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### **Social Diversity and the Judiciary in Pakistan**

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## **Social Diversity and the Judiciary in Pakistan**

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The mainstream political discourse that has developed in Pakistan since Partition has often revolved around a monolithic notion of Muslim identity that, albeit moderated by the acknowledgment of non-Muslim minorities, does not seem to be equipped to respond to the global landscape of social diversity not only outside the Muslim majority of the Federal Republic, but also within the great ethnic and social variety of Muslim communities. However, the preamble of the 1973 Constitution states that the interests and the rights of minorities are protected, and although much depends on its interpretation and implementation, it appears that the main concern of the legislator for the respect of non-Muslim communities should be to allow some extent of social diversity. By drawing on the pivotal moments of the history of the Pakistani judiciary this paper will analyze how the Pakistani judiciary has posited itself in relation to the notion of social diversity, and, from a perspective of governance, in relation to federalism. I will first provide the constitutional framework for the protection of social and ethnic diversity in Pakistan and the method of data collection for this paper; I will then consider the One Unit Bill, the Constitution of 1973, the 18<sup>th</sup> and 19<sup>th</sup> amendments, and the jurisprudence regarding the appointment of judges: Al-Jehad 1996 and 1997, *Syed Zafar Ali Shah* 2000, *Sindh High Court Bar Association* 2009, and *Munir Hussain Bhatti* 2011, which is the most recent case and potentially the landmark case for the future of the Pakistani judiciary. To date the controversy on the appointment of judges is the only consistent jurisprudential trend that sheds lights on the position of the judiciary regarding social diversity. Occasional decisions have taken into account ethnic diversity more directly but they have not yet surfaced at the level of public debate. A sample will be analyzed at the end of this paper before the conclusions together with the information collected through qualitative fieldwork in Lahore and Multan (Punjab), Peshawar and Chilas (Khyber Pakhtunkhwa) and Gilgit (Gilgit – Baltistan).

## **Constitutional Protection of Social and Ethnic Diversity in Pakistan**

The Pakistani Constitution protects the freedom to profess non-Islamic religions and to manage non-Islamic religious institutions (art. 20). Furthermore, it safeguards against taxation for the purposes of any particular religion (art. 21) and protects educational institutions irrespective of religion (art. 22). Moreover, additional seats to Christian, Hindu, Sikh, Buddhist, Parsi and Qadiani communities are provided in the national assembly and in the provincial assemblies on the basis of article 51 (2A) and article 106(3). Some degree of autonomy is recognized by the Constitution (Chap. 3 – Miscellaneous) to the Tribal Areas, the Provincial Administered Tribal Areas, and the Federal Administered Tribal Areas. To date however, it is unclear if this separate treatment translates into some degree of autonomy and consequent form of local government or, on the contrary, it conceals grounds for discrimination (see also Adeney 2007, esp. chap. 5). On a different but related thread, article 28 states that communities that have a distinct language, script or culture shall have the right to preserve the same. This article must be read together with article 251 which states that Urdu is the national language of Pakistan (1), and that efforts should be made to replace Urdu with English, and that Provincial Assemblies may adopt measures for teaching, promoting, and using languages other than English (3). Hence, in spite of the heavy accent on diversity in matters of religion there is also room, at least on the constitutional level, for a broader notion of diversity that would include language (other than English and Urdu), script, and culture, both within the Muslim communities themselves and beyond the binary opposition Muslim/ non-Muslim.

## **Research Methods**

In spite of the fact that I have an excellent access to law courts and the judiciary in Pakistan because of my long-term research on women-judges, which started in June 2010, the explicit formulation of the research question for this paper revealed problematic. As a result I was denied access to the library of the Law Commission and to the High Court archives which are likely to keep records on the access to justice and appointment of judges in terms of social and ethnic diversity. Given that the members of the judiciary are not allowed to give interviews, this refusal hampered my research

substantially. Although the ethnicity and the social persona of the investigator always have an impact on research, the sudden closure that I have experienced should be seen, in my view, as a an indicator of the fact that data on social and ethnic diversity in Pakistan can be hardly obtained on the basis of quantitative and statistic surveys. In fact, the most significant data for this paper was obtained through observation of court proceedings, analysis of case law, and informal conversations with jurists.

