

**ARE COURTS IN PAKISTAN POLITICALLY DIVIDED? IS IT ALL ABOUT JUDGES OR THE JUDICIARY ITSELF? A QUALITATIVE ANALYSIS OF THE PAKISTAN'S JUDICIAL POLITICAL HISTORY**

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**I. Abstract**

*This study sets the shift in judicial behaviour within the backdrop of increased social contestation and emphasises the relationship between institutional change and social structural transformation. It argues that the major driver of the growth in judicial activism is the emergence of a sizable, aspirational urban middle class—a social structural change that is amply reflected in the changing class mix of the court, among other institutions. The political perspective of the judiciary, namely the ruling by Pakistan's Supreme Court and high courts, changed concurrently with this movement. The growing middle class, whom the judiciary identified with and regarded as a source of support, as well as the spread of information and the unification of ideologies and values as a consequence of these inequalities. As a result, both the middle class and the judges began to be cognizant of class. This widespread knowledge of class and the rise of judicial activism around the world may help to explain how and why the behaviour of judges has changed in Pakistan.*

**II. INTRODUCTION**

The foundations of Pakistan's current legal structure date back to mediaeval times, maybe much earlier. Approximately one millennium was required for the establishment of the legal system as we know it today. The system was in use over a number of historical periods, including the Hindu, Muslim, and British colonial ages, as well as the Mughal Empire and

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post-independence periods. The judicial system normally maintained a steady growth and gradual march towards consolidation and improvement/refinement despite the frequent changes—one rule or dynasty being replaced by another—which ultimately contributed to the socio-economic and political turmoil of Indian society. This was true even if there had been no severe failure or interruption (Mehmood, A., & Cousins, J. J. 2022)<sup>2</sup>. The system went through three different historical eras: the Hindu Kingdom, Muslim Rule, and British Colonial Administration. The fourth and present phase got under way with the division of India and the founding of Pakistan as a sovereign and independent state. As a result, the system has expanded and altered. On this issue, almost all legal analysts and historians in India are in agreement. The judicial system did receive inspiration and influence from foreign doctrines and ideas as well as native norms and practises throughout this era of growth and expansion (Kureshi, Y. 2022)<sup>3</sup>. This was true both in terms of setting up the structure, hierarchy, and jurisdiction of the courts as well as adopting trial procedures and practises. Contrary to common assumption, this has led to a local flavour and national tint being added to the contemporary legal system rather than it being entirely imported. And although the approach may not be ideal for our people's intelligence or the characteristics of the area, it has been used often and has been refined to the point where the ordinary person can grasp it. The fact that more and more people are using the legal system to settle their differences and conflicts suggests that the system has some degree of legitimacy and acceptance (Rafiq, A. 2022)<sup>4</sup>.

The Pakistani Constitution includes a rather comprehensive description of the higher judiciary as well as specific guidelines on the composition, purview, power, and obligations of several courts. The Constitution guarantees both "independence of the judiciary" and "separation of the judiciary from the government." The higher courts are charged with the duty to "preserve, protect, and defend" the Constitution. The Constitution also outlines the qualifications needed to become a judge, as well as their appointment process, required years

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<sup>2</sup> Mehmood, A., & Cousins, J. J. (2022). Judicialising Urban Political Ecologies: Post-Politics and Environmental Governance in South Asia. *Antipode*.

<sup>3</sup>Kureshi, Y. (2022). *Seeking Supremacy: The Pursuit of Judicial Power in Pakistan*. Cambridge University Press.

<sup>4</sup> Rafiq, A. (2022). *Changing course: understanding judicial independence in Pakistan* (Doctoral dissertation, University of Oxford).

