The Influence of U.S. Jurisprudence on the Supreme Court of Pakistan

Umar Rashid & Amna Rashid

Abstract

The article is a study of citation of United States law by the judges of the Pakistani Supreme Court in their decisions. The ultimate purpose is to understand the rationale behind the use of foreign law by domestic courts. However, as a first step in the purpose this article will limit itself to use of U.S. Law by the judges of the Supreme Court. The article will try to answer the question whether the citation of foreign law (in words of Justice Scalia) is "unprincipled and opportunistic" or does it represent the manifestation of iusgentium (law of nations) on constitutional development in Pakistan. The concept 'law of nations' (iusgentium) is not used in the narrow sense to mean international law. Instead it denotes a far broader concept, and as a result less precise, comprising of something similar to the general consensus of mankind, or common law of mankind, on issues dealing not just with sovereigns, but with legal issues generally; such as rights, property, contracts, tort(s) and crime. Iusgentium represents the near consensus on legal issues amongst most jurists, lawyers and judges in the world and as such represents an invaluable resource for judges and lawmakers to answer particular problems that they may face in their own jurisdictions. The article will thus be a first step and further research will shift focus on use of foreign law other than U.S. law by Pakistani Supreme Court justices. Therefore, the article will help in answering

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Umar Rashid and Amna Rashid are faculty members at University of Management and Technology (UMT), Lahore. Requests should be sent to umar.rashid@law.nyu.edu.

several questions: the need to borrow from and reasons for borrowing from foreign sources; the problems borrowing may face and cause; why it may be problematic and resisted; and the effect it has on constitutional development in Pakistan; and whether use of foreign sources is "unprincipled and opportunistic" or does it represent the manifestation of iusgentium.

Introduction

Referring to and borrowing from foreign law is inevitable, especially in today's age of easy access to foreign law, for there are only a limited number of general constitutional principles available to judges and lawmakers.1 Courts normally treat foreign legal norms either by incorporating them, resisting them or by engaging with them, 2 and often this has far reaching consequences for the development of local laws. 3 Therefore, it is not surprising that reference to foreign law often leads to heated debates amongst its detractors and supporters. 4 Such use of foreign law has been variously described as unprincipled and opportunistic5 or manifestation of iusgentium (law of nations).6 The use of foreign law by Pakistani courts is widespread and has given rise to controversy whether such an approach is refreshingly cosmopolitan or a threat to Pakistan's legal autonomy and integrity. Whether it is unprincipled and opportunistic or does it represent the manifestation of iusgentium, is an important question to consider.

This article is divided into three parts. The first part briefly discusses reasons as to why courts may refer to foreign law. The second part provides examples of the language used by Pakistani Supreme Court when referring to U.S. Law and what this language says about the place of U.S. and foreign law in the jurisprudence of Pakistani law. The third part provides

examples of how U.S. law has been used by the Supreme Court of Pakistan in an attempt to understand whether such use is unprincipled and opportunistic or if it represents the manifestation of iusgentium (law of nations).

Part I: Reasons why Courts may refer to Foreign Law

Though reference to and use of foreign law may be inevitable, it can be problematic. Use of foreign law is often criticized on the basis that it can be a threat to the autonomy and integrity of local law.7 It is argued that use of foreign law undermines judicial legitimacy and allows for illegitimate expansion of judicial discretion8 and thus should be resisted9. It is further argued that referring to foreign law is inconsistent with sovereignty, since such use can prevent national courts from expressing their own unique national character based on their own history, values and needs.10 Additionally use of foreign laws also carries the risk of improper implementation of such laws which cannot only cause the implementation to fail, but can lead to confusion and betrayal of fundamental national values.11

Similarly, use of foreign law can undermine the political legitimacy of constitutions.12 The argument is that the validity of constitutions is based on popular agreements expressed through the electoral process, public deliberation, and through correspondence between constitutional norms and national values.13 This validity is adversely affected by undue reliance on foreign law.14 Furthermore, concerns have been raised on the use of foreign law as undermining accountability in a democratic system. In democratic countries, judges are either elected directly by the people or are appointed through a system under which the ultimate decision rests with the democratically elected chief executive or the legislative assembly. 15 Thus judges, even if not directly elected, are appointed through a system under which the appointing

authority is accountable to people. If a decision of a foreign court is used, that decision was rendered by a (foreign) judge not accountable to the people. Moreover, this (foreign) judge is playing a role in shaping the law that binds the people of the country to whom he is not accountable.16

This problem of legitimacy is based on the scope of use of foreign law and is considerably lessened if the constitution expressly or implicitly authorizes reference to foreign law17 or as in the case of Pakistan where it forms part of discourse surrounding constitutions from the earliest years of constitutional development. 18 Similarly, use of foreign law can, theoretically, be quite helpful, as it can offer new perspectives, insights, and ideas and more options for decision making and act as a counter to "parochial tendencies" of national constitution and laws. 19 Similarly, reference to foreign law can help expand the space for domestic deliberation, can allow national governments to better bear the pressure of powerful interest groups, and insulate courts form inter-governmental pressure. The argument here being that recourse to foreign law sources can protect "democracy from the debilitating grip of globalization". 20 Similarly, use of foreign law does not necessarily entail that distinctive national legal traditions cannot develop, rather conscientious use of such sources can help in resolving increasingly similar issues concerning constitutional guarantees and rights and can help in enriching the thinking of domestic regime of constitutional protections.21

Professor Waldron has argued that recourse to iusgentium should not be denied to courts today.22Iusgentium is more than what we now call international law. It rather represents the preponderance of juristic opinion that can be accessed by lawmakers and judges faced with particular problem. Just like a scientist relying on experiments of their peers worldwide, courts can do the same when faced with problems, relying not

just on their own reasoning but also taking into account the reasoning used by others.23

Part II: Examples of the Language used by Pakistani Supreme Court when referring to U.S. Law

Unlike the controversy that can arise in foreign jurisdictions when foreign law is used, the use of foreign law by Pakistani courts appears to be a norm rather than an exception.24 In this regard, the Supreme Court of Pakistan has referred to and used United States law and jurisprudence throughout its history from cases ranging from interpretation of the constitution itself, basic rights of the people, to the interpretation of ordinary statutes and ordinances of Pakistan. This article discusses a number of such cases as examples of how the Supreme Court of Pakistan has used U.S. law, however it should be noted that the list is not exhaustive. An exhaustive list would greatly increase the length of this article for it has been observed by the authors that the Pakistani Supreme Court has referred to U.S. law in multiple cases almost every year since the independence of Pakistan.25 This article limits itself to cases that are of constitutional significance and which show the breath of areas covered by cases that refer to U.S. jurisprudence. Similarly, the article also does not discuss decisions of the various High Courts in Pakistan that have referred to U.S. jurisprudence.