### **Judiciary and Federalism: Turning Points and Controversial Episodes**

Pakistani case-law shows that diversity is not pursued without turmoil and polarizations not only for what concerns its protection but first of all regarding the formal requisites that allow the judiciary to provide accountable justice. Not unlike most judicial systems, the Pakistani judiciary is eager to protect its own independence, which is seen as the only premise for a society that respects social and ethnic diversity. And, not unlike most common law judicial systems, in Pakistan, the appointment of judges constitutes the hinge between the executive and the judiciary: although independence is the principle, a certain input from the executive branch is deemed necessary to ensure a suitable level of democratic representation and accountability. The crux lies therefore in the extent and the modalities of such an input from the executive branch, and this holds particularly true in a federal state that is struggling to achieve an adequate representation of diversity.

#### **a) The One Unit Bill**

The current configuration of federalism in Pakistan can be traced back to the Constituent Assemblies formed at the time of the Independence of the Indian sub-continent from British colonization and during the events that led to the adoption of the One Unit Bill. On 9 December 1946 the India Constituent Assembly met in Delhi while India was still under the British rule: it included delegations from the present Pakistan, the present Bangladesh, and the princely states of India. After the Independence of India and the Partition in 1947, the Government of India Act (1935) served as a working Constitution for Pakistan until 1956. In June 1947, the Constituent Assembly of Pakistan, which was

formed under the Independence Act, met in Karachi with delegations from Sindh, East Bengal, Baluchistan, West Punjab, and Khyber Pakhtunkhwa (the former North West Frontier Province). On 15 August 1947 the Partition of India created the Dominion of Pakistan, composed of East (later Bangladesh) and West Pakistan (the present Islamic Republic of Pakistan), two areas geographically located on the West and East of the Secular Union of India (later Republic of India). Until 1956, however, Pakistan was without a constitution -- the main cause being formulated as a lack of cultural unity. Historians have recorded the initial mistrust by Pakistani élites of local diversities that were perceived as a threat to the state's sovereignty (Jalal 2007 and Toor 2005). Moreover, whereas West Pakistan was divided in provinces based on geographical boundaries, East Pakistan very quickly found political cohesion revolving around Bengali culture and language. In an attempt to create a platform for cultural cohesion that could numerically counter the East wing of the country, on 30 September 1955 the Constituent Assembly passed the One Unit Bill that reconfigured West Pakistan as one nation. This move aimed at the immediate outcome of successfully opposing the political dominance of East Pakistan whose outnumbering population had reached a greater degree of linguistic and political cohesion in comparison with West Pakistan. The Constituent Assembly was disbanded as soon as the One Unit Bill passed, thereby confirming the instrumental role of the One Unit Bill in the upcoming elections won by West Pakistan. In fact, neither the Constitution of 1956 nor that of 1962 included a reconfiguration of the federal structure of Pakistan. No mention was made regarding East and West Pakistan. On the contrary, Part IX of the Constitution, titled The Judiciary, recognized the jurisdiction of the Supreme Court with regard to the disputes between the Federation and the Provinces and in certain disputes between the Provinces. The only difference may have been that with the move of the capital from Karachi to Islamabad, the permanent location of the Supreme Court was also moved while branches remained located in each province. Language and ethnic diversity being not the criteria of the re-organization of Pakistan in Provinces (Waseem 2011a and 2011b) there was no point for the judiciary to take it into account at a formal level. In fact social diversity itself within the judiciary in Pakistan is even to date only taken into account as a pragmatic necessity for ensuring a suitable level of stability and accountability at the local level.

