

## Analysis of the Independence of Superior Judiciary Under Civilian Governments in Pakistan: From 1947 till 2009.

Mobina Mehsood\* Fawad Khan† Raza Ullah Shah‡

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**Abstract:** *The political history of Pakistan is divided into two phases: military regimes and political/civilian governments. The military ruled over Pakistan more than half and civilian governments remained in power less than half of its entire history. This paper studies and examines the function of the judiciary and effect of executive on independence of the superior courts during civilian governments in Pakistan from 1947 till 2009. Violation of judiciary independence of through executive are examined under several domains like its undue role in judicial appointments and removal; its undue influence during the case proceedings and decisions; the abuse of judicial proceedings due to political considerations.*

**Key Words:** Independence of Judiciary, Superior Judiciary, Executive, Judicial Appointment, Removal.

### Introduction

Pakistan came into existence on August 14, 1947. Ever since its creation, this country saw several extra-constitutional military interventions and many constitutional eventualities. During this short period of sixty nine years Pakistan has witnessed suspension or total abrogation of the constitution during each of the five martial law regimes. The government functioned through Laws, Orders or “Provisional Constitution” Orders issued by Military dictator. The military ruled over Pakistan about 36 years.

The above statistics show that Army has remained more in power then the civilian-governments in Pakistan. The period of “civilian government can be divided” into four episodes of

1947 to 1958

1972 to 1977

1989 to 1999 and

2008 till date (May 2016).

This paper covers the first three periods of the civilian governments; as the superior judiciary was able to gain judicial independence in 2009 with restoration of the sacked judges. In November 2007 the President of Pakistan cum COAS (Chief of Army Staff) committed a takeover against the judiciary and illegally/constitutionally sacked all unwanted judges of “high courts and Supreme Court”. The Lawyers Movement supported by few political parties and civil society forced the civilian government to restore the dismissed judges and in March 2009 all “judges were restored”. After restoration the judiciary was changed and it was more powerful; more active; more effective and more independent. That is the era of post restoration of independent judiciary is excluded from this study.

In 1947 Pakistan had the vice-regal system of colonial time. Government of India Act, 1935 served as the Provisional Constitution of this country before the promulgation of its own constitution in 1956 through Pakistan’s Constitutional Assembly. The Pakistan first constitution lasted just two and a half years when Gen Ayub Khan annulled the 1956 constitution and enforced martial law in 1958. During this first episode of civilian government (1947-58) the country was ruled by seven prime ministers and four governor generals. In the second period Pakistan was ruled from 1972 to 1977 by Zulfikar Ali Bhutto served first as president and then as prime minister in the 1972 interim setup and under the constitution of 1973 respectively. During 1988 to 1999, Benazir Bhutto and Nawaz Sharif took turns twice.

\*Lecturer, Nawab Allah Nawaz Khan Law college, Gomal University, Dera Ismail Khan, KP, Pakistan.

† Student, Department of Public Administration, Gomal University, Dera Ismail Khan, KP, Pakistan.

‡ Assistant Professor, Department of Management Sciences, Qurtuba University, Dera Ismail Khan, KP, Pakistan.

Email: [razaullah@gu.edu.pk](mailto:razaullah@gu.edu.pk)

This study is aimed at examining the interference of executive in the judiciary, such as its attempts to recruit its favorite judges or to remove the ones it despises; hampering the court proceedings, influencing the court decisions; abuse of the judicial proceedings for political considerations; and humiliation of the judges.

### **Judges Appointment during Civilian Governments**

The significance of the procedure for judges' appointment for the independence of judiciary cannot be denied, as it's the human resource of an institution which makes or mars an institution. The more the judges are competent and honest with their job the more will they secure credibility and public confidence for themselves. Ghulam Muhammad Khan the then Governor General of Pakistan was the first who violated appointment procedure of the Pakistan chief justice when in 1954 he appointed Justice Munir as chief justice of Pakistan after retirement of Sir Abdur Rashid. In this case the governor general by passed most senior judge of Federal court, A.S.M. Akram by appointing justice Munir who was Lahore High Court chief justice ([McGrath, 2000](#)). The loss made by this appointment made on the bases of favoritism can still be felt in the judicial system of the state. Instead of curbing the rot in its nib it expended to a threatening situation.