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of service, compensation, and benefits. The Federal/Provincial Consolidated Fund pays for judge salaries and other costs related to running the superior courts. This means that the legislature can talk about them, but they can't decide on them (Iqbal, A., Bangash, A. U., & Reayat, N. 2022)<sup>5</sup>. The causes, venue, and method for the removal of 18 judges from the superior courts are also laid forth in the Constitution. The Supreme Judicial Council, which is made up of the senior judges of the Supreme Court and High Courts, has the authority to recommend the dismissal of a judge for misconduct or physical or mental incompetence, either on its own initiative or in response to a request from the President. So, the Constitution guarantees that the higher court will be free, independent, and fair. The Supreme Court and the High Court's recently acquired some financial independence. This action was taken in reaction to the Supreme Court's ruling in the case of *Government of Sind v. Sharaf Faridi*, this action was taken (Fatima, S., Bilal, M., & Khokhar, F. 2022)<sup>6</sup>. The judiciary's independence, in the court's view, also entails that the executive no longer has financial influence over it. The Chief Justice of the Supreme Court and the High Courts should thus be permitted to transfer funds within the budgeted allotment without the Finance Ministry's consent. The Chief Justices would therefore have the power to transfer funds between heads, add or remove 20 roles, and upgrade or degrade already-existing positions, the Court said (Künkler, M. 2022)<sup>7</sup>. The Constitution's Article 175(3), which states that the "judiciary should be gradually detached from the Executive within 14 years," was the subject of this ruling." The Court found that in order to comply with this constitutional requirement, the judicial judges had to be placed under the High Court's administrative control and the magistracy's authority had to be split. The Court established March 23, 1994, as the cut-off date for adopting this clause. As a result of the review petition, the Supreme Court extended the deadline in a decision dated January 24, 1996, to March 23, 1996. Additionally, it emphasised the need for separation to be finalised by the deadline and made it clear that any further requests for extensions of time would not be taken into account. Due to the

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<sup>5</sup> Iqbal, A., Bangash, A. U., & Reayat, N. (2022). Judicial Empowerment and the Support of the Legal Community in Pakistan. *Pakistan Social Sciences Review*, 6(2), 603-614.

<sup>6</sup> Fatima, S., Bilal, M., & Khokhar, F. (2022). Executive Intervention in Judicial Independence in Pakistan: An Overview of the Past. *Dialogue (Pakistan)*, 17(1).

<sup>7</sup> Künkler, M. (2022). Legal Professionals in the Muslim World: Between Social Transformation, Judicial Control, and Feminisation. *Mirjam Künkler, "Lawyers in the Muslim World: Between Social Transformation, Judicial Control, and Feminisation" in Rick Abel, Ole Hammerslev, Hillary Sommerlad, Ulrike Schultz (eds.) Lawyers in 21st-Century Societies: Comparisons and Theories. Oxford: Hart, 73-97.*

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appropriate legislative modifications, the High Court's now have access to judicial judges (Bilal, M., & Khokhar, F. 2022)<sup>8</sup>. In the judgments of Al-Jehad Trust v. Federation and Asad Ali v. Federation, the Supreme Court further clarified the procedure and specifications for appointment to the Supreme Court, High Court, and appointment of the Chief Justices of the aforementioned courts. This tactic was modified by the Constitutional 18th and 19th (Amendments) Acts of 2010. Before these changes, it was customary for the President of Pakistan to accept a panel of nominees from the Chief Justice of Pakistan and choose a competent judge from that panel. Similar to this, the President would receive a panel of potential nominees for appointment from the Chief Justice of each High Court. The Chief Justice of Pakistan and the Provincial Governor would then approve this panel. He had to follow the Chief Justice's advice, unless there were important reasons that the President had to know about (Jatoi, S. A., Mustafa, G., & Kataria, M. S. 2022)<sup>9</sup>.

### III. RESEARCH METHOD

The research was normative legal research, and it analyses about the courts in Pakistan, their politically involvement, also the role judges and the judiciary.

### IV. ARE COURTS IN PAKISTAN POLITICALLY DIVIDED?

Over the last several decades, Pakistan's courts have evolved to serve not just a legal but also a political purpose. The courts may be crucial as the nation's opposition considers its next move. One of the most important changes to the country's current political system is the establishment of Pakistan's superior judiciary, which is made up of the Supreme Court, the Federal Court of Islamic Law, and the country's provincial high courts, as a combative and active centre of power. As elected institutions and political parties compete for more power in the government, conflicts between institutions have become common (Hussain Jillani, T.