## **b) The Constitution of 1973**

The present judicial system in Pakistan is regulated by part VII (articles 176-212) of the Constitution of 1973, which together with the 18<sup>th</sup> and 19<sup>th</sup> amendment provides the rules and the procedure for the composition, jurisdiction, power structure and function of the judiciary. The Constitution also provides for the separation of powers and the independence of the judiciary (Preamble and Article 2 A), the qualification of judges and their modes of appointment (article 177 and 193), the conditions of service, the salaries and benefits (article 205), and the removal of judges of the superior courts on grounds of misconduct or physical and mental incapacity (article 209).

The Constitution provides for the Supreme Court, the High Courts, and the Federal Shariat Court.

### **a) The Supreme Court**

As per the wording of 1973, amended in 2010, the Constitution provided that the Supreme Court should be composed of the Chief Justice of Pakistan plus a number of other judges as determined by Act of the Parliament (article 176). The Supreme Court exercises original, appellate and advisory jurisdiction; it is the court of ultimate appeal, and its decisions are binding on all other courts (article 189). The Supreme Court is competent to mediate the disputes between the federal and provincial governments, among provincial governments, and to advise on questions of public importance for the enforcement of fundamental rights (article 184). It has appellate jurisdiction in civil and criminal matters (article 185) and advisory jurisdiction to the government on questions of law (article 186).

### **b) The High Courts**

The original wording of the Constitution provided for a unique High Court for Sind and Baluchistan, but the 5<sup>th</sup> amendment of 1976 provided for two separate courts: one for Sind and another one for Baluchistan (article 192). The Chief Justice and the other judges of each High Court are appointed by the President based on their experience and qualifications (article 193 (2)). These provisions were subsequently amended by the Legal Framework Order (2002) and the 18<sup>th</sup> Amendment (2010).

Article 200 of the Constitution of 1976 provided for the transfer of a judge from one High Court to another only with his consent and in conjunction with consultation by the President with the Chief Justice of Pakistan and the Chief Justices of both High Courts. However, the Fifth Amendment Act (1976) empowered the President to order such a transfer for a period not exceeding one year, and then subsequently extended to two years (President Order No. 14, 1985). In the same vein, Constitution (Amendment) Order 1980 provided that a High Court judge may be transferred to the Federal Shariat Court for up to two years (article 203 – C(5)). These provisions have been the object of debate and criticism for being used to exercise pressure on the judiciary against the public interest.

### c) The Federal Shariat Courts

The Federal Shariat Court was established by President Order No.1 of 1980 and integrated by the Constitution of 1973 in the chapter 3A along with Constitution (Amendment) Order 1980. It is composed by eight Muslim judges including the Chief Justice of the Court (article 203 C(2)): not more than four judges qualified to be High Court judges and not more than three as ulema with fifteen years of experience in Islamic law, research or instruction (article 203 C (3A)). The Federal Shariat court has jurisdiction on whether any law or provision of law is repugnant to the Injunctions of Islam (article 203 D). The Federal Shariat Court also exercises appellate revisional jurisdiction over the criminal courts deciding on Hudood cases (article 203 DD). The decision of the Federal Shariat Court is binding on the High Courts as well as on the subordinate judiciary (article 203 GG). Appeal against its decisions lies in the hands of the Shariat Appellate Bench of the Supreme Court (article 203 F). The Federal Shariat Court attracts criticism for merely duplicating the existing superior courts and for not ensuring the necessary criteria for the independence of the judiciary.

The independence of the judiciary has been at the center of most of the recent controversies revolving around the lawyers' movement and the restoration of the judiciary in Pakistan in 2009. However, efforts to preserve the independence of the judiciary date back to *Government of Sind v. Sharaf Faridi* PLD 1994 SC 105, when it was decided that the Chief Justice of the Supreme Court and High Courts should not depend upon the approval of the Ministry of Finance for the management of funds within the budgetary allocation. This decision, which limited the financial control of the

executive over the judiciary, was elaborated on the basis of article 175 (3) of the Constitution providing that “the judiciary shall be separated progressively from the executive within 14 years.” Hence the Supreme Court also held that the judicial magistrates were to be placed under the administrative control of the High Court. This was the first step of an ongoing process that would develop in *Al-Jeад Trust* 1996 and 1997, *Syed Zafar Ali Shah* 2000, *Sindh High Court Bar Association* 2009, and *Munir Hussain Bhatti* 2011. As we shall see, this is about the independence of the judiciary, but more specifically about how the Pakistani judiciary is positing itself vis-à-vis the executive and the notion of accountability as equating or not with broadly based legitimacy. In terms of governance, the jurisprudence regarding the appointment of judges sheds light on the dynamics between the courts and the federation and should help to gauge the determinants of Pakistani federalism.