Zulfiqar Ali Bhutto appointed judges keeping in view their political affiliations. In the High Courts, several judges were appointed who were office bearers of PPP. These appointments were made with an apparent intention of upholding the party policy in the future (Khan, 2001). After retirement of Lahore High Court Chief Justice in 1976 Bhutto appointed a junior judge superseding almost a dozen senior judges of the High Court as the Chief Justice of Lahore High Court. These judges were not only senior than him but were also competent than him ([Patel, 2004](#)). In 1977 Bhutto once again punched the judiciary by appointing an advocate who had previously been a member of Punjab Provincial Assembly on PPP ticket as the Lahore High Court judge; He was not even a PPP worker but his election campaign was also set aside by election tribunal for malpractices committing in his campaign for election. His appointment as a judge shocked everyone i.e. the public, the judiciary and the bar. Although the judge resigned in the face of severe criticism from his post within a few days, but this incidence strained the judicial appointment process permanently ([Patel, 2004](#)).

Benazir Bhutto accentuated for radical changes in the judges appointment procedure, this idea was included in the PPP manifesto for general election of 1993. But when she won the elections, her government excelled everyone in arbitrary judicial appointments (Khan, 1998). In June 1994, the government of People's Party appointed Sajjad Ali Shah as Chief Justice of Pakistan by surpassing three of his senior colleagues, thus deviating from decades' old resolution of hiring most senior judge of Supreme Court as Chief Justice of Pakistan.

Appointment of Justice Shah as "Chief Justice of Pakistan" was made under the condition that he will give his written resignation to Benazir's husband i.e. Zardari in advance which will be used against him in case he could not please the Prime Minister ([Shah, 2001](#)). Along with the "improper appointment of the Chief Justice"; she was also committed to appoint judges in the High Courts for personal and political considerations. She even shared this covert agenda with Chief Justice of Pakistan; by telling him that she wanted to induct her Party workers irrespective of the fact that they are fit for such appointment or not ([Shah, 2001](#)). These amazing things happened secretly; to the contrary of which "Benazir Bhutto and her party" had publicly declared their faith time and again in an independent judiciary.

According to [Shah \(2001\)](#) twenty additional judges were employed by the People's Party government to the Lahore High Court in August 1994 not in consonance with the recommendations of "Chief Justice of Pakistan". All of the newly appointed judges were practicing lawyers except two of them who were chosen from the lower judiciary. Among the remaining 18 judges only six or seven judges could rightly claim to fulfill the merit while the remaining appointees were outrageous simply (Khan, 2001). One of them is said had not even visited the High Court building in his life before he came to "take his oath as a judge" (Khan, 2001). Another one was being prosecuted for murder in the same High Court. They also included a person who was believed to be appointed as a judge in compensation for losing

elections three times under the PPP flag ([Arif, 2001](#)). Sindh High Court was also packed with nine additional judges. Among these new appointees two judges were appointed from the session judges' list, one of whom was Agha Rafiq Ahmad who was on number 34 in the seniority list of total 37 session judges in Sindh Province, while Shah Nawaz Awan the other appointee was on number 13 in that seniority list. Judges appointed from the bar also included some controversial names who according to Justice Shah had never attended a hearing in the High Court ([Arif, 2001](#)). Seven more acting/ad hoc judges were appointed in Supreme Court accompanied by the ten permanent judges ([Mian, 2004](#)). The famous judges' case judgement was the reaction of the "Benazir Bhutto's government politicization" of judiciary and appointment of judges on political and personal considerations "(Al-Jihad Trust V. the Federation of Pakistan, 1996)".

### **Removal of the Judges during Civilian Governments**

Job security is significant for independence of judiciary. To ensure the security of their job the Constitution of Pakistan has explicitly described the removal or termination procedure of the superior courts judiciary through its Art 209. Which makes Article 209(7), a constitutional guarantee to the members of higher judiciary, from any kind of illegal removal from their jobs. According to the aforementioned articles of the "constitution of Pakistan, president of Pakistan" can remove a judge of the "higher judiciary" upon the recommendation of the Supreme Judicial Council. The Pakistan Judicial history is full of orders the practices for judges' removal was not followed in its true spirit. Zulfikar Ali Bhutto amended the constitution of Pakistan through the fifth "Constitutional Amendment" in 1976. The sole drive of this alteration was to eliminate the despised Chief Justices of the High Courts despite the fact that the move was vehemently opposed by the opposition. This amendment restricted the tenure of the "Chief Justices of Supreme Court" to five years and that of the High Courts to four years. These judges were given two choices after the completion of their tenure. They had to retire or serve as "senior most judge of court". If a judge of the High Court was appointed as a judge of the Supreme Court, he had to accept the appointment otherwise he would be retired. This provision contradicted Article 209(7) of the Constitution. Mehmood (1992) declared the Lahore High Court Chief Justice; Justice Sardar Muhammad Iqbal and Peshawar High Court Chief Justice; Justice Ghulam Safdar Shah as the main victims of the fifth amendment (Mehmood, 1992). On the completion of their four years of tenure as the Chief Justice these judges were compelled either to get retreat or to take the "lower status" of a senior most judge. Justice [Iqbal \(2001\)](#) declared that the sole drive of this alteration was to eliminate Justice Muhammad Iqbal from his office. While a simple order from a Supreme Court Bench made Justice Sajjad Ali Shah to leave his office.