Table 1 provides examples of the use of language by the Pakistani Supreme Court when referring to U.S. law from each decade since 1950s:

Reference to U.S. Law Excerpts from Supreme Court Cases	**Supreme Court Case**
• The [current] case of the appellants did not come within the ratio decidendi of *Yick Wo v Peter Hopkins* [U.S. SC case]. • The expression has been borrowed from the Fourteenth Amendment to the Constitution of the United States.	PLD 1957 SC 9
• In this connection the following passage occurring in Vol. 18 of American Jurisprudence, Elections 225 is instructive.	PLD 1957 SC 301
• In this respect the Constitution of Pakistan, The Indian Constitution and late Constitution of Pakistan made a significant departure from the American pattern. • That such a proceeding is within the competence of the Courts exercising the power of judicial review is, in my opinion, made plain by the action taken in a case of apprehended violation of a Constitutional right by the	PLD 1964 SC 673

Supreme Court of the United States in the case of *Chicago Milwaukee v Minnesota*.	
• The Supreme Court of American has held… • The Courts in Pakistan… cannot 'roam at large' like the American Courts… • The legislators in America had… • In America, it is well recognized… • Even the American jurists concede that… • What American Jurists would call… • According to comments in some American authorities… • Following observations of the Supreme Court of America in… are also pertinent. • But even the famous American jurist…	PLD 1966 SC 854
• It may well be, as has been suggested in some quarters, that in this sense it [art.2 and art. 98 of the 1962 Constitution of Pakistan] is as comprehensive as the American 'due process' clause in a new grab.	PLD 1969 SC 14
• Even the American Jurist are not unanimous.	PLD 1972 SC 139

• The great American Judge [Oliver Wendell Holmes, Jr.] sowed the seed of the American realism in a famous article. • Such a principle, has also been adopted in America in various cases. • [A]nd the American Courts too adopted the policy that where the acts done by the usurper were "necessary to peace and good order among citizens and had affected property or contractual rights they should not be invalidated", not because they were legal but because they would cause inconvenience to innocent persons and lead to further difficulties. • [T]his Court [Pakistani Supreme Court] like the Supreme Court of the United States of America strictly confines itself. • According to Holmes law is really what the Judge decides. • From this examination of the authorities [American authorities] I am driven to the conclusion that the Proclamation of Martial Law does not by itself involve the abrogation of the civil law and the functioning of the civil authorities and certainly does	

not vest the Commander of the Armed Forces with the power of abrogating the fundamental law of the country.	
• It is interesting to note in this connection that in the Constitution of the United States of America as originally enacted the Bill of Rights, which had also been adopted by the founding fathers, had not been incorporated.	PLD 1973 SC 49
• The American views on the subject are contained in a copy of a letter of Pennsylvania Assembly to Governor Robert Marris. • But in this connection the standard laid down by the Supreme Court of America for reviewing the use of emergency measures has varied widely. • In Ex Parte Milligan ((1866) 71 US 2)…. The Court [SC of USA] verged on taking the extreme view….. But in contrast to this the Supreme Court [USA] appears to have gone to the other extreme in Moyer v. Peabody ((1909) 212 US 78)	PLD 1977 SC 657

• Similarly. Mr. Batalvi [Lawyer representing the State of Pakistan] had not pointed to any American statute law containing any provision similar to section 111. P.P.C. [Pakistan Penal Code]. So far as the cases of Betts & Ridley v. Rex (22 Cr. A. Rep. 148); Allan Banbridge v. The Queen (43 Cr. A. Rep. 1514.); Boyd v. United States (142 U S 1077); were concerned it was contended that these were not relevant as they did not deal with any provision similar to section 111, P.P.C. • It would thus be seen that this statement of law from the American Jurisprudence is not only in complete harmony with the case-law quoted by the learned counsel for appellant Bhutto, but also with the views expressed by Monir already quoted in the earlier part of this discussion. • In support of his contention the learned Special Public Prosecutor relied on a passage… American Jurisprudence (Volume 14), pages 813, 829 and 83.	PLD 1979 SC 53

• Obviously, therefore, there is no vesting of judicial power in the courts as in the American Constitution. • [Art. 281 of the Interim Constitution of Pakistan 1972] is similar to the Due Process Clause in the American Constitution. • From the review of cases it becomes abundantly clear that both in American and England. • See 550 of the American Jurisprudence, Volume 16, 2nd Ed., page 946. • In only two cases in all American history have congressional delegations to public authorities... • The Learned counsel relied on *Hurtado v. People of California*.	PLD 1983 SC 457
• It is worth mentioning the admirable words' of Chief Justice Hughes of the Supreme Court of United States of America: "We are under a Constitution, but the Constitution is what the judges say it is ...." • In American system:… • This is illustrated from what an American Chief Justice, Charles Evans, Hughes, said…	PLD 1988 SC 416

• It was held by the American Supreme Court:… • A reference to the observations made by its Supreme Court in United States of America v. America Trucking Associations (1940) 310 U S 534 would bear this out.	
• The first principle finds expression in second edition of `A Treatise on the Anglo-American System of Evidence in Trials at Common Law' by John Henry Wigmore in Volume V at page 194, in the following words… • In the American jurisdiction too privilege is not allowed to prevail • See Clinton E. Jencks v. United States of America (353 U.S. 657) and Roviaro v. United States of America.	PLD 1992 SC 492
• Indeed, this progressive approach has been adopted by the Courts in the United States and the reason given for doing so is that. • Speech ends where conduct begins but if both are combined the Court has to draw the dividing line. As held in American Communications	PLD 1993 SC 473

