



**Center for  
Research &  
Security  
Studies**

# Pakistan: Justice Restored

## *What Next?*

R04102009F05

Center for Research and Security Studies  
60, Nazimuddin Road, F-6/1, Islamabad.

Tel: 009251 8314801-3

[www.crss.pk](http://www.crss.pk)

In 1958, Major-General Sahibzada Iskander Mirza abrogated the Constitution and declared Martial Law. Justice Muhammad Munir, the 2<sup>nd</sup> Chief Justice of Pakistan, failed to block this extra-constitutional step (Justice Munir coined the infamous ‘Doctrine of Necessity’ in order to validate illegitimate emergency powers).

In 1969, General Agha Muhammad Yahya Khan, Pakistan’s 5<sup>th</sup> Chief of Army Staff (COAS), imposed Martial Law. Justice Hamoodur Rahman, the 7<sup>th</sup> Chief Justice of Pakistan, did not move the Supreme Court of Pakistan (SC) against General Yahya’s Martial Law for as long as General Yahya remained the Chief Martial Law Administrator (Yahya was declared a ‘usurper’ only after Yahya was president no more).

In 1977, General Muhammad Zia-ul-Haq, Pakistan’s 8<sup>th</sup> Chief of Army Staff, overthrew the democratically elected Prime Minister Zulfikar Ali Bhutto in a *coup d’etat*. Justice Sheikh Anwarul Haq, the 9<sup>th</sup> Chief Justice of Pakistan, ‘legitimized’ the illegitimate act.

### **Independence of the Judiciary**

#### **Decisional Independence**

The “idea that judges should be able to decide cases solely based on the law and facts, without letting the media, politics or other concerns sway their decisions, and without fearing penalty in their careers for their decisions.”

#### **Institutional Independence**

The idea that the “judicial branch is independent from the executive and legislative branches.”

#### **Financial Independence**

The idea that a “judge’s salary is not dependence on the Executive decision and his conditions of service are secured and not to be varied at the whim of the Executive.” And, that the judicial organ is financially autonomous

On 12 October 1999, General Pervez Musharraf, the 13<sup>th</sup> COAS, ousted the democratically elected Prime Minister Nawaz Sharif, dismissed the National Assembly,

the four Provincial Assemblies and took on the title of Chief Executive. Justice Saeeduzzaman Siddiqui refused to take oath under Musharraf's Provisional Constitutional Order (PCO) and was, therefore, forcefully removed. Justice Irshad Hasan Khan, who took over as the 16<sup>th</sup> Chief Justice of Pakistan, legitimized General Musharraf's *coup d'etat*.

<b>Status of Criminal Cases in Pakistan</b>	
Prisoners Under Trial	Approximately 80,000 <sup>1</sup>
Average Criminal Case	10 – 12 Years

For the record, at least 3 Governor-Generals, 7 Presidents, 26 Prime Ministers and 4 Chiefs of Army Staff have treated both the Judicial and the Legislative branches of the Government of Pakistan as mere extensions of the Executive Branch. For the past 6 decades, the Pakistani Executive, both civil and military, has considered Pakistani judges and Pakistani parliamentarians as subservient to the Executive.

#### **Five Conditions of Judicial Independence**

- 1. Security of judicial tenure;**
- 2. Security of judicial salary;**
- 3. Institutional independence of subordinate judiciary;**
- 4. Judicial appointments by separate Judicial Service Commission; and**
- 5. Administrative independence and financial autonomy of judiciary**

Pakistan changed on 14 August 2002 (Pakistan's first private electronic news channel, Geo, began its test transmission that day followed by regular programming from 1 October 2002). Geo taught Pakistanis that they ought to hold their governments accountable. Geo taught Pakistanis that they had fundamental rights that must be protected. Geo taught Pakistani voters to move away from emotionally driven politics towards issues and policies that various political parties rallied for.

<sup>1</sup>± 5,000 by the end of February 2009.

Pakistan *also* changed fundamentally on 9 March 2007 when Iftikhar Muhammad Chaudhry, the 20<sup>th</sup> Chief Justice of Pakistan, said ‘NO’ to at least three 3-star generals-all in uniform.

Pakistan changed *yet* again on 18 February 2008 when Pakistani voters voted more on issues than on emotions. Pakistan changed-yet one more time-on 16 March 2009 when Pakistan’s version of an absolutely non-violent Peoples Power converted Pakistan’s *de jure* Chief Justice back to *de facto*.