The independence of judiciary was violated by the executive not only through political appointments and illegal removal of judges from the higher judiciary; but the judges were also harassed and pressurized to get "favorable decisions from the courts".

### **Pressure on the Judges to Get Favorable Decisions**

Different political governments applied different tactics to pressurize the judges and consequently to manipulate decisions of the court in their favor. If a judge dared to stand in their way and have a fair play they and their families suffered enormously. Our judicial history is full of instances where the executive showed no respect for an unfavorable verdicts and orders. Even the Prime Ministers have ridiculed the courts publically or in the parliament for getting unfavorable decision from the courts. This attitude pushed the courts to initiate contempt of proceedings of court against three serving Prime Ministers of Pakistan i.e. Mian Muhammad Nawaz Sharif, Zulfikar Ali Bhutto and Benazir Bhutto. But none of them could be convicted for their being the head of the powerful governments.

As mentioned earlier our judicial history is full of cases where judges are harassed or intimidated by the government to mold the decision of the court in its favor. In our case there is no need to recount all these instances as only few examples will be sufficient for this purpose. Tamizuddin Khan's case was the first of case when the Federal Court was pressurized to reverse the "decision of the Sindh Chief Court" by upholding the Governor General's order regarding the dissolution of the "first Constituent Assembly

of Pakistan". Only Justice Cornelius was able to withstand the government pressure; he testified that pressure was being put on the rest of the judges ([McGrath, 2000](#)).

Lahore High Court Chief Justice, Justice Kadri was intimidated and humiliated by Zulfiqar Ali Bhutto through every possible mean for the decision of a case in which the then government was interested ([Kadri, 1990](#)). His family members were threatened by Rao Rashid a member of Bhutto's government for burning their homes and elimination of their entire family lines if Justice Kadri didn't surrendered to their demands ([Kadri, 1990](#)).

Justice Salahuddin Ahmad; a Supreme Court judge was threatened of being imprisoned if he released a particular person under detention by Rafi Raza a special assistant to Zulfiqar Ali Bhutto. Justice Ahmad was "Chairman of a Review Board" and used to reflect periodically the cases of the persons interned under the security ordinance. After being threatened justice Ahmad brought the matter into the notice of "Chief Justice of Pakistan" and resigned as chairman of the Board ([Gauhar, 1998](#)). Justice Sajjad Ali Shah was pressurized and harassed through innumerable phone calls a night before the statement of Supreme Court Judgement in Nawaz Sharif's case in 1993([Shah, 2001](#)).

### **Harassment and Humiliation of the Judges**

In Pakistan the executive never showed due respect to superior judiciary, while judges humiliated and dishonored to pressurize them in an endeavor to fulfilling their ulterior motives. And if some judges tried to stand against this attitude of the executive and dared to apply the law, the government never hesitated to disgrace and dishonor them. If this tactic could not stop judges from administering justice, then these judges were both legally and illegally victimized. Annals of our Judiciary are full of instances of judges' humiliation some of these instances are recounted here.

In 1972 Zulfiqar Ali Bhutto soon after he came into power called upon all judges of Lahore High Court and Supreme Court for meeting in Lahore. This was an unprecedented event in the sense that none of the former Prime Ministers had dared to summon the judges for a meeting. During this meeting Bhutto not only criticized the judiciary but also addressed them in a highly authoritarian manner ([Gauhar, 1998](#)). In another meeting in Lahore, Bhutto scolded the judges in such a way that the then Chief Justice Hamoodur Rehman, was left with no choice but to refute his false allegations against the judiciary ([Gauhar, 1998](#)).

