

Similarities between Pakistan's Legal System and that of Hong Kong
A Transcript of the CCLS Talk Series Lecture by the Hon'able Justice Kemal Bokhary

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Abstract

Out of English common law origins, each jurisdiction in the common law world has developed its own common law. Of the many schools of Western jurisprudence, natural law comes closest to the Sharia. The common law is founded on natural law. Pakistan and Hong Kong share common law roots. The dimensions of those shared roots include a constitutional dimension. Pakistan's judiciary has the strength that comes from challenges bravely met. Legal practitioners in Pakistan pursue the founder's profession. The legal academy in Pakistan can call relevantly to mind the time when and the place where the chair was more influential than the bench. People in Pakistan and in Hong Kong alike are committed to the rule of law. Their shared ideals are reflected in how constitutional cases are decided. In both jurisdictions, the law's application and development are informed by due access to the courts, judicial independence, due process, democracy, the attaching of importance to outcomes, innovation and the exercise of imaginative faculties. Although the Hong Kong Court of Final Appeal does not initiate cases of its own motion, the Supreme Court of Pakistan's practice of doing so when necessary has been noted with admiration in Hong Kong.

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1. Introduction

I esteem it an honor to address you. For this opportunity to do so, I thank our hosts. My knowledge of Pakistan's legal system is limited. I must therefore rely on your indulgence. Doing so, I venture some thoughts on the similarities between Pakistan's legal system and Hong Kong's.

Comparative law matters. What do we really know of our own jurisprudence if we only our own jurisprudence know?

2. The Development of Distinct Common Law Jurisdictions

Mr. Justice Story called English common law the "grand reservoir of all our jurisprudence"². Yet, each common law jurisdiction has developed its own common law. For instance, in *Uren v Australian Consolidated Press*³, the High Court of Australia chose not to replace the Australian test for exemplary damages with the new test devised by the House of Lords in *Rookes v Barnard*⁴. The Privy Council respected that choice. Lord Watson, known as "the Privy Council Judge par excellence," was celebrated for endeavoring "to interpret the law according to the spirit of the jurisprudence of the jurisdiction from which the appeal came"⁵. The Privy Council never applied to a people any rule unsuitable to their habits and conditions⁶.

Of the many schools of Western jurisprudence, natural law comes closest to the Sharia, a view shared by Professor J N D Anderson⁷ and myself. This is consistent with Professor Majid Khadduri's point that "In Islamic legal theory the law preceded society"⁸. In *Millar v Taylor*⁹, Mr. Justice Aston stated: "The common law, now so called, is founded on the law of nature and reason." This statement was made in the presence of Lord Mansfield, who did not contradict or qualify it.

² *United States v Wonson* 28 F Cas 745 at p 750 (1812)

³ [1969] 1 AC 590

⁴ [1964] AC 1129

⁵ Richard Haldane, "The Appellate Courts of the Empire" (1900) 12 *Judicial Review* 1 at p 5

⁶ *Padman v Hanwata* AIR 1915 PC 111 at pp 122-113

⁷ Expressed in the opening chapter of his *Islamic Law in the Modern World* (New York University Press, 1959)

⁸ Made in the opening sentence of his *Islamic Jurisprudence: Shafi'i's Risala* (Johns Hopkins University Press, 1961)

⁹ (1769) 4 Burr 2302 at p 2343

Pakistan and Hong Kong share these common law roots. The dimensions of these shared roots include a constitutional one, as echoed in the opinion of the United States Supreme Court in *Smith v Alabama*¹⁰, which noted that constitutional interpretation is influenced by provisions framed in the language of the English common law¹¹.

3. The Pillars of Pakistan's Legal System

Pakistan's judiciary possesses strength derived from challenges bravely met. The nation's legal practitioners—in private practice and public service—pursue the profession of the nation's Founder. At the zenith of the four great schools of Islamic jurisprudence, "the chair was more influential than the bench"¹². Inspired by this example, Pakistan's legal academy is poised to impart what Dr. Johnson called "illumination of the mind."

When I once asked Chief Justice Bhagwati of India who the greatest judge from the subcontinent to serve on the Privy Council was, he replied, "Ameer Ali of course," surprised the question was necessary. The Right Honorable Mr. Syed Ameer Ali is widely tributed, including a reference to his "great learning"¹³ made in the Judicial Committee of the Privy Council, a tribunal whose jurisdiction once extended to a quarter of the world.

