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Attorney-General of Pakistan - A brief overview

Abstract
The legal system of Pakistan represents a fusion of the *Shariah* law and common law systems. Traditionally, the Pakistani legal system adapted the pre-1947 colonial law for local use. Amendments to these colonial laws, in particular inspired by the Islamic traditions, have been interspersed in intervals. As a result, the Pakistan legal system retains fundamental common law doctrines (such as binding precedent and delegated legislation) while gradually integrating laws of Islamic origin within the existing common law framework. However, Pakistan's legal system is far from being a complete mirror of the English legal system. One such major distinction is that there is no division within the legal profession into barristers and solicitors. This has meant, amongst other things, that the chief legal officer representing the Federation of Pakistan (hereinafter referred to as the 'Federation') is the Attorney-General of Pakistan and that there is no comparable office of Solicitor-General in Pakistan as in other common law jurisdictions.

This article provides a brief overview of the Attorney-General of Pakistan and the importance of the office to Pakistan as a developing country and a maturing legal system in its own right. This article is divided mainly into two parts. The first part presents the constitutional background and briefly outlines the function of the Attorney-General of Pakistan. The second part examines the increasingly political role of this office.

Keywords
Attorney-General of Pakistan, chief legal officer, Federation of Pakistan

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ATTORNEY-GENERAL OF PAKISTAN – A BRIEF OVERVIEW

UMAIR GHORI*

Introduction

The legal system of Pakistan represents a fusion of the *Shariah* law and common law systems. Traditionally, the Pakistani legal system adapted the pre-1947 colonial law for local use. Amendments to these colonial laws, in particular inspired by the Islamic traditions, have been interspersed in intervals. As a result, the Pakistan legal system retains fundamental common law doctrines (such as binding precedent and delegated legislation) while gradually integrating laws of Islamic origin within the existing common law framework. However, Pakistan's legal system is far from being a complete mirror of the English legal system. One such major distinction is that there is no division within the legal profession into barristers and solicitors. This has meant, amongst other things, that the chief legal officer representing the Federation of Pakistan (hereinafter referred to as the 'Federation') is the Attorney-General of Pakistan and that there is no comparable office of Solicitor-General in Pakistan as in other common law jurisdictions.

This article provides a brief overview of the Attorney-General of Pakistan and the importance of the office to Pakistan as a developing country and a maturing legal system in its own right. This article is divided mainly into two parts. The first part presents the constitutional background and briefly outlines the function of the Attorney-General of Pakistan. The second part examines the increasingly political role of this office.

Constitutional background and role of the Attorney-General of Pakistan

The office of the Attorney-General of Pakistan (hereinafter referred to as the 'AGP') is created by art 100 of the *Constitution of the Islamic Republic of Pakistan 1973* (hereinafter referred to as the '*Constitution*'). Article 100(1) of the *Constitution* vests the President of Pakistan with the power to 'appoint a person, being a person qualified to be appointed a Judge of the Supreme Court, to be the Attorney-General for Pakistan'.

Article 177 read with art 175A of the *Constitution* provides for the appointment of Supreme Court judges. The combined effect of these provision results in a common set of criteria for both the apex judiciary and the AGP. Out of these two provisions art

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177 is the provision dealing with eligibility while art 175A provides for the appointment procedure for Supreme Court judges. However, the *Constitution* is not clear on whether the appointment of the AGP follows the same procedure *mutatis mutandis.* Regarding eligibility, Article 177(2) of the *Constitution* states that a Judge of the Supreme Court of Pakistan must be a citizen of Pakistan and either is a judge of a High Court[1] for a period of not less than five years or has been a practising advocate of a High Court for not less than fifteen years.

Article 100(2) provides that the tenure of the AGP is to be at 'the pleasure of the President.' More importantly, this provision states that the AGP 'shall not engage in private practice so long as he holds the office of the Attorney-General'. This is a recent restriction that was introduced into the *Constitution* vide the *Constitution (Eighteenth Amendment) Act 2010* (art 32) effective from 19 April 2010. This is a significant change because previous office holders were free to conduct private practice. In fact, holding the office of AGP was considered a significant factor in attracting high profile clients. This practice raised ethical concerns and also the possibility of conflicts of interest. In practice, therefore, the AGP did not accept any case where the Federation was a party.

Article 100 (3) of the *Constitution* briefly provides for the function performed by the AGP. This provision states that the AGP shall

> give advice to the *Federal Government* upon such legal matters, and to *perform such other duties* of a *legal character* as may be *referred or assigned* to him by the *Federal Government*, and in the performance of his duties he shall have the right of audience in all courts and tribunals in Pakistan (emphasis supplied).