During the proceedings of the well-known judges' case in 1996 the Prime Minister wanted the judges to adjourn the case sine die. But when the Chief Justice kept the proceedings going, she got angry and started harassing the Chief Justice in many ways to make him stop the same ([Shah, 2001](#)). His son-in-law, Pervez Ali Shah's official residence was searched and raided without showing any search warrant, afterwards the Chief Minister of Sindh called upon him where he was asked to persuade the Chief Justice for fulfilling the Prime Minister's requests. But when "Pervez Ali Shah" was unable to do what was required of him he was suspended from his post ([Shah, 2001](#)). Another judge who was a member of the penal hearing the judges' case was intimidated by transferring his son to very distant area and KP ([Gauhar, 1998](#)). All these were done by a Prime Minister who always publically proclaimed her commitment to Judiciary independence.

The judges were able to withstand all these threatening conditions and announce a judgment in the judges' case which made a history. The Prime Minister was so angry with the Chief Justice that he publically insulted him in a meeting to such an extent which he could not sustain and caused him a "heart attack and was admitted" in hospital for several days ([Mian, 2004](#)).

In 1997, Supreme Court of Pakistan started disdain of court actions against Nawaz Sharif, the "then Prime Minister". In a reaction to this proceeding a pamphlet was distributed and printed against the Chief Justice by the PMLN workers. They later on Physically attacked Supreme Court on October 28, 1997 ([Shah, 2001](#)).

### **Executive misused Judiciary as a Tool for Political Victimization**

It's our national tragedy that the executive has harassed and disgraced the honorable members of judiciary on one hand while on the other hand tried to use the judiciary like other departments of the

government to persecute their political opponents through judicial prosecution. It's a common practice in Pakistan that political opponents of the incumbent government are victimized by instituting false or true cases against them to stop them from opposing the government's policies or to pressurize them. Asad Durrani a former Director General of ISI states that it's very common for a government having control of the legal institutions, prosecution authority, and agencies like FIA and ISI etc. to use them against their political opponents for institution of false cases and then these cases are used to pressurize its opponents even if they can't be used due to lack of evidence ([Durrani, 2007](#)).

Pakistan Vs Abdul Wali Khan MNA and others a case in Supreme Court is one of the most disappointing cases of persecution of opposition by the government through judiciary (Pakistan Vs Abdul Wali Khan MNA and others, 1976). National Awami Party (NAP) had a coalition government in the two provinces of Balochistan and KPK (NWFP at that time) while it "was a major opposition party" in the Parliament and "Abdul Wali Khan was" the opposition leader. Zulfikar Ali Bhutto dismissed Baluchistan government on the basis of several allegations. National Awami Party coalition government with JUI in KPK resigned in protest against the dismissal of the Balochistan government ([Pak Institute for Peace Studies, 2009](#)). In response to these authoritative actions from Bhutto's government a rebellion erupted in Baluchistan (Gulshan & Saeed, 2014). In 1975 NAP was banned by Zulfikar Ali Bhutto government under section of 3 of Political Parties Act of 1962. After dissolution of NAP as per the requirement of Political Parties Act the government referred its decision to Supreme Court for approval along with a complaint comprising of several allegations against the party. Wali Khan was not happy with the Supreme Court Bench formed to hear their case. His objection was against the two judges' presence, Justice Muhammad Cheema and "Justice Muhammad" Gul which was rejected. As soon as the Reference proceedings began, Bhutto publically declared that a decision made against the government by the Supreme Court will although be accepted but the Supreme Court will be responsible for its consequences ([Patel, 2004](#)). As per Article 204 of the Pakistan constitution this speech was a clear cut "contempt of court". Chaudhry Zahoor Elahi initiated a contempt of court "application against Bhutto" which was dismissed out rightly by the Court. The dismissal of this application diminished the self-confidence of defendants in court ([Patel, 2004](#)). Looking at discharge of contempt application and rejection of Wali Khan's objection the defendants boycotted the case proceedings. The court held ex parte proceedings in the case and absolute in courtesy of government. [Newberg \(1995\)](#) is of the view that court accepted all the allegations made by the government against the party instead of looking into the ground realities of the case. The just fulfilled the wishes of the Prime Minister through their judgment instead of providing justice to the citizens ([Newberg, 1995](#)).

