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Chief Justice under Attack and Independence of the Judiciary: What Lessons are there for Burma's Legal Profession?

Introduction

This article focuses on the 2007 judicial crisis in the Islamic Republic of Pakistan. In particular, the ability of its legal profession to work collectively to protect the independence of the judiciary, and lead a popular movement towards the successful reinstatement of the country's Chief Justice. The experience of Pakistan's legal professionals in struggling for judicial independence, human rights and democratic values under General Musharaff's military dictatorship is instructive in drawing parallels with the not incomparable situation in Burma. Why is it that Burma's bar association and legal professionals have fallen silent, and have been unable to stand up and defend the rule of law and rights of their people? What lessons can be learnt from the Pakistani lawyers' experience and applied to the Burmese context?

These issues will be addressed in four parts. First is an outline of the political background and judicial system in Pakistan to provide the context. Next, a review of the judicial crisis of 2007 that sparked the mobilization of thousands of Pakistani lawyers on the streets. In the third section, connections are made between the experiences of the judiciary and legal profession in both countries. And finally, a set of recommendations directed at Burma's legal profession concludes the article.

Part I (i) Pakistan's Political Background

Pakistan gained independence on partition of British India in 1947 and has since vacillated between military and civilian governments. Military leaders have ruled the country for more than half of the past 50 years, and their influence over the political system has been significant.

In 1999, a military coup resulted in General Pervez Musharraf ousting elected Prime Minister Nawaz Sharif and assuming executive powers. In 2001, Musharraf named himself as President and was sworn in, becoming Pakistan's



fourth Army chief to have assumed executive control. The following year there was a handover from military to civilian rule with parliamentary elections in November 2002, and the appointment of a civilian prime minister, Mir Zafarullah Khan Jamali. A confrontation over authority between Parliament and the President ended in December 2002 with a compromise under the terms of which Musharraf pledged to resign his military position as Commander-in-Chief in late 2004. However, in 2004 Musharraf announced that he would retain his military role.

It seems that a similar pattern has been repeated again in 2007 – 08, with Musharraf controversially holding on to power for a second presidential term, and continuing to use a range of oppressive and dubious tactics to secure his control over the country, and notably the judiciary. The latest parliamentary elections resulted in a civilian prime minister. On March 25, 2008, Musharraf swore in Syed Yousaf Raza Gillani as the Prime Minister, who leads a coalition government united against him. Whether this is proof that Musharraf's authoritarian rule is starting to wane is still to be seen, although there are already signs that this may be the case.

Part I (ii) The Judiciary in Pakistan

Judicial Structure

Pakistan's judicial system comprises three levels of federal courts and three divisions of lower courts, as well as a Supreme Judicial Council. The Supreme Court is Pakistan's highest court, and its Chief Justice is appointed by the President. Together, they determine the other judicial appointments. The Supreme Court has original jurisdiction in any federal – provincial type dispute, or between provincial governments. It also has appellate jurisdiction and advisory functions. The appellate jurisdiction of the Supreme Court covers final orders, judgments, decrees, and sentences handed down by the High Court, the Federal Shari'a Court, and the appellate Tribunals.¹

Each of the four provinces has a high court, the justices of which are appointed by the president after conferring with the chief justice of the Supreme Court and the provincial chief justice. These courts have original and appellate jurisdiction over decrees, judgments and sentences issued by civil and criminal courts. The judiciary however, is proscribed from issuing orders that are contrary to any Presidential decisions. The Federal Shari'a Court hears cases that primarily involve Islamic law. The Bench comprises eight Muslim judges appointed by the President. Although Shari'a was given legal status in 1991 and has original jurisdiction to determine laws which are repugnant to Islamic law, it has not replaced the existing legal code.²



Suspension of the 1973 Constitution

The 1973 Constitution was the first constitution in Pakistan to be framed by elected representatives. It created a parliamentary form of democracy in which the executive power is vested mainly in the Prime Minister's Office. The President is the formal head of state, but is bound to act on the advice of the Prime Minister. This constitution has been suspended three times in its 25 year history; most recently by Musharraf on November 3, 2007. It was later restored on December 14, 2007.