### **c) From Al-Jehad to Sind Bar Association**

The close link between the independence of the judiciary and the system of the appointment of judges was clearly asserted by *Al-Jehad Trust* (PDL 1996 SC 324), whose petition was accepted on the express declaration that the independence of the judiciary is a matter of public interest and therefore attracting the competence of the Supreme Court under Article 184 (3) of the Constitution. The bench of five judges decided that consultation for the appointment or confirmation of a judge of a Superior Court by the President/Executive with the consultees mentioned in Articles 177 and 193 of the Constitution being mandatory, any appointment or confirmation made without consulting any of the consultees would be against the Constitution and therefore invalid. In fact, in the light of the subsequent case-law, it may be suggested that the exact nature of the executive input, as interpreted in Pakistan, was being thrashed out already in *Al-Jehad* when it was said that the Constitution must be read as “an organic document designed and intended to cater the need for all times to come. It is like a living tree, it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people. Thus, the approach, while interpreting a constitutional provision should be dynamic, progressive and oriented with the desire to meet the

situation, which has arisen, effectively. The interpretation cannot be a narrow and pedantic. But the Court's efforts should be to construe the same broadly, so that it may be able to meet the requirement of ever changing society. The general words cannot be construed in isolation but the same are to be construed in the context employed. In other words, their colour and contents are derived from their context.” (PDL 1996 SC 324)

*Al-Jehad Trust* was the first of a number of precedents that have interpreted the Pakistani Constitution in line with the Indian jurisprudence of *S.P. Gupta* 1982 (1981 Supp (1) SCC 87) outlining the nature of the executive input for the appointment of the upper judiciary. According to *Al-Jehad* 1996, the wording “after consultation” indicates that “the consultation should be effective, meaningful, purposive, consensus-oriented, leaving no room for a complaint of arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and the Chief Justice of a High Court as to the fitness and suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reasons to be recorded by the President/Executive” (PDL 1996 SC 324). Henceforth not only appointments but also shifts and removals should only be the outcome of the same procedure (*Al-Jehad* 1997).

Notwithstanding that the Proclamation of Emergency on October the 12<sup>th</sup> 1999 suspended most of the executive function putting Pakistan under the control of the army, the Supreme Court heard the appeals seeking to declare the military takeover as unconstitutional and illegal. Although, when the judiciary was asked to take oath under the Provisional Constitutional Order (out of thirteen judges of the Supreme Court seven took the oath and six did not), the Supreme Court reiterated the fundamental principles of governing the State of Pakistan:

If the Parliament cannot alter the basic features of the Constitution, power to amend the Constitution cannot be conferred on the Chief Executive of the measure larger than that which could be exercised by the Parliament. Clearly, unbridled powers to amend the Constitution cannot be given to the Chief Executive even during the transitional period even on the touchstone of ‘State necessity’. The Constitution of Pakistan is the supreme law of the land and its basic features i.e. independence of judiciary, federalism and parliamentary

form of government blended with Islamic provisions cannot be altered even by the Parliament. Resultantly, the power of the Chief Executive to amend the Constitution is strictly circumscribed by the limitations laid down by the Supreme Court. (Syed Zafar Ali Shah 2000)