According to Justice [Patel \(2004\)](#) neither the government had the power to the party on allegations that it was working "against the ideology of Pakistan" nor did Supreme Court have authority to indorse Reference based on such weak proofs of intelligence reports and newspapers reports. Newspaper reports were accepted in evidence while eye witnesses were not summoned to give testimony, monitoring reports of Kabul Radio and Non-contextual excerpts NAP speeches were accepted in evidence. These evidences were not in conformity with Qanun-E-Shahadat Order, 1884 of Pakistan. Chapter iv and v of the Order have declared these evidences either weak or inadmissible in court. NAP leaders were accused of resorting to terrorism and armed rebellion against the state of Pakistan. Subsequently a case of 55 NAP leaders were heard by a special tribunal of three judges in Hyderabad Central Jail. The reference proceeded in the court "under criminal Law Amendment (Special Court) Ordinance 1975" ([Newberg, 1995](#)).

NAP was not the only victim of Bhutto's government utilization of the judiciary for his political adventures. In 1977 hundreds of cases were lodged against his political opponents and even their family members purely for political purposes ([Newberg, 1995](#)).

In 1994 during Benazir Bhutto's government incriminated Shaikh Rashid Ahmed, who was the member of National Assembly from Muslim League for having an unlicensed Kalashnikov rifle. Allegations of a rifle recovery from his home in his absence were raised. The case was processed in a special court which convicted Mr. Shaikh rigorous imprisonment to seven years along with fine of 200,000 rupees. Government kept on delaying an appeal in High Court at Lahore against judgment using

different tactics for about eleven months. Finally, the High court fixed a date for case upon the victim's request to "Supreme Court of Pakistan" to intervene and direct the Lahore High court regarding the appeal disposal. Government then withdrew the case and Shaikh Rashid Ahmad was acquitted after a long period of 18 months. But the court never dared to ask the government for keeping Mr. Shaikh in prison for such a long period of time without any legal justification that's why a "senior lawyer Ijaz Batalvi" termed the case as a judicial scandal.

In April 2001, once again the Supreme Court of Pakistan found another case at Lahore High Court towards judicial scandal. Where an Accountability Bench found Asif Ali Zardari and Benazir Bhutto culprits in SGS Kick Back case and punished them for five years' imprisonment and nine million rupees fine. In appeal the Supreme Court found the decision of the court politically motivated and set aside the decision of the court by sending it back for retrial.

## Conclusion

The aforesaid facts and figures vindicate the stance that none of the civilian governments of this country left any stone unturned to abuse judiciary to meet their political ends. Independence of Judiciary seems to be a concept alien to all of them and respect for judges and judicial system kept on degrading during the civilian governments. Almost each and every one of them, used independence of Judiciary as a ploy to lure the public and intelligentsia in to thinking high of them, but they could never resist their desires of using their power to turn the Judiciary on their opponents. The politicians in opposition kept on ranting that the government was using the courts in order to meet its political motives but when the same opposition got a chance to be in power, it used the same tactics to victimize its rivals.

Almost each civilian government used allegations of corruption, foul play and acting against the ideology of Pakistan to quell dissent both in the political arena and from civil society. This continuous abuse of the justice system served as an agent for the public to lose confidence in the administration of justice. Judicial system of the country lost its respect and esteem for the ordinary folks for its unabated serving of those in power.

The judicial history of this country is a sorry story. It started, when Governor General Ghulam Muhammad forced it to introduce the doctrine of necessity. Zulfikar Ali Bhutto kept on encroaching on judiciary's independence through constitutional amendments. Nawaz Sharif and Benazir Bhutto made fun of the independence of judiciary by molding judgments in their favor and evading contempt proceedings with impunity. In almost all of the civilian administrations, contempt of court, interference with the administration of justice and attacking and harassing the judges was a day to day affair. In 1998, some political supporters even dared to attack the Supreme Court building.

## Suggestion

De jure "independence of the judiciary without de facto independence is like a beautiful flower without fragrance". The following factors are a must for de facto Independence of Judiciary:

The judges of superior judiciary must always be ready for any sacrifice to protect and preserve the judicial independence.

The political parties should stop all kinds of interruptions in the administration of justice and they should commit to resist all kinds of violations of the independence of judiciary.

The vigilance and determination of the Bar to preserve the independence of judiciary is indispensable.

Public perception is also a key for the independence of judiciary. It needs to be sensitive and reactive to all kinds of intrusions in justice dispensation system. Public opinion can be easily molded through civil society, Bar councils, Political parties, and electronic and print media.

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