Association v. Douds (1950) 339 US 382 the freedom of expression of views is curtailed or restricted when they "threaten clearly and imminently to ripen into conduct against which the public has a right to protect itself".	
• Study of Constitutions of different countries shows that Constitutions are always made and promulgated keeping in view objective conditions and socio-economic requirements and sometimes in such Constitutions is provided…. In the Constitution of United States certain amendments to the Constitution are regarded to be within the exclusive .purview of the Congress and the Supreme Court has refused to interfere with them on the ground that doing so would amount to entering into political questions as in respect of such matters the Court has no power of judicial review.	PLD 1997 SC 426
• his conclusion finds support from the observation of Willoughby in Constitution of United States, Second Edition, Vol. II at page 1709 where the	Constitution Petition No.53 of 2007 & Constitution Petition No.83

term 'due process of law' has been summarized	of 2012 (The Supreme Court of Pakistan)
• We may, at this stage, refer to the case of United States v. Richard M. Nixon, President of United States [418 US 683].	2012 SCMR 584 (Supreme Court of Pakistan)

An examination of the table shows that it is a norm for counsels and for the judges to use U.S. law in their arguments. Unlike most other jurisdictions, the Supreme Court of Pakistan considers taking into account foreign law as nothing special. It is something not only accepted but encouraged for the language used can be seen to show how referring to U.S. law is taken to strengthen ones position.26 Even where the Court does not agree with or considers that U.S. law would be an authority, the language used by the Court gives the impression that starting discussion with identifying the U.S. position (or other foreign laws especially of India and England) on a particular issue, is perfectly legitimate and reasons need to be provided as to why U.S. law is not relevant or helpful.27 The use of U.S. law (and other foreign law) by judges of the Supreme Court of Pakistan to bolster their arguments and to provide legitimacy to their own interpretations is done without going into details as to the appropriateness of using foreign law for interpretation of Pakistani law.

The use of the law of England and India in arguments by the Supreme Court of Pakistan can be partially explained on the basis of the close connection that the Pakistani legal system has with these two systems. After the partition, the court structure of Pakistan was the continuation of the structure present in united India.28 Both Pakistan and India have continued to use

the laws promulgated under the British rule, and as a result, case law from England continues to be of persuasive authority, especially pre-partition case law.29 So the Supreme Court of Pakistan referring to the law of England and India for the purposes of interpretation of various Pakistani laws is not without justification. The surprise is the heavy use of U.S. law by lawyers and judges at both the High Court and Supreme Court level of Pakistan, when there is no such connection between the U.S. and Pakistani legal system as exists between the later and India and England.

The following part of this article discusses selected cases of the Supreme Court of Pakistan where U.S. law was used. The list of cases is in not exhaustive rather it is representative of the diversity of areas in which the Supreme Court has sought assistance from sources of U.S. law. Further, an attempt is made to understand whether such use is unprincipled and opportunistic or if it represents the manifestation of iusgentium (law of nations).

Part III: Examples of how U.S. law is used by the Supreme Court of Pakistan

After the first Constitution of Pakistan came into existence in 1956, the Supreme Court of Pakistan referred to U.S. law to decide two important cases that raised the issue of fundamental rights of people of Pakistan. In both cases, the Court used U.S. law to uphold the rights of people. This practice of using U.S. law to help in the interpretation of civil liberties and human rights has continued.

PLD 1957 SC 9

Jibendra Kishore vs. The Province of East Pakistan 30 concerned the compatibility of acquisitions by the State of the interests of rent-receivers in East Bengal under sections 3 and

37 of the East Bengal State Acquisition and Tenancy Act 1950, with Articles 5 and 18 of the 1956 Constitution of Pakistan.31 The 1950 Act was passed to reform the land tenure system in Bengal. The old system had been introduced by the East India Company through the Bengal Permanent Settlement Regulations of 1793 and amended by the British colonial government through the Bengal Tenancy Act of 1885. The old system provided for the *zamindari* system of land tenure and revenue system. It put a fixed revenue demand on *zamindars* or landlords (landed aristocracy) to pay the government, thus granting them ownership over the land and disregarding the rights of actual tillers of the land. The system in its application was flawed and quite unjust towards the traditional tillers of the land.32 The 1950 Act allowed for wholesale acquisition of these *zamindars* or rent-receivers interest through the payment of compensation throughout East Pakistan, thus bringing such land under the direct control of the government with a view of improving the conditions of actual tillers of the land.33 The acquisitions of *zamindars* or rent-receivers interest under the 1950 Act were challenged as being contrary to Article 5 of the Constitution 34 for being arbitrary and discriminatory. The acquisitions of *wakf* and *debutter* property under the 1950 Act were challenged for being contrary to Article 18 of the Constitution, which guarantees the right to establish, maintain, and manage religious institutions. 35 In the case of *wakf* property, the right of Muslims citizens to establish, maintain, and manage their religious institutions was used; and in the case of *debutter* property, the right of Hindu citizens to establish, maintain, and manage their religious institutions as provided under Article 18 of the Constitution was used to challenge the 1950 Act.

In its interpretation of Article 5 of 1956 Constitution, the Supreme Court of Pakistan referred to the Fourteenth Amendment to the Constitution of the United States, primarily the Due Process Clause and Equal Protection Clause. The

Supreme Court of Pakistan also discussed the U.S. Supreme Court decisions of *Yick Wo vs. Peter Hopkins*36 and *Homer Adolph Plessy vs John H. Ferguson37* in considerable detail to help in the interpretation of Article 5 of the 1956 Constitution. To help interpret Article 18 of the 1956 Constitution, the Supreme Court of Pakistan referred to *Copen vs. Foster* of the Supreme Judicial Court of Massachusetts.38 U.S. law was also used to help uphold the validity of the 1950 Act designed to bring to an end the unjust *zamindar* system (a system implemented by a colonial power). It must be noted that the reference to the U.S. law was taken as essential in understanding the Pakistani Constitution.

PLD 1957 SC 301

In another case, *Mir Nabi Bakhsh vs. The Election Petitions Tribunal*,39 the Pakistani Supreme Court referred to U.S. law (as summarized in Vol. 18 of American Jurisprudence, Elections 225) as a reason to support their conclusion that a breach of technical election rule(s) or irregularities by election officials was not sufficient to invalidate the votes cast by voters, provided that such breaches or irregularities did not affect the results. Thus, the Court used U.S. law to prevent the disfranchisement of voters and to uphold voter rights.