In 2007 President Pervez Musharraf sought to be re-elected for a second term. Since Musharraf was at the same time the Chief of the Army *and* the President of Pakistan, one of his opponents petitioned the Supreme Court on whether the re-election of Musharraf was constitutionally permitted. Musharraf was admitted to the elections, but the Supreme Court reserved for itself the last word until the final decision. Musharaf won the election on October the 6<sup>th</sup> with a 98% majority. Nevertheless, the Supreme Court delayed its decision about the eligibility of Musharraf until the 5th of November. On November the 3<sup>rd</sup>, three days before the Supreme Court's decision, Musharaf declared the State of Emergency as per art. 232 of the Pakistani constitution. He acted as Chief of Staff of the Army and issued a Provisional Constitutional Order (PCO) suspending the Constitution. The Federal Cabinet was terminated, and the Constitution was suspended, and the judges had to take an oath under the PCO – the ones who refused were dismissed. The text of the Proclamation of Emergency stressed the particularly difficult situation in Pakistan that had come about by the escalation of violence and terrorism and on the hostility of the judiciary, which was said to have overstepped its own limits and thereby hindered the efforts of the government, police and army. The PCO ordered all the judges to take an oath to the PCO; it suspended some basic constitutional rights, and it forbade any legal questioning of the act itself. As a result, a bench of seven Supreme Court judges validated the election and asked Musharaf to resign from the office as Chief of Army in order to be president. The Proclamation of Emergency and the PCO were thereby validated. On the 2<sup>nd</sup> of November, however, following the petition from a barrister and a panel of seven Supreme Court judges headed by Chief Justice Iftikhar Chaudhry, the Supreme Court produced a stay order preventing the government from imposing martial law. As a consequence the judges who had refused to take the oath were removed without retirement privileges, and new judges were appointed. The long march from Islamabad to Lahore on the 15<sup>th</sup> of March 2009 in order to restore the judiciary resulted in the official notification of the restoration of the judiciary, and Iftikhar Chaudhry was reinstated as

Chief Justice of Pakistan. On July the 31<sup>st</sup> the Lahore High Court Chief Justice Mohammad Sharif Khawaja presented to the Supreme Judicial Council a list of judges who swore to abide by the 2007 Proclamation of Emergency and PCO and the Code of Conduct of Supreme Judicial Council. Seventy-six judges were suspended until the decision on the 31<sup>st</sup> of July 2009 which declared unconstitutional all steps taken by Pervez Musharraf including the nomination of judges that took the oath. The judges who had taken the oath were removed, while the ones that refused were reappointed on the basis of the célèbre Supreme Court decision: *Sindh High Court Bar Association v. Federation of Pakistan* (PLD 2009 SC 879).

#### **d) The 18<sup>th</sup> Amendment**

The most controversial section of the 18<sup>th</sup> amendment is Section 67 which inserts article 175 A into the Constitution and changes the method of appointing the upper judiciary. Before the inclusion of article 175 A, judges of the Supreme Court were appointed by the president on the advice/consultation of the Chief Justice of the Supreme Court, which was binding, as we have seen. After the 18<sup>th</sup> Amendment, the Judicial Commission was given the role that was previously under the sole authority of the Chief Justice. The Commission, by majority of its total-membership, nominates a list of judges to the Parliamentary Committee, which is composed of four members from the Senate and four members from the National Assembly. Provided that the Committee does not confirm the nomination by a three-fourth majority of its total membership within the said period, the Commission sends another nomination. Hence, a Parliamentary Committee confirms the nomination, whereas previously, the Chief Justice (of the High or Supreme Court as the case may be) nominated a person or list of people for a particular post to the President. The issue will be therefore to understand what is the exact nature and role of the Parliamentary Committee.

