Courts, Constitutions and Authoritarian Consolidation in Pakistan

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In 2024, Pakistan has moved in a decisively authoritarian direction. The civilian and military hybrid ruling coalition that came to power in 2022 is using electoral engineering and constitutional entrenchment to consolidate power in the face of popular discontent and resilient political opposition. This process of electoral and constitutional consolidation does not move forward unimpeded, without resistance, and requires capturing and coordinating state institutions. In this blogpost, I show that formal constitutional safeguards provided little protection against the hybrid regime's capture and weaponization of electoral monitoring bodies, and the limited judicial resistance to this process of consolidation, as exemplified in the Supreme Court judgment, *Sunni Ittehad Council v Election Commission of Pakistan* (2024), required looking beyond established constitutional roles and procedures. This raises important questions regarding the appropriate roles and rules for judicial and guarantor institutions in tutelary hybrid regimes. Finally, I discuss how the regime has succeeded, for now, in neutralizing this judicial resistance.

Hybrid Regime Politics in Pakistan

In Pakistan's hybrid political system, the military has always played a powerful tutelary role, but the extent to which the military acts as a veto-player, decision-maker, and partner in governance varies across regimes. During the 2000s, Pakistan was ruled directly by the military, with civilian institutions and parties placed in subordinate roles. During the 2010s, Pakistan was a multi-party hybrid order in which elected governments were formed based on fragile coalitions that could be manipulated by the military, allowing the military to constrain the government's policy-making authority and legitimacy. Since 2018, Pakistan transitioned to a hybrid order in which elected parties form governments with the support of the military and through the elimination of political opposition, but these governments depend on the military to keep state institutions aligned and opposition weakened. Thus, the civil-military partnership underpinning this order is asymmetrical. Between 2018 and 2022, the military's primary partner was the Pakistan Tehreek-e-Insaaf (PTI), led by Imran Khan. But Khan fell out with the military leadership, and since 2022, the military has attempted to retain a similar hybrid system but with a coalition of political parties called the Pakistan Democratic Movement (PDM) that had largely been in opposition during the previous four years. All hybrid arrangements relied on electoral and constitutional consolidation.

Elections since 2018 have been used to place allied political elites in important political offices, shut the opposition out of political institutions, and give the hybrid arrangement popular legitimacy. Constitutional consolidation has involved either judicially interpreting or legislatively amending the constitution to give the ruling elite more durable control over state institutions and legally secure the regime from opposition challenges. The choice between amending or reinterpreting the constitution depends on where the regime leadership has enough allies: in the parliament, the judiciary, or both.

Authoritarian Consolidation in 2024

The current hybrid arrangement was established in 2022 after a military-backed parliamentary vote of no-confidence led to the PDM coalition replacing the PTI government. Given that PDM came to power through parliamentary procedure rather than a popular electoral victory, the new arrangement suffered from a

legitimacy deficit. Facing popular political opposition that grew increasingly critical of both civilian and military arms of the ruling arrangement, the regime finally agreed to elections in February 2024.

Pakistan has two constitutional bodies tasked with ensuring free and fair elections: a caretaker government that manages the state in the run-up to an election and an election commission that administers the electoral process. The commission and caretaker government are formally protected from partisan capture, as the selection of their leading officers requires consensus between government and opposition parties in parliament. But how does this constitutional design protect against the military's capture of election monitoring bodies? When the ruling party is dependent upon the military, and the opposition party is either weakened or excluded from parliament, there is little constitutional design can do to stop the military from influencing the selection of these officers, as it did when parliament selected a politician close to the military as caretaker prime minister, and retained a bureaucrat antagonistic to the PTI as chief election commissioner.

In the lead-up to the elections, the caretaker government oversaw a campaign of state repression targeting PTI's leaders and workers. The Election Commission disqualified many PTI members from running and banned PTI candidates from running under their party symbol and name, the symbol through which voters would be able to recognize party candidates on the ballot. The judiciary remained either willfully ignorant or actively complicit in facilitating the pre-poll rigging. Further, when, in spite of the pre-poll rigging, PTI still performed much better than expected, the Commission, working with other state institutions, oversaw a brazen effort to doctor the election results and deny PTI a parliamentary majority. The parties of the PDM could then form a coalition government, while PTI's winning candidates were barred from joining parliament as members of PTI. The electoral engineering was so brazen and blatant that the process and outcome enjoyed little to no popular legitimacy.

The next stage of authoritarian consolidation was constitutional entrenchment. Between 2018 and 2022, constitutional entrenchment of the previous hybrid arrangement relied on pro-regime Supreme Court judges using their constitutional authority to disqualify and weaken the opposition and constitutionally secure the regime's interests. In 2024, the new ruling coalition wanted a parliamentary supermajority to amend the constitution in ways that entrenched their authority and secured it from opposition challenges.

In the national assembly, one-fifth of seats are reserved for women and religious minorities. Parties get allotted a proportion of these reserved seats, based on the proportion of elected seats they won in parliament, to ensure that the reserved seats do not alter the electorally determined balance between parties. But how do the reserved seats get allocated when the largest party (PTI) is not allowed to take its seats in parliament? PTI members ostensibly joined a minor party, the Sunni Ittehad Council (SIC), so that SIC could get PTI's share of reserved seats. However, the Commission refused to allocate these seats to SIC, and instead allocated the reserved seats to the winning parties in parliament, i.e. the parties in the ruling coalition. With the boost of reserved seats, the ruling coalition was closing in on the supermajority it needed to amend the constitution.