4. Historical Context of Hong Kong

"Analysis without history is blind," said James Fitzjames Stephen¹⁴. While I do not agree with all his views, I concur with this sentiment.

For China Trade purposes, Britain sought a possession on China's southern coast. China ceded Hong Kong Island to Britain by the Treaty of Nanking (1842). Hong Kong Island in January 1841 based on an agreement in principle under the so-called Convention of Chenpui.

If I may digress briefly to personal history, my maternal great-great-grandfather, a seafarer from the Gulf States, set foot in Hong Kong about a decade before it became a British colony. His story is told in my memoirs¹⁵.

¹⁰ 124 US 465 (1888)

¹¹ Ibid at p 478

¹² Noel Coulson: *Conflicts and Tensions in Islamic Jurisprudence* (Chicago University Press, 1969) at p 9

¹³ *Bakhshwen v Bakhshwen* [1952] AC 1 at p 12

¹⁴ "English Jurisprudence" (1861) 114 *Edinburgh Review* 456 at p 481

¹⁵ Kemal Bokhary: *Recollections* (Sweet & Maxwell, 2013) at pp1-4

In 1860, the Colony was expanded by the cession of Stonecutters' Island and the Kowloon peninsula south of Boundary Street under the Convention of Peking. In 1898, the New Territories were leased to Britain for 99 years under the Second Convention of Peking.

Upon occupation, Britain proclaimed that Chinese inhabitants would be governed by Chinese laws and customs under the control of a British magistrate, while British subjects and foreigners enjoyed the protection of British law¹⁶. In 1843, Hong Kong was given a legislature, the Legislative Council. The Supreme Court Ordinance of 1844 placed everyone in Hong Kong under the protection of English common law and equity, subject to modifications required by local circumstances. It also allowed ethnic Chinese domiciled in Hong Kong to resort to traditional Chinese laws and customs in personal and religious matters—an appropriate accommodation, as traditional China itself accommodated several legal systems¹⁷.

I pause to mention that even as I, a Muslim, reference Islam with reverence, I remember the Founder's equal inclusion within the nation of members of other faiths.

Hong Kong evolved from a small fishing, farming, and stonecutting community into an entrepot, then a hub of tourism and light manufacturing, and finally the international financial centre it is today.

5. Shared Characteristics and Commitment to the Rule of Law

We in Hong Kong have our harbor and the teeming Pearl River delta as a hinterland. Otherwise, our only natural resource is our people of many faiths, ethnicities, and origins. Circumstances have instilled in us a strong work ethic and an abiding commitment to the rule of law. I have no doubt that similar characteristics exist in every Pakistani true to the precepts which the Founder's life embodies.

The British era in Hong Kong ended on 1 July 1997, when China resumed the exercise of sovereignty under the Sino-British Joint Declaration of 1984. This "handover" ushered in the "one country, two systems" principle, which preserves our previous system for at least fifty years. This

¹⁶ It was so proclaimed under two proclamations, one by Commodore Sir J J G Bremner and Captain Charles Elliot together on 1 February 1841 and the other by Captain Elliot alone on the following day

¹⁷ As pointed out by Professor Anthony Dicks in his contribution to *Islamic Family Law* (Chibli Mallat and Jane Connors eds) (Graham & Trotman, 1990) at p 360

preservation is entrenched not only by treaty¹⁸ but also by our post-handover constitution, the Basic Law. Upon the handover, the Hong Kong Court of Final Appeal became our court of last resort.

6. Constitutional Adjudication and Judicial Review

Pre-handover, Hong Kong's constitution consisted of the Hong Kong Letters Patent and the Hong Kong Royal Instructions, which were beyond the power of the colonial legislature to abrogate. On 8 June 1991, a third constitutional instrument, the Bill of Rights¹⁹, was introduced, reproducing the International Covenant on Civil and Political Rights (ICCPR) almost verbatim. It was entrenched by an amendment to the Letters Patent, prohibiting the legislature from restricting ICCPR rights.

In 1913, our judiciary stated that enactments beyond the legislature's power would be pronounced bad²⁰. However, the power to make laws for "peace, order, and good government" was consistently interpreted by the Privy Council as the widest possible law-making power. Therefore, "constitutional review" (as I call *Marbury v Madison*²¹ judicial review) was more theoretical than real until the Bill of Rights.