PLD 1964 SC 673

A third case, *Saiyyid Abul A'la Maudoodi vs. Government of Pakistan*,40 concerned notifications issued by the then two provincial governments of Pakistan declaring Jamaat-i-Islami of Pakistan (a political party) an illegal association. The Supreme Court of Pakistan held the two notifications void on grounds of their incompatibility with the Constitution of Pakistan, and the right of freedom of association as enshrined in the Constitution. The court upheld the rights of political parties and condemned the government for actions designed to

deprive the party and its members of their rights. In reaching its decision, the Supreme Court made extensive reference to U.S. law in support of its decision and its interpretation of the right of freedom of association.

PLD 1966 SC 854

A fourth case, *Province of East Pakistan vs. Sirajul Huq*,41 concerned the administrative organization of the government under the system of Basic Democracies introduced by the first military dictator of Pakistan. The Supreme Court of Pakistan used U.S. law about the delegation of legislative powers to decide whether the powers delegated by Pakistan's parliament were compatible with the Constitution. While accepting that the Pakistan Supreme Court had the power to review legislation (including delegated legislation), in the present case, it held the delegated powers valid by referring to the practice in the U.S. of enlarging the powers of delegation. The Supreme Court decision reflected a desire to ensure that the administrative system chosen by the government should be allowed to work, unless it explicitly contravenes commonly accepted principles of political practice. Since U.S. jurisprudence would not allow validation of a dictatorial regime, the Court validated the delegation of legislative powers without analyzing the validity of the underlying system implemented by a dictator.42 Thus, using U.S. law only to decide the validity of delegated legislation and not the validity of the entire system.

PLD 1969 SC 14

In yet another case, *Government of West Pakistan vs. Begum Agha Abdulkarim*, 43 an issue arose over interpretation of Article 2 of the 1962 Constitution of Pakistan. Article 2 states that the rights of individuals are to be dealt with in accordance with the law. The Pakistan Supreme Court drew direct

comparison between Article 2 and the U.S. "due process" clause, equating article 2 to be as comprehensive as the "due process" clause. The Supreme Court in this case reviewed the powers of government to detain individuals under the Defence of Pakistan Ordinance, 1965. The Supreme Court furthered its own powers of review by requiring that detentions, by arresting authorities, need to be compatible with Article 2 of the 1962 Constitution. Thus, in this case the Supreme Court referred to U.S. law to uphold civil liberties of the citizens of Pakistan.

PLD 1972 SC 139

Another case, *Miss Asma Jilani vs. The government of the Punjab*,44 was a landmark case in Pakistan's history, holding that proclamation of martial law by General Yahya Khan illegal. The Supreme Court held that the Doctrine of Necessity could not be used to legalize the military regime of General Yahya Khan. The Supreme Court further explained that the Doctrine of Necessity can, at most, only condone a usurper's illegal and illegitimate acts and cannot legitimize it. Similarly, it held that "Martial Law by itself [cannot] lead to the complete destruction of the legal order"45. To reach these conclusions, the Supreme Court of Pakistan used U.S. cases that arose after "the suppression of the rebellion of the Southern States."46 Using U.S. Law, the Supreme Court held that "only those legislative and administrative acts [of the Martial Law regime] can be recognized by the Courts, which may be found to be absolutely necessary on the doctrine of necessity within the limitations of that doctrine to be adjudged by the Courts," so that hardship is not caused to innocent people. Hardship to people was thought to occur if all actions promulgated/taken by unlawful authority such as affecting marriages, contracts, property transactions, etc. are held void.

PLD 1973 SC 49

In yet another case, *The State vs. Zia-ur-Rahman*, 47 the Supreme Court of Pakistan referred to U.S. Chief Justice Marshal's statements in support of its decision regarding the distinction between "judicial power" and "jurisdiction" of Courts and its relationship with the Legislature. The case concerned the validity of criminal orders issued by military courts instituted under General Yahya Khan's dictatorship. The Supreme Court held the regime constituted under a military dictatorship as illegal, but also found a way to uphold the validity of specific acts and laws from that period to prevent a legal vacuum from occurring. What is interesting is that the referred U.S. law and Justice Marshal's statements were not made in the context of transitions from a military rule to a civil rule, which the *Zia-ur-Rahman* case dealt with.

PLD 1977 SC 657

Another case, *Begum Nusrat Bhutto vs Chief of Army Staff and Federation of Pakistan*, 48 concerned the legality of the detention orders passed by Chief Martial Administrator against the "former" Prime Minster of Pakistan, Zulfiqar Ali Bhutto. Only one justice, Muhammad Akram, J., discussed U.S. cases in support of his decision to uphold the validity of Martial law promulgated by Zia-ul-Haq in July 1977. He referred to U.S. case law dealing with the use of 'emergency powers' by the executive to uphold the validity of orders passed by a military dictator. Interestingly, Justice Akram provided no reasons why the referred U.S. law could be used to grant legitimacy to a military dictator, especially because the referred U.S. law had never envisaged granting legitimacy to a military dictatorship. In fact, the entire premise of the referred U.S. law was based on the use of emergency power by a democratically elected chief executive and not a military dictator.

PLD 1983 SC 457

The important case of *Fauji Foundation vs Shamimur Rehman*49, concerned the validity of Martial Law Regulation No. 103, under which a company was dissolved and its rights, properties, assets, debts, liabilities, and obligations were transferred to the Fauji Foundation. The Regulation was challenged on the ground that it amounted to a legislative judgment, in contravention to separation of powers doctrine applicable to the Constitution of Pakistan. The Regulation was also challenged as being in contravention of Article 3 of the 1972 Interim Constitution that was argued as being similar to the "due process" clause in the U.S. Constitution. The Supreme Court of Pakistan held the Regulation valid. The Supreme Court while reaching its decision had extensive discussion on the separation of powers doctrine in the Constitution of Pakistan and whether the doctrine was comparable to the implied doctrine of separation of powers in the U.S. Constitution. It also had an extensive discussion on whether Pakistan's legal system provides comparable procedural and substantive guarantees that the U.S. "due process" clause provides. Even though it was held that fundamentals of the due process clause could not be invoked to annul legislation (the reason being that the Constitution provides its own mechanism for annulment of legislation), the Supreme Court felt a need to discuss and provide reasons as to why the due process clause, as applicable in the U.S. Constitution was not applicable in Pakistan.