Judicial Pushback against Authoritarian Consolidation

What role can the judiciary play in stalling authoritarian consolidation? What kind of judicial interventions in the electoral and parliamentary processes are needed, and can the judiciary constitutionally justify such interventions?

These were the questions facing Pakistan's Supreme Court when the SIC challenged the Commission's decision to distribute reserved seats among ruling parties and demanded SIC be given its proportion of reserved seats. Given the judiciary's history of facilitating and legitimizing hybrid regime consolidation for most of the period since 2018, the Court's ruling *against* the Commission's allocation of the reserved seats among the ruling parties was unexpected. And the majority went further, i) finding that

the Commission had acted in a partisan manner when it banned PTI candidates from running as members of PTI in the elections, ii) ruling that elected members of the PTI should sit in parliament *as* members of the PTI, effectively restoring PTI's place as the largest party in parliament and iii) ordering that PTI should get a share of the reserved seats in line with their 'true' position in parliament. The judgment was immediately historic and controversial, triggering a backlash from the regime.

How did the Court explain and justify these significant interventions into the electoral process? Borrowing from recent comparative constitutional law scholarship, the detailed majority judgment offered a distinct vision of Pakistan's constitutional order. First, it called electoral management bodies "guarantor institutions…akin to a fourth branch of government." Second, it called the country a "constitutional particracy." In elevating the constitutional status and significance of the election monitoring bodies and political party competition, the judgment used this to justify heightened judicial scrutiny of, and intervention in, the electoral process to ensure that the election commission plays its role as a guarantor of fair elections between competing parties. As the judgment states, "The process of free and fair elections requires vigilant judicial monitoring" as the "primary obligation of courts is to protect the electorate's right to fair representation", and this "duty underscores the Court's…constitutional mandate to oversee the electoral cycle *comprehensively*." The Court went through a litany of the failures of the Commission in ensuring parliament represented the true "will of the people as expressed in the election," and overruled the Commission's decision to allocate the reserved seats to the ruling parties. So, what was the correct allocation?

The majority admitted that the best remedy lay beyond what was prescribed in the relevant statutes, but was one that "put things right" and ensured "complete justice." It held that since PTI had suffered the most as a result of the Commission's actions, *complete justice* required that PTI be "restored to..,insofar as possible… the same position they would have been if such unlawful acts…had not occurred." In determining how the seats should be allocated, the majority held that '[T]he logic of words should yield to the logic of *realities*.' Even though members of PTI have formally appeared before the Court as members of the SIC, in reality, there was no reason why members of the country's largest party would join minor parties "of their own will." Thus, the majority was stating that it could not be blind to the authoritarian political reality guiding the actions of PTI members, and the Court had an obligation to look beyond formal presentation to restore PTI to its 'true' position. Only restoring seats won by PTI members *to* PTI, and allocating reserved seats proportionately to PTI, would correct for the injustice done to the party, and ensure parliament retained its representative character.

Thus, the Court majority, weary of the danger of constitutional entrenchment posed by a military-manufactured parliamentary supermajority, attempted to challenge authoritarian consolidation by enhancing judicial scrutiny of election processes and results, and making its own assessment of what a representative parliament looks like. This raises an important question: Should courts have the power to interpret and determine what a representative parliament or what the 'true' electoral outcome, looks like? It is probably necessary for judges to interpret and draw attention to "political realities" in their jurisprudence when they are operating in an authoritarian political context, and must confront abusive constitutionalism by exposing the state's self-serving political manipulation of formal constitutional procedures. But how can courts be deterred from applying precedents that are developed to confront authoritarian consolidation, to also undermine and constrain more representative and democratically legitimate political arrangements? In short, how different should the work of judicial representation-reinforcement look in more democratic regimes compared to more authoritarian regimes, especially when the difference between the two is blurred in hybrid regimes like Pakistan?

Conclusion

Finally, can this judicial pushback actually work? So far, it has not. The government did not comply with the judgment and instead cobbled together the numbers it needed to pass a constitutional amendment to ensure it does not face such judicial challenges in the foreseeable future. The 26th constitutional amendment, ably discussed here, is designed to enable greater political involvement in judicial appointments, chief justice selection, and most significantly, in deciding which judges get to sit on constitutional cases. On the face of it, a parliamentary committee that proportionally represents all parties in parliament deciding the new chief justice is not exceptional, but when the largest opposition party is denied its share of seats, it is just a forum for the ruling coalition to choose its preferred chief justice. A new cross-institutional commission will decide on judicial appointments and which judges get to sit on constitutional cases. The government and its allies get a narrow majority on the commission to ensure that judges who align with their interests get selected for these benches. There have been longstanding concerns regarding Pakistan's interventionist judiciary and its anti-democratic jurisprudence, but this amendment is not designed to produce a more responsive and accountable judiciary, but one that is more easily managed by the hybrid regime. Lawyers and judges may still push back against the amendment. But even if they don't, the new structure does leave judges with some agency. But judges will now have to directly bargain and form coalitions with politicians sitting with them on the commission to get their interests upheld in bench formation and judicial appointments. The question remains: what kind of judge will this structure produce?

Thus, the process of authoritarian consolidation continues in Pakistan's hybrid regime, and in the face of a unified civilian and military executive, there is little constitutional courts or guarantor institutions can do to stall the process. But, given the regime's legitimacy deficit, how long will it be before civilian and military partners fall out, and what kind of bargaining, contestation and institutional disruption can we expect to follow?

ABOUT THE AUTHOR

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