Since then, our judiciary has exercised constitutional review in earnest—first under the Bill of Rights, and now under the Basic Law and the Bill of Rights. As a national law, the Basic Law is beyond the power of the Legislative Council to abrogate or amend. It enumerates a wide range of rights and freedoms and entrenches the Bill of Rights by providing that the ICCPR as applied to Hong Kong shall remain in force. Judicial stewardship of an entrenched constitution is common to both Pakistan's legal system and Hong Kong's.

7. The Essence of Constitutional Jurisprudence: A Focus on Outcomes

The jurisprudence of Pakistan's Supreme Court exhibits a quality noted by Professor C L Lim: a "dislike [of] paying homage to principle when outcome risked being orphaned²²." I have observed

¹⁸ In his article "Hong Kong Fifteen Years after the Handover: One Country, Which Direction?" (2013) 51 *Columbia Journal of Transnational Law* 275 at p 279

¹⁹ Which formed Part II of the Hong Kong Bill of Rights Ordinance (Cap 383)

²⁰ In *R v Ibrahim* (1913) 8 HKLR 1 at p 18

²¹ 5 US 137 (1803)

²² *Towering Judges* (R Abeyratne & I Porat eds) (Cambridge University Press, 2021) at p 124

and admired its abiding commitment to producing results of practical justice, not platitudes. If we talk the constitutional talk, we must walk the constitutional walk.

Five Court of Final Appeal decisions reveal the essence of our constitutional jurisprudence:

1. **Last Resort Striking-Down:** In *Official Receiver v Chan*²³, we struck down a legislative provision that restricted freedom to travel more than necessary, as it was beyond remedial interpretation.
2. **Remedial Interpretation:** In *HKSAR v Lam Kwong Wai*²⁴, we read down a persuasive burden in firearms legislation to an evidential burden to save it. In *W v Registrar of Marriages*²⁵, we read up the words of gender in matrimonial legislation to include reassigned gender to give meaning to the constitutional right to marry.
3. **Tailored Remedies:** In *Koon v Insider Dealing Tribunal*²⁶, we struck down a fining-power to render the tribunal's proceedings civil, thereby preserving its findings and other orders. This was innovative, though less so than the Supreme Court of Pakistan's approach in *Shehla Zia v WAPDA*²⁷.
4. **Suspended Declarations:** In *Koo v Chief Executive*²⁸, we held that a striking-down order may be suspended for a limited time to allow for corrective legislation when an unconstitutional arrangement attempted a constitutionally worthy objective. We distinguished this from "temporary validity," which provides a shield from liability, as used in *Special Reference No 1 of 1955*²⁹ (Pakistan) and *The Manitoba Language Rights Case*³⁰ (Canada). Koo's case called only for suspension, as "necessity will not justify going further than necessity obliges"³¹.

²³ (2006) 9 HKCFAR 545

²⁴ (2006) 9 HKCFAR 574

²⁵ (2013) 16 HKCFAR 112

²⁶ (2008) 11 HKCFAR 170

²⁷ PLD 1994 SC 693

²⁸ (2006) 9 HKCFAR 441

²⁹ PLR 1956 WP 598

³⁰ [1985] 1 SCR 721

³¹ *Proceedings against George Stratton & Others for deposing Lord Pigot* (1779) 21 State Trials 1045 at p 1231

8. Foundational Principles in Practice

8.1 Access to Justice

Access to the courts gives meaning to Magna Carta's promise not to deny justice³². I have called it "an articular right"³³. The Supreme Court of Pakistan in *Jamal Shah v Election Commission*³⁴ barred the creation of an authority whose actions are not subject to law. The US Supreme Court in *NABP v Button*³⁵ stressed litigation's role in pursuing causes, and the UK Supreme Court in *R (UNISON) v Lord Chancellor*³⁶ stated that access to the courts is inherent in the rule of law.

8.2 Judicial Independence

Judicial independence prevails in Pakistan and Hong Kong and is not an exclusively Western concept. From 18th-century China, Sun Shou-chih's case³⁷ illustrates this, where the Board of Punishments resolutely counselled the Emperor to be faithful to the law, which he then endorsed.

8.3 Due Process

Due process, by that or another name, is enforced in both jurisdictions. The People's Court of Haidian District, Beijing, enforced due process in *Tian Yong v University of Science and Technology, Beijing*³⁸, a case issued by the Supreme People's Court as a Guiding Case.