<b>Number of Executions</b>			
<b>China</b>	<b>Iran</b>	<b>Saudi Arabia</b>	<b>Pakistan</b>
470	317	143	135

Independence of the Judiciary is, in effect, the principle that the Judicial Branch of the government should be ‘politically insulated’ from the Legislative and the Executive branches of the government. And, that “courts should not be subject to improper influence from the other branches of the government, or from private or partisan interests.”

<b>Salaries of Judicial Executives (Rs.)</b>			
Civil Judge (Magistrate)	Senior Civil Judge	Additional Sessions Judge	District & Sessions Judge
45,000	75,000	100,000	135,000

To be certain, ‘Independence of the Judiciary’ is not an object – neither a banana nor an apple – that the Pakistani nation consumed on March 16. Independence of the Judiciary is actually a dynamic phenomenon and every judiciary in the world is continuously in the process of becoming either less or more independent.

<b>Prisoners / 100,000</b>			
India	Bangladesh	Pakistan	US
29	50	59	715

Presidents, Prime Ministers and Chiefs of Army Staff have kept the judiciary under their absolute control through 3 means: Judges appointments, their promotions and their removal.

Presidents, Prime Ministers and Chiefs of Army Staff have also used judges to manipulate the political process in their favor. Presidents, Prime Ministers and Chiefs of Army Staff have in effect consciously and deliberately crippled the judicial organ of the state in order to achieve their own ends at the cost of 172 million Pakistanis. And, judges never stood up – maybe because Pakistanis never stood up for their judges. Our superior judiciary, as a consequence of 60 years of executive manipulations, is now in a state whereby it is failing to “address creeping financial corruption within its own ranks. Dysfunction in the superior judiciary also impedes reform in the subordinate judiciary, which comprises the trial courts in which the mass of ordinary judicial business is transacted.”

Ijaz Hussain in his article titled ‘PPP and judicial appointments’ writes, “To being with a word about these appointments is in order. There are sixteen appointments to the Lahore High Court; thirteen to the Sindh High Court; five to the Islamabad High Court; and one to the Supreme Court. Most of the appointees are either jiyalas, sympathizers of the PPP or opponents of the lawyers’ movement for the restoration of deposed judges. In many cases, appointees are unfit for the job for one reason or the other.”

The Asian Development Bank (ADB) has assessed Pakistan’s courts as:

**“Pakistan’s courts suffer from massive backlogs of cases, causing long delays in litigation and severe dissatisfaction among litigants. Courts are understaffed and lack trained administrators, and their physical infrastructure ... grossly inadequate and of poor quality. The legal system .... technologically backward and inefficient and ... laws .... outdated.”**

The same ADB assessment made the following recommendations:

- **To undertake measures to decrease congestion.**
- **To undertake measures to increase efficiency of courts.**
- **To create a legal information system on Pakistani law for the Ministry of Law, Justice and Human Rights, the judiciary, lawyers, law schools, public libraries and the general public.**
- **To enhance the capacity of the legal profession and the judiciary.**
- **To undertake a survey of problems faced by businesses with a view to identify the laws that need to be reformed to bring them in line with the Government's economic liberalization policies.**
- **To disseminate information to ordinary citizens on the working of the Ombudsman Office and the small causes courts.**

The International Crisis Group (ICG), the “non-profit, non-governmental organization whose mission is to prevent and resolve deadly conflicts”, in a report titled ‘**Building Judicial Independence in Pakistan**’ has recommended curtailing the powers of the Chief Justice in the following manner:

- **Institute administrative reforms that curtail Chief Justices' power over the assignment of cases and of judges.**
- **Establish professional, managerial divisions within the courts to fulfill the task of assignment of cases.**

*Sui generis*, or parallel judicial configurations, is the other issue that needs an urgent resolution (*sui generis* is a Neo-Latin term that means “of its own kind or unique in its characteristics” indicating an “idea, an entity or a reality that cannot be included in a wider concept”). We have the following four such parallel judicial frameworks:

1. The 1901 Frontier Crimes Regulation (FCR) that covers 27,220 square kilometers of Pakistan and is applied to close to 6 million residents of FATA.
2. The 1997 Ehtesab Act passed by the Nawaz Sharif government (17 February 1997 to 12 October 1999) that gave birth to Ehtesab Courts.
3. The 1997 Anti-Terrorism Act that gave birth to Anti-Terrorism Courts.
4. The Federally Administered Northern Areas (FANA) simply falls outside the Constitution of the Islamic Republic of Pakistan. That means some 2 million residents of FANA and 72,496 square kilometers of Pakistan remaining outside the Constitution.