#### **e) The 19<sup>th</sup> Amendment**

On the 1<sup>st</sup> of January 2010 Pakistani President Asif Ali Zardari signed the 19<sup>th</sup> Amendment, which was considered as potentially able to resolve the differences between the judiciary and executive by introducing yet a new procedure for the appointment of the upper judiciary. Under the said amendment, the number of senior judges serving as members of the Judicial Commission was increased to four, while the number of members of the Parliamentary Committee for the appointment of the Chief Election Commissioner was raised to twelve. According to the same Amendment, the Chief Justice of the Supreme Court makes recommendations for the appointment of ad hoc judges in superior courts in consultation with the Judicial Commission headed by the Chief Justice. President Zardari described the amendment as "a New Year's gift of democracy". This being the second unanimous amendment to the Pakistani Constitution of 1973 in less than a year's time, it was welcomed as a promising solution to the friction between the judiciary and parliament. The 19<sup>th</sup> Amendment, it was thought, would be an adequate response to the Supreme Court's anxiety that the Parliamentary Committee might constitute an undue influence on the judiciary. It was hoped that all the conflicts regarding the appointment of the upper judiciary would be forgotten, and that the new procedure would ensure accountability and transparency of the judges' selection as well as limiting the role of the government through the all-party composition of the Parliamentary Committee.

**f) Role and importance of the judicial commission's recommendation**

Within two months after the President assented to the 19<sup>th</sup> Amendment, two constitutional petitions were filed challenging the decisions of the Parliamentary Committee whereby it refused the nominations made by the Judicial Commission for the extension in the tenure of four additional judges of the Lahore High Court and two additional judges of the Sindh High Court. The view of the learned Additional Attorney General was that "the Parliamentary Committee represented the view of the Parliament and consequently had supremacy over all other bodies." He also argued that "its decision could not be the subject of judicial review as the Parliament was the supreme law making institution, and its decision could not be reviewed by any court." (9.). The Supreme

Court not only asserted its competence in reviewing the decision of the Parliamentary Committee, but also declared as illegal its refusal of the approved nominations of the Judicial Committee. The analysis of the arguments elaborated by Justice M.A. Shahid Siddiqui and Justice Jawwad Khawaja are of utmost importance here because this decision is likely to greatly influence the future configuration of the Pakistani judiciary. Both justices pointed out that the composition of the Judicial Committee as envisaged by Article 175A has the clear purpose of providing a refined mechanism able to ensure that the appointment of judges would cease to be determined by only one person (so far the Chief Justice). By designating the Judicial Committee would be comprised of five sitting judges of the Supreme Court, one former judge of the Supreme Court, the Chief Justice and the most senior judge of the High Court, Federal Minister of Law and Attorney General of Pakistan, Law Minister of the concerned province and two senior advocates/members of the Bar), the 19<sup>th</sup> Amendment has created a trustworthy body possessing the technical expertise relevant for the appointment of a person as a judge of the High Court. Both Justices concur in saying that since the creation of the Judicial Committee responds to the need of devolving the power of the appointment of judges to a specialized body, it would make no sense to submit this newly created body to the veto of a Parliamentary Committee. Justice Khawaja's opinion goes even further in elaborating on the maintainability of the petitions, the relevant rules of constitutional interpretation, justiciability, and the grounds for judicial review. For the purpose of this paper I will point out the elements of this opinion that are immediately relevant to the purpose of this paper: diversity and federalism.

The maintainability of the petitions is argued with the principle of the public interest litigation. Judicial precedents have shown that "the process of making judicial appointments was inextricably linked with the independence of the judiciary; and since the latter was a matter of public importance [...] it was held that the petitioner had "rightly invoked the jurisdiction of this Court" (11).

Article 175 A must furthermore be interpreted in relation with the Constitution as an organic whole and not as a self-contained island. Hence, when looking at the newly amended wording of article 175 A "the repeatedly emphasized imperative of maintaining a record both of the proceedings of the Committee and of the "reasons" behind its

decisions, very strongly suggests that the Committee’s decisions were intended to be subject to judicial review.” (26)

But the gem of Justice Khawaja’s opinion is laid down at point 32 which expounds on the nature of the Parliamentary Committee as essentially having executive capacity and consequently subject to judicial review: [T]he Committee [...] must not be seen as a ‘parliamentary’ committee properly speaking; rather, in constitutional terms, it is a committee of parliamentarians, acting independently as a constitutional body in an executive capacity.” (32) As a consequence “the Committee cannot be imagined [...] without the check of judicial review.” (41) The opinion by Justice Khawaja concludes by stating that the impugned decisions of the Committee were based on the erroneous understanding of the law that designed the Parliamentary Committee as exclusively providing executive input and not possessing a veto in the appointment of judges. The last point of the opinion refers to Articles 28 and 251 of the Constitution and introduces the Urdu translation of Justice Khawaja’s opinion for the benefit of the “wider section of those who are unable to understand the [English] language”. (83)