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<sup>8</sup> Bilal, M., & Khokhar, F. (2022). Executive Intervention in Judicial Independence in Pakistan: An Overview of the Past. *The Dialogue*, 17(1), 105-119.

<sup>9</sup> Jatoi, S. A., Mustafa, G., & Kataria, M. S. (2022). JUDICIAL ACTIVISM AND DEMOCRACY IN PAKISTAN: A CASE STUDY OF CHIEF JUSTICE SAQIB NISAR ERA. *Pakistan Journal of Social Research*, 4(2), 1-11.

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2022)<sup>10</sup>. In the past, Pakistan's military exercised a disproportionate degree of power. In this hostile environment, Pakistan's supreme court has been an important part of the country's political system. It has helped settle conflicts between political elites and state elites. But over the past fifteen years, the superior judiciary has advanced from simply mediating political disputes to assuming its own tutelary role within the political system, using its veto power to push its own ideas on politics and policy while limiting the influence of elected institutions(Lin, C. C. 2022)<sup>11</sup>. The court has frequently contested, constrained, and hurt institutions that are both elected and unelected as a result of this recent finding. Opposition organisations and state officials have turned to the courts, which are using increasing powers to try to topple civilian and military administrations(Crouch, M. 2022)<sup>12</sup>.

The circumstances surrounding the demise of Imran Khan's government this year brought to light the prominence, tutelary objectives, and challenges of the superior judiciary's interactions with other state institutions and society. After the Supreme Court determined that Khan's efforts to halt the vote and call for early elections were illegal, a coalition of opposition parties forced Khan to accept the no-confidence vote in parliament. Various members of the public have views on the choice. Others who thought the court respected the constitutional order and those who thought it was "a judicial coup" had divergent opinions. To properly understand this ruling and its political ramifications, it's crucial to take into account how the supreme court has evolved through time and how it now functions. Due to changes in its organisational structure and philosophy, the court now shares a large amount of authority with the military that is not decided by popular vote. As the judiciary tries to make its mark on politics and policymaking, it sometimes goes up against, limits, or works with elected and non-elected power centres' (Ahmed, I. 2022)<sup>13</sup>. Meanwhile, political and military elites try to co-opt or control judges in order to align the judiciary's growing power and ambition with their own interests and ambitions. This relationship affects Pakistan's political environment. But as judicial aggressiveness goes up, standards go up and political discontent

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<sup>10</sup> Hussain Jillani, T. (2022). Interplay of majority/minority rights, religious freedom and the role of judiciary in Pakistan. *South Asia@ LSE*.

<sup>11</sup> Lin, C. C. (2022). The Impact of Constitutional Courts in Asia. In *Oxford Research Encyclopedia of Politics*.

<sup>12</sup> Crouch, M. (2022). Judicial Loyalty to the Military in Authoritarian Regimes: How the Courts Are Militarized in Myanmar. *Law & Social Inquiry*, 1-28.

<sup>13</sup> Ahmed, I. (2022). Between God, the Nation, and the State: Paradoxes of Islamisation in Pakistan. In *Religion, Extremism and Violence in South Asia* (pp. 185-211). Palgrave Macmillan, Singapore.

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grows. This makes for a complicated relationship between strength and weakness (Shamshad, M., Sarwar, I., & Arshad, F. 2022)<sup>14</sup>.

## V. IS IT ALL ABOUT JUDGES OR THE JUDICIARY ITSELF?

Using a mix of judicial innovation and constitutional provisions, the court was granted the power to sway the judgments of other governmental bodies. The 1973 constitutional amendment increased the scope of the judiciary's review power. The High Courts are empowered by the Constitution to ensure that governmental institutions protect fundamental rights. Now that it has concluded that some problems involving the protection of fundamental rights are "of public concern," the Supreme Court may rule on them. Following significant improvements after 2006, public interest litigation, which had its beginnings in the late 1980s, has been utilised by the courts as a tool to meddle in the affairs of the administrative and legislative branches of government in the name of the public interest. The top judge began taking on cases that were often based on media and television reports when there wasn't a petitioner. *Suo moto* powers, which let the court respond to public opinion and make the court more visible and have a bigger impact, were up to the discretion of the chief judge. Second, the judiciary severed its connections with the executive branch and assumed control of the government's power to nominate judges (Munir, B., et al. 2020)<sup>15</sup>.

