be upheld by an independent, impartial judiciary. The alternative is a descent into chaos.

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A View from Kenya

By Hon. Mary A. Ang'awa

The lack of confidence in the Kenyan judiciary has a long history. This was recently borne out by the elections of December 2007. When the results were announced, the losers felt cheated and were angry. When they were told, "If you are not satisfied with the election results, go to court and challenge them," they responded, "We have no confidence in the judiciary; we refuse to go to court."

As a judicial officer of twenty-seven years at that time, fourteen on the High Court of Kenya, this remark cut me to the core. Instead of organized and rational legal intervention, violence broke out and the country burned. It was a crushing blow to be unable to arbitrate, comment, or intervene in the events because a matter cannot be judicially reviewed unless it is brought before a court by any party. I attempted to join independent groups established to foster peace among the communities, but this severely limited my ability to ascertain whether there might be potential litigants among them.

Some constitutional background.

The Kenyan judiciary is based on the British system, with the major difference being that no jury system exists. The judiciary is comprised of three tiers, including (1) the subordinate courts, pre-

sided over by magistrates; (2) the superior courts, presided over by puisne judges of the High Court; and (3) the Court of Appeal, presided over by the judges of appeal. The judges have security of tenure, whereas the magistrates do not.

Like most Commonwealth countries, Kenya adapted a constitution that was used by most of the former British colonies when they gained their independence. Nearly all of these constitutions contained the Declaration of Human Rights.

In the current Kenyan Constitution, the executive powers are vested in the president as head of the executive branch, and the legislative power is vested in Parliament, but no similar enactment was made concerning the judicial authority being vested in the judiciary. This created an imbalance between the judiciary and the legislature and executive, with the outcome that the judiciary was constructed on the weakest foundation.

Attempts at reform. This shortcoming, and others, of the current constitution were patently evident to many Kenyans. The chapter in the constitution on the judiciary was clearly one where the public wanted reform. The Constitution of Kenya Review Commission was established in 2002, and it was intended to be driven by the people rather than by the government.

The Review Commission mandated "an advisory panel of eminent Commonwealth judicial experts" to reconsider the chapter on the Kenyan judiciary and to give its input on the proposed new constitution. Surprisingly, the Court of Appeal resisted this panel's investigations and fielded two separate court cases to stop the review process. Similarly, a committee established for the judiciary by the chief justice ended its meetings with the commission. In protest, members of the Law Society wore yellow ribbons on their robes and took to the streets. The few judges who openly supported the review process found themselves transferred to stations far distant from the capitol, which is what happened to me. In the

end, the dispute boiled down to one issue: Should there be a separate court, known as a Supreme Court, that would address constitutional issues and that would not be presided over by the current judges of the Court of Appeal?

Some interested parties suggested that all the judges should resign simultaneously and reapply for their jobs afresh. This time their actual qualifications would be taken into account, such as the extent of their work experience and whether they had obtained additional academic law degrees.

In May 2002, the panel of experts released a report finding a "crisis of confidence" in the judiciary. The panel suggested this was caused by the politicization of appointments of judicial officers, and it pointed to the need for a guarantee of security of tenure and for judicial remuneration to be delineated in the constitution, so that judicial officers would be protected from job uncertainty and salary cuts. They also concluded that reforms were urgently required to restore public confidence in the judiciary and that enhanced transparency, independence, and accountability were necessary. Further, they opined that widespread corruption had crippled and compromised the judiciary, regardless of the constitutional issues.

Yet 2002 was an election year, and Parliament was dissolved earlier than scheduled, forcing the work of the commission to come to a halt. After the 2002 elections, a new government assumed power, ending twenty-four years of rule by the previous government. When the review process began again, a new draft that had been reworked by the government under the auspices of the attorney general was substituted for the original draft, the effect of which was to compromise it considerably.

The stakeholders on the reforms of the judiciary nonetheless were of the opinion that the legal reforms contained in the new proposed draft should emphasize making the judiciary independent, accountable, and effective. The drafters opposed making

reforms piecemeal. They declared that financial and budgeting autonomy for the judiciary was essential. They felt that the process for judicial appointment should be clearly outlined, as should the provisions for discipline and removal of judges from office. They similarly felt that access to justice issues and the backlog of cases needed to be made part of the reform agenda. If such reforms were enacted, they said, this would restore public confidence in the judiciary.