### **Diversity as Criterion for the Appointment of Judges**

The bulk of case law that concern the appointment of judges in Pakistan evidently relates to social diversity only as the systematic premise which allows the independence of the judiciary and therefore the accountability of the judiciary to minorities as well as to the majority of a given society. Gender, religious creed, language, and ethnic representation do not appear as formal criteria.

However my research on women judges in Pakistan reveals that more than 1/3 of Pakistani judiciary are women and that proportionally Khyber Pakhtunkwa, which is conventionally portrayed as the stronghold of patriarchy in Pakistan, has the higher number of women in the judiciary. My observation tells that it is current practice in Pakistan to appoint at least a woman judge in family courts although their jurisdiction and competence is for all purposes equal to their men colleagues.

My fieldwork in Gilgit-Baltistan, which is characterized by a significant level of ethnic rivalries, has shown that the peculiar configuration of the Federation of Pakistan,

reflects in the perceptions of the judiciary of both the so-called up-country (Gilgit Baltistan) and down-country (the four Provinces and the Capital Territory). In spite of a widespread conviction that Gilgit Baltistan and Azad Kashmir are not part of Pakistan, it is interesting to note that case law of both areas are recorded by the national digests, and perhaps more importantly, that unwritten rules make that Islamabad has a say in the appointment of judges in Gilgit Baltistan and that the Chief Justice comes from “down-country”. For this data to be interpreted in quantitative terms further research should be carried out but the general perception in the three provinces of Sindh, Balochistan, and Khyber Pakhtunkhwa as well as in Gilgit Baltistan and Azad Kashmir, is that ethnic Punjabis are appointed at the apex of most executive and judicial bodies outside Punjab whereas the inverse does never happen.

Religious creed and sectarian affiliations, which is at the center of very delicate controversies in Pakistan, also deserves to be investigated for its impact on the management of justice, although no formal regulation exists at the time of writing this paper. However for ensuring that a satisfactory level of accountability and social stability it is consolidated practice that two Sunnis and one Shia justices should sit at the Appellate Supreme Court of Gilgit Baltistan.

On the basis of my survey of case law and observation of civil and criminal litigation language and cultural diversity seem not to be a frequent argument in court either. *Sardar Haji Muhammad Yousaf v. District Coordination Officer* is interesting not for its outcome which was after all a predictable dismissal since it was founded on a repealed law, but for the argument that were developed within this rare case of claims for cultural and language diversity. The petitioners claimed to belong “to the indigenous tribe of Khudaidad Zai, Begzai, and as per tribal system [to] own a specific culture, whereby; a caste/tribe is presided over and represented through tribal Chief, i.e. Sardar.” One of the petitioners being the owner of more than 400 acres of land and having inherited the title of Sardar from his deceased father, he had approached the court for confirmation of his status on the basis of art. 28 of the Constitution, that preserves the rights of citizens to have a distinct language, culture and script. The argument was dismissed with the following reasoning:

The custom of language, script, and culture does not include appointment of ‘Sardar’ which institution A under Ordinance, 1976, stood abolished and all those cultural customs to that extent have been declared to be against the provisions of law relating to the Sardari System. Section 3 of the Ordinance, 1976 clearly provides in the following terms:---

“3. Abolition of system of Sardari. Notwithstanding any custom or usage, as from the commencement of this Ordinance, the system of Sardari shall stand abolished and no person shall ---

- (a) exercise any judicial powers not expressly conferred on him by or under any law for the time being in force; or
- (b) maintain any private jail; or
- (c) save as provided in the Code of Criminal Procedure, 1898 (Act V of 1898), or any other law for the time being in force, arrest or keep in custody any person; or
- (d) take free labor from any person or compel any person to labor, against his will; or
- (e) demand or receive, by reason of being or having been a Sardar, any tribute or any other payment, whether in cash or in kind.”