Following the suspension of the constitution in October 1999 by Musharraf, a National Accountability Bureau (NAB) was set up, together with accountability courts in order "to work to eliminate corruption through a comprehensive approach encompassing prevention, awareness, monitoring and combating."³ Under these extra-judicial tribunals, and pursuant to section 58(2)(b) of the constitution, former Prime Ministers Nawaz Sharif and Benazir Bhutto were both charged and convicted of corruption, and their governments dismissed. According to the International Commission of Jurists, the NAB and the accountability courts are prone to denying due process and fundamental rights.⁴ Other special courts, including Anti-Terrorism Courts have also been set up under Musharraf and are not required to adhere to due process or provide fair trial guarantees.

Article 6 of the Constitution, which states that anyone who abrogated or attempted or conspired to abrogate or subvert the constitution shall be "guilty of high treason," may have been an attempt by the drafters to avert potential takeovers of the state by military leaders. History, however, has demonstrated clearly that this has not provided an adequate bulwark against military coups. Moreover, it is evident that constitutional amendments have been successfully made by military leaders such as Musharraf in order to provide immunity against acts such as declaring emergency rule.⁵

Cheema identifies six important steps that army chiefs have taken to give their coups legitimacy and to strengthen the power of military rule. They co-opt the bureaucracy; use accountability against politicians; entrench the army in political and civil affairs; create a new breed of politicians subservient to them under the guise of local government reform; hold elections to create some sort of democratic legitimacy; and finally move to co-opt the judiciary.⁶

Of key concern in this paper, is the recent incursion of military influence into the judicial sphere and the accompanying loss of judicial independence; and importantly, how the legal profession in Pakistan reacted to the Musharraf-led encroachment.



Part II

Pakistan's 2007 Judicial Crisis

Pakistan's judicial crisis unfolded on 9 March 2007 when Musharraf suspended Iftikhar Chaudhry, Chief Justice of the Supreme Court, from his position for alleged impropriety and misconduct, which essentially meant corruption charges.⁷ This bold act was the first time in the Supreme Court's 50 year history for a chief justice to be suspended.⁸ Chaudhry's removal infuriated the country's legal community and immediately resulted in several hundred lawyers demonstrating publicly against what was seen to be an executive and anti-constitutional attack on the independence of the judiciary. Within one week, the protests escalated into a full-scale campaign against military rule. By May, a nationwide protest movement was underway with calls for a civilian government, fair elections, and the return of democracy.

After months of sustained and widespread public protests in Pakistan, and having been held under house arrest since 10 March 2007, a full 13-member bench of the Supreme Court reinstated Chaudhry on technical grounds as head of the judiciary, and quashed all charges against him on 20 July. This became an historic moment in Pakistan as it was the first ever verdict to contradict a military ruler.

The assaults on democracy and the rule of law by Musharraf's administration continued right through 2007, with the arrest and detention of thousands of lawyers and the misuse of existing laws and adoption of new or amended laws that further undermined the civilian judiciary and consolidated military control.⁹ According to Basilio Alo, "Chaudhry has spoken out against emergency rule and inspired thousands of his lawyer-brethren to protest in the streets in their traditional black suits and ties. He has become an international symbol of an independent judiciary and of resistance to the excesses of military rule. Hundreds of attorneys have also turned out to protest on his behalf in cities across the country."¹⁰