PLD 1988 SC 416

The important case of *Benazir Bhutto vs. The Federation of Pakistan*,50 was brought by Benazir Bhutto in her capacity as the co-chairperson of the Pakistan Peoples Party (PPP) to challenge a number of provisions of the Political Parties Act 1962 which were argued to be unconstitutional and in violation

of the fundamental right of freedom of association. The challenged provision of the 1962 Act, introduced as amendments during General Zia ul-Haq military reign, had the effect of keeping PPP and a number of other political parties unregistered and hence incapable of contesting general elections. The Supreme Court of Pakistan discussed U.S. Law while holding those provisions of the 1962 Act in violation of fundamental rights, specifically in violation of Articles 17 (Freedom of association) and 25 (Equality of citizens) of the Constitution.

PLD 1992 SC 492

In the politically charged case of *Mohtarma Benazir vs. The President of Pakistan*,51 the Supreme Court referred to U.S. Law to exclude evidentiary privilege,52 so that evidence could be cross-examined by the accused to ensure a fair trial. The court referred to U.S. law that does not allow privilege to prevail where disclosure is found to be essential for determination of the defence of the accused. The case concerned a criminal investigation of Benazir Bhutto. The investigation was initiated through a reference filed against her on1stJanuary 1990, by the then President of Pakistan, for her activities while she was the prime minister of Pakistan. The investigation against her rested on evidence contained in certain documents provided by the Intelligence Bureau of Pakistan. Privilege was claimed in respect of the documents provided by the Intelligence Bureau on the grounds that their production in court would severely damage national interest, national defence, and diplomatic relations with foreign powers. In this case, the Supreme Court of Pakistan used U.S. law to support their decision to uphold the rights of the accused and disallow privilege, thus allowing Benazir's counsel to cross examine the documents in court.

1999 SCMR 2883

In another case, *Ardeshir Cowasjee vs. Karachi Building Control Authority*, 53 while upholding the rights of local residents to object to the conversion of a park to a commercial high-rise building, the Supreme Court of Pakistan referred to a previous Supreme Court case of *Ms. Shehla Zia and Others vs. WAPDA*.54In the *Shehla Zia case*, the Supreme Court, while interpreting the word "life" in Article 9 of the Constitution of Pakistan, referred to the meaning of word "life" as understood in U.S. jurisprudence. The Supreme Court held that the right to life and liberty under Article 9 refers to "all facets of human existence" and to "all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally".55

PLD 2009 SC 107

The important case of *Muhammad Nasir Mahmood vs. Federation of Pakistan* 56 concerned the validity of the law relating to eligibility to contest elections for the federal and provincial assemblies of Pakistan. The issue before the Supreme Court of Pakistan was whether the new qualification requirements to contest elections for the federal and provincial assemblies of Pakistan under Articles 62-63were compatible with Articles 17 and 25 of the Constitution. The new qualification requirements under Articles 62-63 required that a person shall not be qualified to be elected or chosen as a member of federal or a provincial assembly unless he is at least a graduate possessing a Bachelor's degree. The Supreme Court referred to laws of twenty-nine countries including the U.S. to hold that qualification/eligibility criteria of Articles 62-63 were valid.

2009 CLD 212

In another case, *Muhammad Kaleem Rathore vs. Institute of Chartered Accountants*,57 the Supreme Court used U.S. Law to reach its decision. The case concerned the validity of a Directive issued by the Securities and Exchange Commission of Pakistan. Under the Directive no listed company could appoint as external auditors a firm of auditors that had not been given a satisfactory rating under the Quality Control Review Programme of the Institute of Chartered Accountants of Pakistan. The Directive in question was alleged to be in violation of the Companies Ordinance 196158 and a clog on the fundamental right of the petitioner to pursue his trade and profession. The Court held that the Directive was valid. It stated that the Directive and the Review Program were similar to legislative and executive reforms introduced in the U.S. over similar issues of accountability and governance in the corporate world and were essential in the post Enron period the world over.59

Constitutional Petition No.53 of 2007 & Constitutional Petition No.83 of 2012

In another important case, *Riaz-ul-Haq vs. Federation of Pakistan*60, the Supreme Court of Pakistan used U.S. "due process law" in its interpretation of the right of "access to justice to all" enshrined in article 9 of the Pakistani Constitution. In its decision, the Supreme Court held various provisions of the different Service Tribunals Acts as unconstitutional and in derogation of articles 2A, 9 and 175 of the Constitution of Pakistan.

2012 SCMR 584

Another politically charged case, *Watan Party vs. Federation of Pakistan,*61 concerned a leaked confidential memorandum

dated 10th May 2011 from Pakistan's Ambassador to the U.S., Hussain Haqqani, to Admiral Mike Mullen, Chairman of Joint Chiefs of Staff of the U.S. In this case, the Supreme Court of Pakistan referred to the U.S. Supreme Court case of *United States v. Richard M. Nixon* (418 US 683) to allow for collection of pretrial evidence against the Ambassador of Pakistan to the U.S. The decision was based on the principle used in the *Richard Nixon case* that communications between public office holders, such as a President, does not have absolute privilege.