This article demonstrates the inherent confusion in the representative role of the AGP, that is, the appointment of the AGP is by the Federation and the AGP represents the Federation, yet takes instructions from the government. This confusion permeates the actual function of the AGP and results in the politicisation of the office.

The AGP's function is further assisted by the Additional Attorneys-General and Deputy Attorneys-General (collectively referred to as the 'Central Law Officers') appointed under s 2(1) of the *Central Law Officers Ordinance 1970* (hereinafter referred to as the '1970 Ordinance'). Section 2(2) of the 1970 Ordinance provides that such appointees shall hold office 'during the pleasure of the president' and are entitled to remuneration. Section 3(a) further provides that criteria for appointment of the Additional Attorneys-General and the Deputy Attorneys-General are similar to those for the AGP. Section 4 of the Ordinance also extends the right of audience to the Central Law Officers to appear in any court within the country. In addition to the

[1] In Pakistan, High Courts are the provincial appellate courts.

Central Law Officers, all federating units of Pakistan (provinces) have their own provincial Attorneys-General and Deputy Attorneys-General that are appointed on similar criteria to represent the Federation in the provincial high courts.

In addition to domestic duties, the AGP is tasked with international representation before international courts and dispute settlement tribunals as well. The most notable representations by the AGP in recent times was in the 2005 arbitration proceedings before the International Centre for Settlement of International Disputes settling a dispute between a Turkish contractor engaged in building the M1 Motorway and the government of Pakistan.[2] The AGP in this matter (Barrister Makhdoom A Khan) worked alongside foreign and local counsel to defend the arbitration claim. Similarly, another landmark international proceeding that has found its way into public international law textbooks is the *Aerial Incident of 10 August 1999 (Pakistan v India)* before the International Court of Justice.[3] In this matter the-then AGP (Aziz A Munshi) represented Pakistan alongside Sir Elihu Lauterpacht as Counsel for the Government of Pakistan.

The politicisation of the Attorney-General of Pakistan

The wording of the *Constitution* suggests that the AGP shall function on a non-partisan basis. Yet, the appointment of the AGP by both civil and military regimes in the past has revealed the political undercurrents behind appointments. In the past, the Supreme Court has controversially ruled in *Hamid Sarfaraz v Federation of Pakistan and another* (PLD 1979) SC 991, that the AGP holding a dual office of the Federal Law Minister under an ad hoc arrangement during martial law, does not lose his right to audience before the Supreme Court or any other court in the country.[4] The Supreme Court further elaborated that the AGP, under art 100(3) of the *Constitution*, could be required to undertake extra duties and for this reason does not cease to be AGP nor lose the right of audience in all courts and tribunals of Pakistan.[5] The Supreme Court stated that assignment of extra portfolios (such as the Federal Minister for Law and Parliamentary Affairs) does not disqualify the incumbent AGP to appear before the Supreme Court in the same capacity.[6] The Supreme Court held that any inference that judges of Supreme Court would not do justice in a matter because they

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2 See generally *Bayindir Insaat Turizm Ticaret v Sanayi v Islamic Republic of Pakistan (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/03/29, 14 November 2005).

3 See generally *Case Concerning the Aerial Incident of 10 August 1999 (Pakistan v India)* [2000] ICJ Rep 12.

4 *Hamid Sarfaraz v Federation of Pakistan & Anor* (PLD 1979) SC 991, 994.

5 Ibid.

6 Ibid.

> would feel beholden to Attorney-General combining in himself office of Law Minister for their appointment, or they would feel intimidated in his presence because of his power to initiate disciplinary proceedings against them[7]

One would observe, however, that this case came at a time when Pakistan was under a military regime and this affected the performance of the organs of the state due to the exceptional circumstances prevalent at the time. Another, and perhaps more clearer judicial statement on the function of the AGP, came in the *Federation of Pakistan and others v Aftab Ahmad Khan Sherpao and others* (PLD 1992) SC 723. In this case, Naimuddin J held that in addition to functioning under art 100(3), the AGP under art 57 of the *Constitution*, may also speak in the National Assembly of Pakistan, without voting privileges, on matters of legal nature such as the *Constitution*, framing, enactment of laws and interpretation thereof.[8] Additionally, under Rule 1 of Order XXVII-A, *Civil Procedure Code of Pakistan* (hereinafter the 'CPC'), the AGP appears, advises and assists the Supreme Court by offering expert advice on constitutional and other legal matters.[9] Accordingly, it is incumbent upon the Supreme Court to hear the AGP in cases where a substantial question of constitutional law is involved before determining such a question.[10] However, it was explained that in such situations, notice for appearance to the AGP does not amount to a notice to the Federation and vice versa, unless it is so provided by law.[11] This judgment is important because it clearly defined the two major capacities of the AGP, that is:

(1) where the Federal Government directs the AGP to appear in a case, and carry out instructions, whatever they may be; and

(2) to act as advisor, under the *Constitution* or any law to advise as to the interpretation of the *Constitution* or that law.[12]

While performing such duties, the AGP is not to act on the advice of the Federation. Rather, the AGP must honestly guide the Federal Government and the Federal Legislature on the questions of law.[13] Thus, the judgment continues, the AGP advises courts as to interpretation of constitutional law under Order XXVII-A, Rule 1 of the

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7 Ibid 995.

8 *Federation of Pakistan and others v Aftab Ahmad Khan Sherpao & Ors* (PLD 1992) SC 723, 757.

9 Ibid. This provision of the CPC deals with suits involving substantial question as to the interpretation of constitutional law.

10 Ibid.

11 Ibid.

12 Ibid.

13 Ibid.

CPC and not like a traditional counsel representing a client (who may have the interest of their respective client at heart while interpreting the *Constitution*).[14]

Another important case that concerned the role of the AGP involves corruption allegations concerning the late Prime Minister of Pakistan Benazir Bhutto and her spouse, the current President, Asif Zardari. In *Benazir Bhutto and Another v. Federation of Pakistan and 2 others* (PLD 1999) Kar. 39, it was held that sending a letter by the AGP addressed to authorities in Switzerland to investigate assets owned by the petitioners was well within the defined role of the office.[15] This case is important because it explains a further role of the AGP in dealing with foreign governments in legal and judicial matters.[16] The judgment in this case referred to the functions of Law, Justice and Parliamentary Affairs Division set out in *Para 21 of Schedule II to the Rules of Business* wherein various functions of the said Division are enumerated. Item 4 specifically provides for '*Dealings and agreements with other countries and international organization in judicial and legal matter*'. Since the AGP was 'a part of the said Division and Chief Law Officer of the Government [he or she] can always be assigned the work of entering into such dealings'.[17]

The aforementioned judgments have all tested the boundaries of the role of the AGP in Pakistan's politico-judicial scenario. With the restoration of democracy and reversion to civilian government in 2008, the apex judiciary has consistently and conscientiously made an effort to assert its independence and hold the government accountable. This has, amongst other things, brought the role of the AGP into the spotlight. The AGP's role has metamorphosed from being the legal advisor/chief law-officer of the Federation to the government of Pakistan's premier apologist in the Supreme Court. In the past, the office of the AGP has been occupied by many independently minded individuals who sometimes took a bold stance against controversial law reform inspired by the *Shariah* system (for example, the AGP under Benazir Bhutto's first government, also the lawyer who defended Zulfikar Ali Bhutto's death sentence before the Supreme Court in 1979) commented that that 'power to declare something Islamic or un-Islamic cannot be granted to *Aalims* and *Muftis.*[18] This power can only be exercised by the people's representative assembly'.[19]

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14 Ibid.

15 *Benazir Bhutto and another v Federation of Pakistan & Ors* (PLD 1999) Kar. 39, 52.

16 Ibid 52.

17 Ibid 52-3.

18 Religious scholars.

19 Statement by Yahya Bakhtiar (29 July 1990) cited in Tahir Wasti, *The Application of Islamic Criminal Law in Pakistan:* Sharia *in Practice* (Brill, 2009) 169-170.

This statement echoes the stance of a liberal government taking a firm position on the application of Islamic criminal laws in modern society.[20]

In recent times, the most controversial case to come before the Supreme Court was the so-called 'missing persons' case. These are a series of cases consolidated into a single hearing for recovery by people that have allegedly been detained in the custody of the security agencies on suspicion of acting against national security, or due to alleged connections with terrorist organisations. Clearly, detaining people without charging them for specific crimes is a violation of basic human and constitutional rights.[21] Here the AGP has become more of a 'whipping boy' before the Supreme Court. Since the institution of these proceedings in late 2007, there have not been many successful recoveries. The AGP has borne the brunt of the Supreme Court's displeasure (in particular the Chief Justice of Pakistan Iftikhar Muhammad Chaudhry) for lack of progress in the matter.[22]