Tensions remained high surrounding the re-election of Musharraf as President for a second term. In November 2007, shortly before the Supreme Court of Pakistan was to determine the constitutional validity of his re-election as president,¹¹ Musharraf, as Chief of Army Staff, suspended the constitution, dismissed about 60 senior judges and lawyers of the supreme court including, for the second time, Chief Justice Iftikhar Muhammad Chaudhry. Many of these members of the judiciary were placed under house arrest. Musharraf also ordered the arrest of political dissidents and human rights activists, and closed all private media. He then declared a state of emergency in Pakistan which lasted until December 15, 2007, and during that time the constitution remained suspended. On November 24, 2007, the Pakistan Election Commission confirmed his re-election as President.¹²

Yousef Raza Gillani, immediately after becoming prime minister, ordered



the release of deposed chief justice Chaudhry and other top judges from house arrest on 24 March 2008. That move has been seen as a direct affront to Musharraf, and one which challenges his political authority.¹³

Dismissal of the Chief Justice

The charges laid against Chief Justice Chaudhry by Musharraf's government were judicial misconduct, misuse of office, and nepotism. It is alleged that he used his position for personal gain and more specifically, sought to position his son in the police force's upper ranks. Based on these circumstances, Musharraf declared the Chief Justice "non-functional". Few people were convinced by Musharraf's explanation for his dismissal of Chaudhry; and many believed that he did not have the power to suspend the Chief Justice in such circumstances.

Given Chaudhry's track record of demonstrating judicial independence and taking on cases that challenged the government, there is little doubt about Musharraf's motives in seeking to silence what he felt to be a hostile judiciary. For example, in the Pakistan Steel Mills privatization case, the Supreme Court blocked the sale of a state-owned steel mill, from which some government officials reportedly would have profited. The fact that the judiciary dared to confront the somewhat taboo yet scandalous issue of the Pakistani military's profitable economic empire,¹⁴ could be deemed historically significant and exceptional.

Chaudhry also raised the issue of disappeared persons thought to be held by Pakistani and United States state intelligence agencies in connection with the "war on terror." Moreover, Chaudhry's apparent opposition to Musharraf's continuing as both President and Army chief irked the military leadership considerably. According to Imran Khan of the Tehrik-e-Insaaf (Movement for Justice) political party, "this is the first time in our history that the judiciary has asserted its independence. Normally, it just sides with whoever is in power. Change is irreversible. You can't have prosperity without genuine democracy and an independent judiciary."¹⁵

Considering that a constitutional amendment was required for Musharraf to continue to double as President and Commander-in-Chief, the military government saw the unallied Chief Justice as an impediment to Musharraf staying in office without removing his uniform. The dismissal of Chaudhry gave Musharraf tremendous powers. He targeted the judges principally, many of whom he sacked, and the country's lawyers by the hundreds, who were arrested and jailed without charge or trial.¹⁶

Fighting for an Independent Judiciary

The protest movement gained ground by employing the following tactics to pressure the Musharraf government and to draw national and international attention to the crisis.



- *Mass public street demonstrations: human chains, protests, picketing, rallies*
- *Targeted demonstrations*
- *Boycott of court proceedings; complete strike of courts*
- *Resignations in protest*
- *Utilizing the media*
- *Inter-city marches*
- *Lawyers sending affidavits en mass to support Chief Justice's legal team*

Lawyers from all parts of Pakistan, Supreme Court judges, other judges, and retired judges participated to show their support for the Chief Justice for the first time in the history of Pakistan. A national conference was organized by lawyers to call on all political parties to postpone their assemblies and join the struggle to bring about democratic change to the government.

Furthermore, the Pakistan Bar Council (PBC) mobilized professional parties, non-governmental organizations, the Pakistan Federal Union of Journalists, the Medical Association, the Medical Council, the Engineering Council and associations of chartered accountants, architects and other activists to join together in civic actions.

Two important features of the protest movement spearheaded by the legal profession in Pakistan were that it was both unified and comprehensive. Protestors were united in their cause to bring about the reinstatement of the chief justice and other dismissed members of the legal profession, and demand that the rule of law and a democratic system of governance be put in place. They additionally called for the release of those disappeared by the military and intelligence agencies, and sought an end to the police practice of beating lawyers and journalists.¹⁷

The sight of hundreds of typically well-dressed lawyers engaged in impassioned and nonviolent direct action on Pakistan's city streets was also irresistible for the international media, and the judicial crisis received widespread coverage in many countries.