ICG has also made the following 11 recommendations:

- 1. End the practice of selectively offering new oaths to judges.**
- 2. End awarding government positions to retired judges.**
- 3. End the practices of not confirming additional judges.**
- 4. Renounce publicly the use of the judicial oath as a mechanism for purging the judiciary.**
- 5. Establish, by proposing and urging adoption of a constitutional amendment, a transparent system of judicial appoints to the High Courts that expands accountability for such appointments beyond the Executive.**
- 6. End deviations from the seniority rule in the promotion of High Court judges to the posts of Chief Justice; establish by statute a seniority rule for promotions from the High Courts to the Supreme Court.**
- 7. Establish public audits of all members of the superior judiciary and close family members to ensure the only statutory benefits are awarded and corruption is avoided.**

- 8. Institute new internal administrative mechanism for the prevention of corruption and the removal of corrupt High Court judges, with oversight from a judicial commission that includes members of the bars and parliamentarians.**
- 9. Absorb the anti-terrorism and accountability courts into the ordinary judiciary.**
- 10. Institute courts within Pakistan's ordinary judicial hierarchy, with review in the Peshawar High Court and the Supreme Court, for the FATA, and conform courts' jurisdictions, judges' tenure privileges in the judiciary of the Northern Areas.**
- 11. Endeavour to ensure that judicial decisions at all levels respect international human rights, including the rights of women, and make efforts to eliminate traditional and religious practices imposed by tribal and village councils that are harmful to women.**

In 2008, Transparency International (TI), the Berlin-based NGO, in its Corruption Perception Index (CPI) ranked Pakistan at 134 of the 180 countries TI surveyed. According to Syed Adil Gilani, Chairman TI Pakistan:

**“Corruption, defined as ‘Misuse of authority for private gain’ impacts the poor disproportionately. Corruption hinders economic development, reduces social services, and diverts investments in infrastructure, institutions and social services. Moreover, it fosters an anti-democratic environment characterized by uncertainty, unpredictability and declining moral values and disrespect for constitutional institutions and authority. He said that at this point of time, the only solution to Pakistan financial crises is an open government system to implement good governance and transparent Rule of Law,**

**and fully independent Judicial System, which permits the citizen to follow up cases of maladministration.”**

On March 24, Chief Justice of Pakistan Iftikhar Muhammad Chaudhry sat in Court Room Number 1 and began dispensing justice. To be sure, Pakistan’s 778,720 square kilometers of land mass is not about to become the land with canals of milk and honey. Justice Chaudhry shall be dispensing justice neither electricity nor *atta* or *pani*. And that is so because any tripod government rests on the Executive, the Parliament and the Judiciary. The Judiciary merely dispenses justice and keeps the Executive and the Parliament to within the bounds of the Constitution. *Bijli*, *atta* and *pani*—plus law and order—are part of the social contract between the elected politicians and the 172 million Pakistanis.

<b>Tenure of Judges</b>
<b>U.K.</b>
<b>Act of Settlement of 1701</b>
<b>Tenure of Judges guaranteed unless the Parliament removes them</b>
<b>U.S.</b>
<b>Lifetime tenure for all Federal Judges</b>
<b>Federal Judges can only be removed by Congress</b>
<b>Canada</b>
<b>Constitution Act, 1867</b>
<b>Right to tenure determined by the Parliament (not the Executive)</b>
<b>Right to salary determined by the Parliament (not the Executive)</b>

For the CJ, he would have to hold the Executive and the Parliament accountable (both consider themselves above accountability). The Lord Chief Justice of Pakistan would have to protect fundamental rights plus steer clear of all purely political quarrels.

Here are 5 of the most critical issues that need urgent resolution:

- 1. The Judicial organ of the state is severely under-financed.**
- 2. Corruption is endemic.**
- 3. The public lacks trust.**
- 4. There are parallel judicial structures (NAB, Anti-Terrorism Courts, Frontier Crimes Regulation, Northern Areas fall outside the Constitution).**
- 5. On top of all of that, adjournments last a life-time.**

Pakistan has been a 60-year sorry story of judicial subservience by the Executive. Our judicial apparatus continues to be frighteningly under-financed and the subordinate judiciary is thoroughly corrupt.

The other side of the coin is that the change that took place on 14 August 2002 is irreversible. Additionally, the changes that took place on 9 March 2007 and 16 March 2009 are also irreversible.