The official goal of executive institutions has been limited twice, once by a constitutional change in 2010 and once by court intervention in the 1990s. The senior justices of the Supreme Court and high courts make up the Judicial Commission, which is in charge of regulating judicial nominations and promotions. Third, judges for the highest courts are frequently chosen from the legal community, where the ethos of the profession favours challenging administrative authority, whether military or elected, and increasingly disregards formalities. The political landscape was divided and courts rose to prominence as venues for settling political conflicts throughout the democratic decade of the 1990s, when political parties were barely institutionalised and inter-institutional conflict was the norm. Judges and

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<sup>14</sup> Shamshad, M., Sarwar, I., & Arshad, F. (2022). From Restoration to Activism: A Case of Judiciary in Pakistan, 2007-18. *Pakistan Journal of Social Sciences*, 42(1), 173-183.

<sup>15</sup> Munir, B., Rafiq, M. W., Rana, M. F. A., Zia, M. M. H., & Rafique, W. (2020). THE WAR OF JUDICIAL INDEPENDENCE IN PAKISTAN: A CRITICAL ANALYSIS OF LEADING POLITICAL CASES.

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lawyers believe that the state's political leadership lacks legitimacy and that the court has the power to affect national politics and policy (Hameed, U., Shafiq, H. M. S., & Zadi, K. I. 2022)<sup>16</sup>. The court was able to grow in a more ambitious and confrontational way because it had more jurisdictional power, the executive was no longer tied to the courts, politics were becoming more like law, and the legal culture was changing. The Chief Justice's responsibilities and power are of a particularly important nature because of the judiciary's engagement in political results and processes. The chief justices of the high courts and Supreme Court also determined when cases would be accepted for hearings, as well as how many and which judges would hear those cases, in addition to public interest litigation and judicial nominations. As a consequence, chief justices have the power to appoint judges to the benches, which has an impact on case outcomes. A chief judge who is vulnerable to influence and has the backing of the military or a political party may now have a significant effect on the law of a particular court as a result of the centralization of the judiciary (Ahmed, I. 2022). However, the military and political elites find it challenging to control and coopt the court because of the judiciary's tight ties to bar organisations. Judges try to establish a strong reputation among the members of the bar as their main clients as their legal careers progress. The bar has a history of political engagement and has collaborated with other groups to address both business and political challenges. The bar's capacity for collective action and disruption may serve as a check on attempts by political and military authorities to exert control over the court, as was illustrated during the Lawyers' Movement in 2007 (Staton, J. K., & Moore, W. H. 2011)<sup>17</sup>. Since they know this, political parties and the military try more and more to lobby and persuade bar leaders in order to indirectly affect judges. Judges' behaviour has become more combative as a result of the tight but sometimes strained connections between the bar and the court, as well as the overlap in legal cultures (Jawad, A. 2022)<sup>18</sup>. Democrats have long believed that the military's engagement in politics is justified by a subservient relationship between the military and the higher courts. In the 1990s, interactions between Pakistan's prime minister, president, and chief of army staff shaped the

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<sup>16</sup> Hameed, U., Shafiq, H. M. S., & Zadi, K. I. (2022). Role of Media to Overcome Delay in Justice: Pakistani Prospective. *Journal of Development and Social Sciences*, 3(2), 1007-1014.

<sup>17</sup> Staton, J. K., & Moore, W. H. (2011). Judicial power in domestic and international politics. *International Organization*, 65(3), 553-587

<sup>18</sup> Jawad, A. (2022). An evaluation of Anti-Terrorism laws in Pakistan: Lessons from the past and challenges for the future. *Security and Defence Quarterly*.