PLD 2015 SC 401

The recent case of the *District Bar Association, Rawalpindi and Others vs Federation of Pakistan*62 is quite significant in its treatment of U.S. Law. The case concerned the validity of various amendments to the Pakistani Constitution brought about by the Constitution (Eighteenth Amendment) Act 2010 and Constitution (Twenty First) Amendment Act 2015, mainly articles 1(2)(a), 17(4), 51(6)(e), 63A, 226, 267A and 175A. This judgment is one of the most significant judgments given by the Supreme Court of Pakistan as it answers the question whether the judiciary can review the substance of constitutional amendments.63 Thirteen out of seventeen justices held that the Supreme Court of Pakistan can strike down a constitutional amendment if it repeals, alters or abrogates the salient features of the Constitution, while the other four believed that judges have no power to examine the validity of constitutional amendments. Eight out of the above mentioned thirteen justices held that the Eighteenth Amendment was valid. While the remaining five out of the above mentioned thirteen justices held that not only does the Supreme Court have the power to examine the substance of Constitutional Amendments, but that in this case various parts of the 18th and 21st Amendments should be held invalid. Therefore, though a majority of justices held that the Supreme Court had the power to review the

substance of constitutional amendments, in the present case, the 18th and 21st Constitutional Amendments were valid. The justices of the Supreme Court made various references to U.S. law. Some pointed to dangers in grounding the reading of and interpretation of the Constitution in U.S. and foreign law and expressed reservation on the use of such law for interpretation of the Pakistani Constitution.64 Other justices referred to U.S. and other foreign law to support their decisions.65

The Supreme Court of Pakistan has remained consistent in its use of U.S. (and other foreign) law. The debate surrounding legal and constitutional principles is steeped in citation of foreign sources by both the bar and the bench and is considered legitimate, notwithstanding certain reservation expressed in *PLD 2015 SC 401*. Even in *PLD 2015 SC* 401, the reservation expressed against use of foreign sources did not question the validity of such use, but rather that such use should be carried out carefully keeping in mind that sometimes the context and histories may not be similar enough to lend legitimacy to such reference.

Even where the Supreme Court referred to U.S. law to legitimize marital law, in cases such as PLD 1964 SC 673, PLD 1966 SC 854, PLD 1966 SC 854, PLD 1973 SC 49, it was done for the sake of political and legal expediency to prevent a breakdown of the administrative system and such use went hand in hand with the Court's attempt to further increase its judicial review powers.66

Although there are arguments that claim the use of foreign law goes contrary to principles of democracy, (i.e., it undermines the democratic value of accountability), this criticism narrows the definition of democratic values. It is submitted that the use of foreign law is not necessarily contrary to principles of democracy rather it is contrary to the nationalist approach. A nationalist approach resists the use of foreign materials as they

do not represent the ideas of national citizenry, rather of a foreign citizenry (citizens of the country whose law have been referred by the Courts of another country) that has little, or no, right to express values of the nation.67

In contrast, in liberal democracies, constitutions express universal rights and principles that transcend national boundaries and are applicable on all societies alike68. Certain rights and certain values are the preconditions for democracy itself and they are too fundamental to be left in the hands of majorities. Where a nationalist approach would always resist the use of foreign law, a broader understanding of a democratic system includes a system of protection and the promotion of fundamental rights and guarantees. This reading of democracy would allow for the use of foreign law to advance the system for protection and promotion of fundamental rights and guarantees.

Furthermore, incorporation of established global standards of fundamental rights legitimizes a nation's action in the international community. Nations do not exist in a vacuum. Rather, in this era of globalization and increasing acceptance of international human rights standards, there is a need for nations to be perceived as upholders of international human rights standards. Use of foreign law in cases that raise issues of fundamental rights or constitutional interpretations, signals inclusion in a shared international community.

As evident from the above discussed cases, the Supreme Court of Pakistan has used foreign law in cases which raised issues of fundamental rights enshrined in the Constitution of Pakistan such as due process rights, political rights, and civil liberties. Furthermore, the Supreme Court referred to foreign law to interpret the constitution in novel cases, regarding the legality of martial laws, the doctrine of necessity as grounds for military coup, administrative orders, and judicial review. Such

use cannot be termed unprincipled and opportunistic when it is carried out by all major stakeholders (including the Bar, the Bench, the litigating counsels and legal academia) for the purposes of legal argumentation. Rather, it is principled and manifestation of iusgentium since it has been consistently used to uphold fundamental rights and increase the review powers of the courts. The practice of the Supreme Court appears to be strategic to the extent that judges use U.S. law to lend greater support to their interpretations. By pointing out how such interpretations were successfully used in the United States, justices of the Supreme Court can provide legitimacy to their interpretations and argue how such interpretations will also be helpful in the Pakistani context. In this sense, the experience of the Supreme Court of Pakistan lends support to the argument that the practice of using foreign law, at least, in Pakistan is the manifestation of iusgentium, and that such practice is principled and rarely opportunistic.

Conclusion

In Pakistan, reference to U.S. or other foreign law does not generate the kind of debate over its legitimacy as it does in other jurisdictions. One reason for this is the historical connection between the Pakistani legal system and the legal systems of India and England. Reference to foreign law has been a norm since the partition and as discussed above, Pakistani judges and lawyers use the reasoning applied by foreign judges and jurists to bolster their own arguments. Similarly, analysis of the cases that do refer to U.S. law show that the use of foreign law by the Supreme Court of Pakistan is principled and rarely opportunistic even when used to lend legality to actions taken under a martial law regime. In this way, the Pakistan legal system is a strong example of the use of iusgentium for legal and constitutional development.

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Waldron, Jeremy. "Foreign Law and the Modern Ius Gentium." *Harvard Law Review* (2005): 129-147.

Young, Ernest A. "Foreign Law and the Denominator Problem." *Harvard Law Review* (2005): 148-167.

Case Law

Pakistan Cases

PLD 1957 SC 9
PLD 1957 SC 301
PLD 1964 SC 673
PLD 1966 SC 854
PLD 1969 SC 14
PLD 1972 SC 139
PLD 1973 SC 49
PLD 1977 SC 657
PLD 1979 SC 53
PLD 1983 SC 457

PLD 1988 SC 416
PLD 1992 SC 492
PLD 1993 SC 473
PLD 1994 SC 693
PLD 1997 SC 426
1999 SCMR 2883 (Supreme Court of Pakistan).
PLD 2009 SC 107
2009 CLD 212 (Supreme Court of Pakistan)
Constitution Petition No.53 of 2007 & Constitution Petition No.83 of 2012 (Supreme Court of Pakistan)
2012 SCMR 584 (Supreme Court of Pakistan)
PLD 2015 SC 401