Arrests, Detentions and Violent Suppression

Pakistani authorities responded to the protest movement in a heavy-handed way, employing violent tactics to suppress the protestors, according to the Asian Human Rights Commission.¹⁸ Demonstrators were attacked, the national media was curtailed, and severe restrictions were imposed on the discussions about the Chief Justice military procedure before the Supreme Court. For example, a 14 March 2007 protest led by lawyers from the Sindh High Court Bar Association involved forming a human chain around a court building. Police used violence to break up the demonstrators, which resulted in scores of injuries and arrests.¹⁹

The military government suppressed protests by arbitrarily detaining lawyers and other demonstrators under the provisional criminal code.²⁰



Thousands of lawyers, estimated to be at least 3000, have reportedly been arrested across the country since 3 November 2007, many said to have been beaten and taken to unknown locations, some arrested without arrest warrants, some held incommunicado.²¹

Violence and intimidation was also reportedly used against the Chief Justice's family, his legal team, as well as a range of other people in positions of authority, such as the president of the Supreme Court Bar Association (SCBA), and the vice-president of the Pakistan Bar Council.

Part III

What are the implications for Burma?

The Historical Role of Lawyers and the Bar Council in Burma

Following independence in 1948, and a period of democratic governance, Burma became an authoritarian state from 1962. General Ne Win took control in a military coup that violated the 1947 Constitution, and later replaced all political parties with his Burma Socialist Programme Party (BSPP). In 1988, amid economic instability and mass civilian protests, the military declared martial law and established a new dictatorship led by the State Law and Order Restoration Council (SLORC). This was subsequently reincarnated as the State Peace and Development Council (SPDC) in 1997, and Senior General Than Shwe is presently at the head of the military junta.

The potential for an independent judiciary in Burma disappeared as rapidly as Ne Win rose to power. It is arguable that prior to 1988, the Bar Council and Bar Associations in Burma retained a degree of freedom in their organization. For instance, the Executive Boards of the Bar Council and Bar Associations were elected from among their membership by a general vote. In saying that, during the BSPP era, senior judges were chosen from among members of parliament, and they in turn appointed other judges down the hierarchy – typically those who were loyal to Ne Win.²² In this way, members of the judiciary were answerable to the Executive and the separation of powers did not exist.

During the democratic uprising in 1988, the Bar Council of Burma issued a statement that supported the will of the people and criticized the violent actions of SLORC. A significant number of judges and lawyers also joined, took to the streets and marched in the public demonstrations. Despite the legal profession having publicly vowed to support and stand for the people, this has not been borne out in the post-1988 era for two main reasons: monopolization of the Bar Council and the upper echelons of the legal profession by the military regime, and rampant corruption amongst the judiciary's ranks.

Currently, the SPDC appoints all Bar Council members based on loyalty and favor. Members can be expelled at anytime if they cease to follow orders from the military junta. Absolute control by the SPDC has rendered the Bar Association and Bar Council ineffective in opposing the regime and supporting the people of Burma.



The inability of the judiciary and legal profession to be independent from the legislature and facilitate good governance is because it is rooted in a culture of corruption. Judges and court officials who regularly accept bribes and rule in favor of those who bribed them are in the majority. To this end, a corrupt judiciary makes the action of stamping out corruption amongst other public officials in other sectors somewhat redundant.