The crux of the matter is the delineation of the security agencies that currently work directly under military control and not under civilian control.[23] In a recent joint petition for recovery by individuals acquitted of terrorism related charges (who were 'picked up' by security agencies from the gaol) the Chief Justice hearing the petition observed that the AGP had not cited any law governing the affairs of the security agencies.[24] The AGP appearing on behalf of the Federation admitted that there were no rules or laws to regulate work of the security agencies.[25]

Another instance where the AGP played a crucial role was the controversial Hasba Bill introduced in the North West Frontier Province assembly (NWFP – now renamed as Khyber-Pakhtunkhawa) by the conservative ruling alliance of religious political parties. This Bill was a precursor to introduction of the *Mohtasib* (Ombudsman) who

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[20] Ibid 169. Five days later the then President of Pakistan, Ghulam Ishaq Khan dismissed both Yahya Bakhtiar and the Bhutto government.

[21] Human Rights Committee, *Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (12 April 2010) ('*Fardon v Australia*').

[22] For a background on the 'missing persons' case see generally Amnesty International, *Denying the Undeniable: Enforced Disappearances in Pakistan*, (Amnesty International Publications, 2008); see also Asian Legal Resource Centre, 'Thousands of Persons Remain Missing Amid Government Inaction' (27 August 2010) <http://www.alrc.net/doc/mainfile.php/hrc15/636/> at 5 April 2011.

[23] See, eg, Dawn, 'No Laws to Govern Spy Agencies, SC Told' (26 November 2010) <http://www.dawn.com/2010/11/26/no-laws-to-govern-spy-agencies-sc-told-2.html/print/>.

[24] Ibid.

[25] Ibid.

was charged with policing public morals according to the *Shariah*.[26] This Bill posed a risk of instituting parallel streams of justice, that is, one under the *Constitution* and the other the *Shariah* with no right of appeal against the *Mohtasib* pronouncement. Predictably, the Bill received a critical response from human rights organisations and mainstream civil society. The-then AGP (Makhdoom A Khan) commented that the risk with this law was that it would enable each Ombudsman to interfere in the lives of Pakistani citizens and install a parallel judiciary.[27] The AGP further stated that from district to district the *Mohtasib's* interpretations could be different on a range of issues and that the powers contemplated are broad, vague, generalized powers that virtually regulate every sphere of human activity. Makhdoom A Khan represented the Federation in challenging this provincial Bill before the Supreme Court of Pakistan where he argued that this Bill was unconstitutional and that it vested open-ended and vague executive powers that could infringe fundamental rights of citizens of Pakistan.[28] This Bill was eventually declared unconstitutional by the Chief Justice of Pakistan.

Conclusion and future directions

This article has reviewed only a few notable matters where the AGP has played a critical role in the development of the law in Pakistan. Since Pakistan is a maturing legal system where the institution of law reform is painstaking and often arduous, the role of the AGP is vital as a bridge between the federal government and the judiciary. This role has assumed greater importance since the judiciary has increasingly taken a critical line against various actions and policies of the government of Pakistan. The office of the AGP has evolved from being an independent and impartial advisor and chief law officer to being the legal representative of the government in the Supreme Court. This politicisation has meant that the ruling parties endeavour to have a party loyalist or a supporter installed as the AGP. In other words, in light of the currently hostile and exacting posture of the Supreme Court, a defender of the current government has become a necessity. However, the politicisation of the office has increasingly diverted the AGP from performing its original function. The politicisation has also taken its toll on the holders of the office of the AGP Pakistan has changed five Attorneys-General since the resignation of Makhdoom A Khan in August 2007 (who had served for six years).

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[26] See, eg, Tahseen Ullah Khan, 'The Proposed Hasba Bill at a Glance' (NRDF, Peshawar) <http://www.khyber.org/pdf/hasba.pdf>.

[27] Comments by Makhdoom A Khan to Refugee Review Tribunal (Australia) (PAK32724) (10 January 2008) 16.

[28] See e.g. Dawn (Nasir Iqbal), 'Hasba Bill Against *Constitution*, Says AG' (2 August 2005) <http://archives.dawn.com/2005/08/02/top5.htm>.

The AGP's function in the *Constitution* is defined in rudimentary terms. One advantage of a less rigid definition grounded in statute for the role of the AGP is flexibility. This is clearly the case with the status of the current office. However, a disadvantage of this approach is that the AGP simply becomes a legal counsel for the current government that is engaged in defending the government rather than objectively advising on the law. A consolidated statute that clearly defines the function, role and appointment of the law officers (such as the AGP, Additional Attorneys- General and the Deputy Attorneys-General) has become necessary.