The newly proposed constitution, which advocated land reform and many other provisions not related directly to the judiciary, was voted down in a national referendum in late 2005, and as such the 2007 general elections were held under the old rules. Further, the judicial reforms that had been instituted piecemeal in the interim, while substantial, nonetheless did not inspire confidence in the independence of the judiciary to resolve the disputes that arose after those elections.

To understand this, we need to look at what comprises independence of the judiciary. To quote Wikipedia,

Judicial independence is the doctrine that decisions of the judiciary should be impartial and not subject to influence from the other branches of government or from private or political interests. In most cases, judicial independence is secured by giving judges long tenure, and making them not easily removable.

Some definitions of judicial independence distinguish only decisional independence and institutional independence. I am nevertheless persuaded that judicial independence may be divided into four categories that I have discussed in greater depth elsewhere. These are (1) judicial independence, which relates to the decision-making process; (2) juridical independence, which relates to the finality of the decision; (3) administrative independence, which relates to the autonomy of management of affairs; and (4) budgetary independence, which relates to being autonomous financially.

Judicial self-regulation and progress. As far back as 1998, in recognition of problems within the judiciary, the chief justice set up a Committee on the Administration of Justice (commonly known as the Kwach Committee), which admitted for the first time that corruption existed within the judiciary. Unfortunately, the chief justice passed away shortly thereafter and the next chief justice did not fully implement the findings of this report before resigning when the new government came to power. In September 2003, the next chief justice established another commission, commonly known as the Ringera Commission, which prepared a report that called for the full implementation of the Kwach Committee report. It similarly noted that judicial corruption was rampant. In a separate report, the commission named twenty-five judges and eighty-three magistrates as being corrupt, and both reports were disclosed to the press. The effect was damaging. Most of the judicial officers opted to resign and take their dues. A few faced the tribunal and were reinstated. Unfortunately, the disciplinary procedures were irregular because no fair hearing was given nor strict rule of law followed. Hence, the security of tenure was compromised.

The judiciary then set up a standing committee in 2005 known as the Ethics and Governance Subcommittee. Its first incarnation, known as the Onyango Otieno Committee, continued to investigate corruption. It was still so much a problem that in May 2006 Transparency International, a global organization fighting corruption, named the judiciary as the No. 6 “bribe taker” in Kenya, which was nevertheless an improvement from the No. 3 slot in the year 2004. Today, the judiciary does not appear in that list.

The Onyango Otieno Committee took a different approach and kept secret the names of those found corrupt. To date, no disclosure or actions taken against those who have been found wanting has been made public, and no

official report has been published by the government. This committee was followed by the Kariuki Kihara Committee in 2007, and it, too, has not published open accusations against judges or magistrates.

The days when the security of tenure was curtailed by Parliament in order to fire judges appear to have passed. The executive rarely interferes in judicial decision making. The infrastructure of courts is being upgraded. Judges have been provided with computers that work well, especially in Nairobi. One of the most positive aspects surrounding the judiciary is that law reporting, which did not exist for twenty years, is now flourishing. An annual colloquium is now held regularly to interact and exchange views. The recent taxation on judges’ allowance was reconsidered. A training institute for judicial officers was established and will long be remembered as an extremely positive milestone in Kenya’s judicial reform history.

Conclusion. The failure of confidence in the Kenyan judiciary can be explained by the lack of independence of the judiciary, which in turn has been compromised by corruption. To achieve this independence, the judiciary must be made autonomous and achieve budgetary and financial independence from the executive. This would require a change in the constitution to give authority to the judiciary to be independent. Kenya needs to work toward complete transparency in the selection of judges. Judges themselves must be diligent in upholding the rule of law in an environment that is conducive to doing so. In the end, we are left with a larger question: Is judicial independence and a regular adherence to the rule of law possible where only sixty-one judges of the Court of Appeal and the High Court, working together with 250 magistrates, serve a population of thirty-four million?

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