In 2006, Mr. Paulo Sergio Pinheiro, the Special Rapporteur on the situation of human rights in Myanmar reported to the UN General Assembly that, “The capacity of law enforcement institutions and the independence and impartiality of the judiciary have been hampered by sustained practices of impunity. I am also very concerned by the continued misuse of the legal system, which denies the rule of law and represents a major obstacle for securing the effective and meaningful exercise of fundamental freedoms by citizens.”²³

When examining why Burma’s bar association and legal professionals have fallen silent, and failed to defend the rule of law and the rights of their people, it is essential to acknowledge the judiciary’s systemic problems of corruption, impunity and manipulation by the military. There is no doubt that addressing Burma’s debased courts is a long and fraught struggle. Great courage, integrity and determination are required to help restore what the Asian Legal Resource Centre has termed the “disgraceful condition of Myanmar’s judiciary.”²⁴ And yet it is clear that there are victims and lawyers willing to argue seemingly impossible human rights cases and to fight for real justice.

The experience of the Pakistani lawyers’ movement in 2007 should provide some inspiration and impetus to the legal profession inside Burma. The victory of the Pakistani lawyers and the civic movement in struggling fearlessly to return the Chief Justice to his rightful position, and defying the autocratic leadership of Musharraf, serves as a case study for hope. In the face of brutal authoritarianism and an absence of the rule of law, and after years of repression and demoralization amongst the ranks, it is still possible to fight for change. The experience in Pakistan demonstrates that the “affected people themselves have retaliated, fought hard for months, defeated the political power of the military leader and now have ensured that the parties elected by them return the judiciary to its rightful place.”²⁵

Burma’s judiciary is monopolized and manipulated by the military regime and yet the struggle for judicial independence hardly registers a note. Now is the time for Burma’s lawyers and judges to step forward and fight for judicial independence.



Part IV

Recommendations

The Bar Council and Associations should:

- actively support lawyers who fight for justice. When appropriate, they should speak out publicly in defense of lawyers who protect the rights of people legally;
- revitalize the spirit of the legal profession so as to motivate younger lawyers to defend justice;
- insist on proactive participation by their members in bringing about reform of the judiciary and in stamping out corrupt practices;
- not allow Executive Members to be appointed by the military regime;
- build stronger connections with the media, including the regional and international media, as well as with other relevant professional organizations;

Additionally,

- The Bar should initiate and facilitate changes on the Bench;
- To maintain its independence from the ruling military regime, the chair of the Bar Council should not be the Attorney General. In most countries, unlike in Burma, the chair of the Bar is elected by its members;
- Lawyers should highlight the ways in which the military regime interferes with the independence of the judiciary and educate the people about the importance of an independent and impartial judiciary for a fair society;
 - Lawyers should identify that they carry the greatest responsibility for resolving conflicts of the people caused by the military dictatorship form of government;
 - The Chief Justice should not decide a case according to the desired wishes of the military regime, nor base decisions on political considerations;
 - The people in Burma should support the Bar Association in its struggle to create an independent judiciary;
 - The legal community as a whole needs to build more effective relations with the UN agencies, the International Community and other organizations to increase international pressure on Burma.

(Endnotes)

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¹⁴ Ali Dayan Hasan, South Asian researcher for Human Rights Watch cites the Pakistani military's economic empire to be valued at US \$20 billion. See Ali Dayan Hasan, "Pakistan's General Problem: popular resistance to Musharaff's rule has seemingly caught the U.S. off-guard", Los Angeles Times, 27 June 2007, <http://hrw.org/english/docs/2007/06/27/pakist16263.htm>. Accessed 12 December 2007.

¹⁵ Above at 9.

¹⁶ William Dalrymple, 'Days of Rage: Challenges for the Nation's Future', The New Yorker, 23 July 2007.

¹⁷ Asian Human Rights Commission, Statement dated 14 March 2007, AS-049-2007 <http://pakistan.ahrchk.net/chiefjustice>. Accessed 12 December 2007.

¹⁸ See for example, documentation of the crisis on <http://pakistan.ahrchk.net/chiefjustice>.

¹⁹ See the joint online publication by the Pakistan Bar Council and the Asian Human Rights Commission documenting the 2007 Lawyers Movement at <http://pakistan.ahrchk.net>.

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