## **Future prospects in a polarized landscape**

It may be surprising that while grave cases of discrimination on the basis of religion, gender, and ethnicity have recurred in Pakistan recently, much of the efforts of the judiciary have been concentrated on its own independence. Although this points out the undeniable gap between the state law machinery and the grassroots level of Pakistani society, the issue of the independence of judiciary is a crucial one for the repercussion that its treatment is likely to have on the management of social diversity. Only an independent judiciary -- it is often argued by (continental Europe) scholarship --can ensure the supremacy of the rule of law within a framework of respect for minorities, and this irrespective of the majoritarian political discourse of the time. To a certain extent, since the Pakistani inherited legal system is one of common law, it appears that the Pakistani judiciary has adopted a strong stance by strenuously rejecting a broad-based system for the appointment of judges. As such it seems to lean more towards the European civil service model that, unlike the American and the British systems, gathers its legitimacy from independence in the first place and secondly from accountability. However it may be misleading to think that an independent judiciary, whose

appointments are not broad-based, is ipso facto unaccountable. In fact, according to typical civil law scholarship only a non-majoritarian and independent judiciary can adequately check the political power. On the other hand the risk pointed out by common law scholarship is that an overly independent judiciary lacks democratic legitimacy, and it might turn into a self-governing body.

What are the future prospects in this polarized landscape that posits a clear-cut confrontation between broad-based v. specialized judicial appointments? Can the judiciary be the umpire of the federal government, or should the judiciary of a federal state be necessarily bound to the several levels of governance? Neither view is free from political vision, but each of them claims to enshrine the tenets for the independence of the judiciary. By denying the legislative nature of the Parliamentary Committee and showing that execution of the decision occurred nevertheless, *Munir Hussain Batthi* 2011, provided not only a clever theoretical but also a pragmatic way out of the impasse opposing the exclusive supremacy of either the judiciary or the executive: the latter is deemed to provide a necessary input that however cannot discard the opinion of the judiciary. The judiciary, conversely, is able to run checks on the federal government without incurring the risk of becoming a self-governing body separated from the society at large – far from that, as the decision contains also a clear wish to reach the wider public and, in obedience to the Constitution, provides an Urdu version as well. There is certainly a long way to go before even reaching the middle class readership, but no matter how little of a gesture this translation might represent, it should act as a reminder to the judges of their role and ability to be accountable to the people and make justice accessible through the use of accessible language. On this regard one cannot but help mentioning the multi-layered translations that, in spite of the workload, are indeed carried out in the everyday management of justice at the level of the lower courts where judges avail of the collaboration of clerks for communication and record proceedings not only in Urdu but in the other languages spoken in Pakistan. Much more can be seen when one observes the everyday practice of justice in Pakistan and witnesses all the little adjustments that, although not expressly provided by the Constitution, allow for day-to-day representation, protection, and management of diversity: some clearly positive as the increasing appointment of women judges and the attempt to proportionally represent the

four provinces at the level of the Supreme Court; others controversial such as salary discrepancies among the Provinces or the mandatory appointment of judges in law courts that are different from their place of residence; and others more general such as the acknowledgement of local practices and of the difficulty in understanding within a global centralized framework. Some see here the seeds for a Pakistani constitutional pluralism others noting else than the perpetuation of a power game that should be neutralized for the benefit of the country's stability. However, it gives hope to see a judiciary that is wary of global moulds and does not shy away from its role of demanding justifications to the Federation, if there be need, and according to the Constitution. In the absence of specific legal provision for the representation of ethnic diversity, the above described set of pragmatic solutions that are in place as unwritten rules for ensuring the daily management of justice, and which are only observable through fieldwork, acquire a particular importance for being the ones that will be sustainable on the long run whenever Pakistan will be ready to systematically take into account ethnic and social diversity for the appointment of judges and more in general for the management of justice. An in-depth study of such practices is needed in order to lay down the basis for sustainable social change.

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