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country's politics (together known as the "troika"). The elected executive office, headed by the prime minister, and the unelected executive leadership, made up of the president and military, often battled until the coup in 1999 that brought General Pervez Musharraf to power (Umar, M., & Khan, N. 2022)<sup>19</sup>. For the aforementioned reasons, the courts started to become increasingly autonomous and interventionist in the 1990s. The upper courts and Musharraf's government clashed in 2007 as a consequence of this tendency. Commander Justice Iftexhar Muhammad Chaudhry was fired and steps were taken to clean up the court because of an interventionist Supreme Court that questioned the regime's core interests, such as Musharraf's ability to continue being president and chief of the army staff (Waseem, M. 2012)<sup>20</sup>. The superior judiciary was upheld by judges who rebelled against Musharraf's control, and attorneys united to preserve it, sparking a nationwide democratic movement that ultimately led to Musharraf's ouster. The upper courts' resistance to and significant influence over Musharraf's government led to its strengthening (Delaney, E. F. 2022)<sup>21</sup>. Judges started to play a tutelary role in the political system after Musharraf's departure and the restoration of an elected civilian administration, combating what they saw to be the excesses and corruption of Pakistan's other power centres. The supreme court, the chief of staff of the armed forces, and the prime minister have come to be known as Pakistan's democratic political system's "new troika." During this decade, national politics was dominated by the conflicts between these three officeholders and their changing allegiances (Sule, I. 2022)<sup>22</sup>. In order to lessen the influence of elected politicians in the unelected bureaucracy, the higher courts, most notably the Supreme Court, accepted the goal of promoting governance and eliminating corruption by interfering with and frequently overturning bureaucratic transfers and postings (Deshmukh, A. 2022)<sup>23</sup>. Along with the creation of socioeconomic policies, the Pakistan People's Party (PPP) and Pakistan Muslim League-Nawaz (PML-N) political leadership were the principal targets of the courts' anti-corruption investigations (Mehmood, S., & Seror, A.

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<sup>19</sup> Umar, M., & Khan, N. (2022). Anti-terrorism courts' convictions in trials of sectarian-terrorism crimes: A case study of the Punjab province of Pakistan. *Asian Journal of Comparative Politics*, 20578911221103441.

<sup>20</sup> Waseem, M. (2012). Judging democracy in Pakistan: Conflict between the executive and judiciary. *Contemporary South Asia*, 20(1), 19-31.

<sup>21</sup> Delaney, E. F. (2022). THE UK'S BASIC STRUCTURE DOCTRINE: MILLER II AND JUDICIAL POWER IN COMPARATIVE PERSPECTIVE. *Notre Dame Journal of International & Comparative Law*, 12(1), 22.

<sup>22</sup> Sule, I. (2022). Judicial Independence in Nigeria: Between Global Trends, Domestic Realities and Islamic Law. *IJSSHR-International Journal of Social Science and Humanities Research*, 5(05), 18-33.

<sup>23</sup> Deshmukh, A. (2022). Rule of Law: A Comparative Analysis of India and Pakistan. *Issue 1 Int'l JL Mgmt. & Human.*, 5, 451.

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2022)<sup>24</sup>. The authority of elected politicians is diminished by frequent judicial intrusions into the workings of executive and legislative institutions, notwithstanding the serious problems of political and administrative corruption that must be addressed (Williams, N. W., & Hanson, M. 2022)<sup>25</sup>. Yousef Gilani and Nawaz Sharif were both elected prime ministers before they resigned because of the Supreme Court's focus on political corruption and broad view of its power (Bajpai, R., &Kureshi, Y. 2022)<sup>26</sup>.

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<sup>24</sup> Mehmood, S., &Seror, A. (2022). Religious leaders and rule of law. *Journal of Development Economics*, 102974.

<sup>25</sup> Williams, N. W., & Hanson, M. (2022). Captured Courts and Legitimized Autocrats: Transforming Kazakhstan's Constitutional Court. *Law & Social Inquiry*, 1-33.

<sup>26</sup> Bajpai, R., &Kureshi, Y. (2022). Mechanisms of democratic authoritarianism: de-centring the executive in South Asia and beyond. *Democratization*, 1-22.

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