India Cases

AIR 1954 Raj 301
(1973) 4 SCC 225

U.S. Cases

543 US 551 (2005)
418 US 683 (1974)

Notes

[1]. See: Osiatynski, Wiktor. "Paradoxes of Constitutional Borrowing." *Int'l J. Const. L.*1 (2003): 244.
[2]. Jackson, Vicki C. "Constitutional Comparisons: Convergence, Resistance, Engagement." *Harvard Law Review* (2005): 109-128, 112-115.
[3]. Young, Ernest A. "Foreign Law and the Denominator Problem." *Harvard Law Review* (2005): 148-167.
[4]. For example see: Friedman, Barry and Saunders, Cheryl. "Symposium: Constitutional Borrowing (Editors' Introduction)". *Int'l J. Const. L.*1 (2003): 177; also see: "The Debate over Foreign Law in Roper V. Simmons". 2005. "The Debate over Foreign Law in Roper V. Simmons". *Harvard Law Review* 119 (1). The Harvard Law Review Association: 103–8; also see: Benvenisti, Eyal. "Reclaiming Democracy: the Strategic uses of Foreign and International Law by National Courts." *American Journal of International Law* (2008): 241-274; also see: Black, Ryan C., Ryan J. Owens, Daniel E. Walters, and Jennifer L. Brookhart. "Upending a Global Debate: An Empirical Analysis of the US Supreme Court's Use of Transnational Law to Interpret Domestic Doctrine."*Geo. LJ* 103 (2014): 1.
[5]. *Roper v Simmons*, 543 US 551, 152 S Ct 1228 & n.9 (2005) Scalia J dissenting: "To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision making, but sophistry… Either America's principles are its own, or they follow the world; one cannot have it both ways".
[6]. Waldron, Jeremy. "Foreign Law and the Modern Iusgentium." *Harvard Law Review* (2005): 129-147. The concept iusgentium or 'law of nations 'is not used in the narrow sense to mean international law. Instead it denotes a far broader concept, and as a result a less precise concept, comprising of something similar to the general consensus of mankind, or common law of mankind, on issues dealing not just with sovereigns, but with legal issues generally; such as rights, property, contracts, tort(s) and crime. Iusgentium represents the near consensus on legal issues amongst most jurist, lawyers and judges in the world and as such represents an invaluable resource for judges and lawmakers to answer particular problems that they may face in their own jurisdictions.
[7]. Farber, Daniel A. "The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History". *California Law Review* (2007): 1335-1365, 1335.
[8]. McLachlin, Beverley. "The Use of Foreign Law ---- A Comparative View Of Canada and the United States". Proceedings of the Annual Meeting (American Society of International Law (2010): 491-493.

[9]. It allows judges to pick and choose from a wide collection of foreign judgments available. It allows the judge to incorporate her preference and cloak it with authority of foreign precedent. See *infra* note 15.
[10].*Supra* note 8.
[11]. Ibid.
[12]. See: Rosenkrantz, Carlos F. "Against borrowings and other non-authoritative uses of foreign law". *Int'l J. Const. L.*1 (2003): 269.
[13]. Ibid.
[14]. Ibid.
[15]. So for example in the U.S. judges at the Federal Level are appointed by President of the United States and confirmed by the United States Senate. At the State level judges in the U.S. are either elected or appointed by the Governor. For more details on the appointment of judges in the U.S. see: http://www.judicialselection.us/. In Pakistan under Article 175A of the Constitution of Pakistan judges to the Supreme Court, Federal Shariat Court and the High Courts are appointed by a Parliamentary Committee after nomination from the Judicial Commission of Pakistan. The Parliamentary Committee is composed of members from the Upper house and Lower house of the Parliament and is composed of equal members from both the Treasury Benches and Opposition Benches. The systems mentioned put ultimate authority for the appointment of the judges in the hand of democratically elected representatives.
[16]. This concern was voiced by Judge Roberts of the Supreme Court of the US when asked by Senator Jon Kyl "[W]hat, if anything, is the proper role of foreign law in U.S. Supreme Court decisions?" at the 'Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. 109th Cong. 200 (2005)'. See, Tushnet, Mark. "When Is Knowing Less Better than Knowing More-Unpacking the Controversy over Supreme Court Reference to Non-US Law." *Minn. L. Rev.* 90 (2005): 1275. The same argument is applicable in Pakistan, where the written Constitution is the supreme law of the land, and the constitution declares a democratic system of governance. Judges are appointed by the Judicial Commission and the Parliamentary Committee.
[17] . Tushnet, Mark. "The Possibilities of Comparative Constitutional Law".*Yale LJ.* 108 (1999): 1225.
[18]. Research of published law reports carried out by the authors show that reference to foreign law and its use by both lawyers and judges has been a central part of the Pakistan's legal system since partition.
[19]. Friedman and Saunders, "Symposium: Constitutional Borrowing", 178.
[20]. Benvenisti, "Reclaiming democracy".
[21]. McLachlin, "The Use of Foreign Law".

[22].Waldron, Jeremy. "Foreign Law and the Modern Iusgentium." *Harvard Law Review* (2005): 129-147

[23]. Ibid.

[24]. Any cursory search of Pakistani reported cases will return a large number of decision from the High Courts and Supreme Court of Pakistan referring to foreign laws especially those of England, India and United States.

[25]. The search was carried out using key words "American" and "United States" on the search tool provided at http://www.pakistanlawsite.com/ and through physical research in PLD (Pakistan Law Decision) casebooks. The same was found when key words were changed to "India" and "England" and "United Kingdom".

[26]. One interesting example arises from one of the authors' personal experience. In a case before a civil court in Lahore concerning LPG (liquefied petroleum gas) contract the judge advised the counsel to present foreign judgments on the issue before the court.

[27]. As an example refers to PLD 1983 SC 457 discussed below *infra* note 58.

[28]. Very few structural changes in the Court structure of Pakistan have taken place since partition, one major change is the inclusion of the Federal Shariat Court, but for the majority of legal issues the structures remains near identical.

[29]. Some examples of major laws used by both India and Pakistan after partition are: Contract Act of 1872; the same Penal Codes of 1860; the same Civil Procedure Code of 1908; and the same Code of Criminal Procedure 1898 till India promulgated its own Code in 1973.

[30]. PLD 1957 SC 9.

[31]. Mention of Constitution in the discussion of a particular case refers to the Constitution of Pakistan that was in force at that time.