8.4 Constitutional Ideals

Fully faithful to the constitution, both judiciaries seek decisions that accord with the highest ideals of the people³⁹. Every court does, in Lord Eldon's phrase, "what it can"⁴⁰. Hong Kong believes in the right of humble folk "not to be pushed around"⁴¹, a right the Supreme Court of Pakistan vindicated by preventing the conversion of a public park into a commercial golf course⁴².

³² Magna Carta, article 40

³³ *Solicitor v Law Society* (2003) 6 HKCFAR 570 at para 45. *Designing Hong Kong Ltd v Town Planning Board* (2018) 21 HKCFAR 237 at para 61

³⁴ PLD 1966 SC 1 at p 52

³⁵ 371 US 415 at p 431 (1962)

³⁶ [2020] AC 869 at para 66

³⁷ (1796) HABL 9.18/13a

³⁸ (1994) 4 Supreme People's Court Gazette 139

³⁹ First said in Kemal Bokhary, "Making Law in the Courts" (2002) 10 Asia Pacific Law Review 155 at p 160, and often repeated since

⁴⁰ *Cockburn v Thompson* (1809) 16 Ves Jun 321 at p 326

⁴¹ *Hartley Shawcross: Life Sentence* (Constable, 1985) at p 316

⁴² *Moulvi Iqbal Haider v Capital Development Authority* PLD 2006 SC 394

8.5 Democracy

Our Basic Law promises democracy⁴³. The Supreme Court of Pakistan has declared that the legitimacy of governance is conditional upon general elections being held⁴⁴, and the Peshawar High Court has stressed the duty of a caretaker government to ensure a conducive atmosphere for free and fair elections⁴⁵.

8.6 Judicial Imagination

Chief Justice Kayani famously spoke of "the imaginative consciousness of the judicial mind"⁴⁶. Hong Kong recognizes that the law's development often requires imaginative faculties. I admire Mr. Justice Jawad Hassan's imaginativeness in *Muhammad Ahmad Pansota v Federation of Pakistan*⁴⁷, a case discussed in a book I co-authored⁴⁸, which calls to mind Lord Shaw's reference to "sound imagination"⁴⁹.

8.7 Healthcare

Our constitution mandates improving medical services⁵⁰, and your constitutional right to life includes healthcare⁵¹.

9. Conclusion

We in Hong Kong do not initiate cases of our own motion (*suo moto*), but I have written admiringly of how Pakistan does⁵².

With your permission, I acknowledge my deep indebtedness to Mrs. Justice Ayesha Malik for what her splendid book⁵³ has shown me of the decisions of the Supreme Court of Pakistan. Those who know law derived from the sacred are well qualified to deduce law from the secular.

⁴³ Articles 45(2) and 68(2)

⁴⁴ *Wasim Sajjad v Federation of Pakistan* PLD 2001 SC 233

⁴⁵ *Zubair v Government of Khyber Pukhtunkwa* PLD 2022 Peshawar 100

⁴⁶ M R Kayani: *A Judge May Laugh* (Pakistan Writers' Co-operative Society, 1970) at p 105

⁴⁷ PLD 2020 Lahore 229

⁴⁸ Kemal Bokhary, Zane Heady and Asher Heady: *Croc and Roll Law* (Sweet & Maxwell, 2023) at p 159

⁴⁹ *Watson, Laidlaw & Co Ltd v Potts, Cassels & Williamson* 1914 SC (HL) 18 at pp 29-30

⁵⁰ Article 138 of the Basic Law

⁵¹ *Adeel Akhtar v Federation of Pakistan* 2023 SCMR 209

⁵² Kemal Bokhary: *Human Rights: Source, Content and Enforcement* (Sweet & Maxwell, 2015) at paras 6.033 and 44.023 where *Darshan Masih v The State* PLD 1990 SC 513 and *The Case of Environmental Pollution in Balochistan* PLD 1994 SC 102 are cited

⁵³ Ayesha Malik: *Supreme Court of Pakistan 1956-2006: Selected Cases* (Pakistan College of Law, 2006)

Thank you for your patience. In conclusion, my wife⁵⁴ and I wish you the brightest future, which we do in the name of our grandchildren.

⁵⁴ Mrs. Verina Bokhary SBS, formerly Mrs. Justice Verina Bokhary of the High Court of Hong Kong