[32]. For more details on the evils of the zamindari system see: Baden-Powell, B. H. "The Permanent Settlement of Bengal." *The English Historical Review* 10, no. 38 (1895): 276-292 and Banerjee, Abhijit V., and Lakshmi Iyer, *Colonial Land Tenure, Electoral Competition and Public Goods in India*, Harvard Business School, 2008.

[33]. Statement of Objects and Reasons of the East Bengal State Acquisition and Tenancy Bill

[34]. Article 5: "All citizens are equal before law and are entitled to equal protection of law."

[35]. Article 18: "Subjects to law, public order and morality (a) every citizen has the right to profess, practise and propagate any religion; and (b) every religious denomination and every sect thereof has the right to establish, maintain and manage its religious institutions."

[36]. U. S. Supreme Court Rep. 30 Lawyer's Ed. 220.

[37]. U. S. Supreme Court Reports, 41 Lawyers Ed. 256.
[38].12 Pick. 485 (Pickering's Massachusetts Supreme Judicial Court Reports).
[39]. PLD 1957 SC 301.
[40]. PLD 1964 SC 673.
[41]. PLD 1966 SC 854.
[42]. For detailed discussion on political situation of the time and political factors affecting the Supreme Court of Pakistan's decision in this case and decisions given by the Supreme Court from 1950s-1990s refer to: Newberg, Paula R. *Judging the state: Courts and Constitutional Politics in Pakistan*. Vol. 59. Cambridge University Press, 2002.
[43]. PLD 1969 SC 14.
[44]. PLD 1972 SC 139.
[45]. Ibid.
[46]. Ibid.
[47]. PLD 1973 SC 49.
[48]. PLD 1977 SC 657.
[49]. PLD 1983 SC 457.
[50]. PLD 1988 SC 416.
[51]. PLD 1992 SC 492.
[52]. An evidentiary privilege is a rule of evidence that allows the holder of the privilege to refuse to provide evidence about a certain subject or to bar such evidence from being disclosed or used in a judicial or other proceeding. In this case the privilege was being argued by the Intelligence Bureau (IB) and the prosecution to prevent disclosure of certain IB documents.
[53]. 1999 SCMR 2883 (Supreme Court of Pakistan).
[54]. PLD 1994 SC 693.
[55]. Ibid.
[56]. PLD 2009 SC 107.
[57]. 2009 CLD 212 (Supreme Court of Pakistan).
[58]. Section 254 of Companies Ordinance 1961.
[59]. The Supreme Court was referring to the Enron scandal of 2001, which lead to the bankruptcy of the Enron Corporation and the dissolution of Arthur Andersen, which was one of the five largest audit firms at the time. For greater details on it being one of the biggest audit failures see: Bratton, William W. "Enron and the dark side of shareholder value". *Tul. L. Rev.* 76 (2001): 1275.
[60]. Constitution Petition No.53 of 2007 & Constitution Petition No.83 of 2012 --- PLD 2013 SC 501.
[61]. 2012 SCMR 584 (Supreme Court of Pakistan).
[62]. PLD 2015 SC 401

[63]. For more details on its significance for the Constitution of Pakistan see: Mir, Waqqas. "Saying not what the Constitution is ... but what it should be: Comment on the Judgment on the 18th and 21st Amendments to the Constitution (*District Bar Association (Rawalpindi) v Federation of Pakistan* PLD 2015 SC 401)". LUMS Law Journal (2015): 64-76.

[64]. For example Jawwad S. Khawaja, J. stated "It must be reiterated that any reading of our Constitution must be firmly grounded in our own historical facts and constitutional text and not on the irrelevant historical facts of America or of countries in Europe." and "I have often found that a great deal of emphasis is placed by counsel on legal theories and doctrines of constitutional law. Such doctrines which mostly took root in the foreign soils of the United States, Britain and other Commonwealth countries require serious critical examination before being pressed into use in Pakistan. This is necessarily so because legal theory and constitutional construction must spring from our own experience and historical context." at PLD 2015 SC 401, 36 and 89 respectively. Also see SH. Azmat Saeed, J. PLD 2015 SC 401, 86: "Other countries including United States of America and United Kingdom have had the luxury of longstanding political stability and constitutional continuity with violent turmoil relegated to the distant past. The Institutions have taken root and are firmly settled in their respected spheres. The core values of Democracy and Rule of Law are universally accepted. The Constitutional Jurisprudence in such countries, in the preceding century and a half has evolved without any real sense of vulnerability. Jurists of such countries take for granted the pre-existence of their basic core values, which may be under constant threat in countries like Pakistan, necessitating constant vigilance for the protection thereof. The opinion of Jurists of such countries may be academically sound and intellectually stimulating but are they really relevant to the harsh reality faced by us in the context of the matter in issue in the list at hand?"

[65]. For example the Basic Structure Doctrine or the Salient Features Doctrine, first enumerated by Justice JR Mudholkar in his dissent in *Sajjan Singh v State of Rajasthan* (AIR 1954 Raj 301) and accepted by the Indian Supreme Court in *Kesavananda Bharati v State of Kerala* ((1973) 4 SCC 225), was used by the majority justices of the Pakistani Supreme Court in this case to hold that the Court has the power to strike down and examine the substance of Constitutional Amendments. Also see Mian Saqib Nisar, j. at PLD 2015 SC 401, 110 and 111: "The views expressed by the US Supreme Court in Coleman v. Miller, as noted above, accord with my own. As is clear that Supreme Court appears to have taken a position that is completely opposed to the "basic structure" doctrine developed by the Indian Supreme Court." and "Upon the foregoing review of the Indian and American authorities, I am firmly of the view that, with respect, the

submissions made by learned counsel for the Petitioners in support of a "basic features" doctrine, whether as, or along the lines as, developed in the Indian jurisprudence must be rejected. I am equally firmly of the view that the "basic features" doctrine should not be adopted and made part of the constitutional law of Pakistan."

[66]. For more on how the Supreme Court dealt with exigencies of martial law and tried to increase their review powers while ensuring that they were not sidelined by a military dictatorship see: Newberg, *Judging the State.*

[67]. For more on nationalist approach see, Sitaraman, Ganesh. "The Use and Abuse of Foreign Law in Constitutional Interpretation' (2009)." *Harvard J of L and Public Policy* 32: 653-656

[68]. Ibid.