



RESEARCH PAPER

Judicial Appointments in the Historical Context: From 1947-2005

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ABSTRACT

The study aims to analyze the importance of the procedure of appointment of judges to the superior Courts. The stated article explains the various phases of appointments by providing its historical context. The literature review has shown the impact of civilian and martial law regimes on the constitutional method of appointments of judges. In Pakistan, Judiciary plays the role of a custodian of the Constitution by exercising the power of judicial review. The method for appointment of judges always remained a controversial issue in Pakistan. The descriptive analytical method in the paper is adopted to show that there was a continuous struggle between executive and judiciary to have an upper hand in the appointment of judges. The selection of judges is considered an indispensable element in the independence of judiciary. For this reason two important Constitutional amendments (18th & 19th) were made to adopt a more democratic procedure for the appointment of Judges.

Introduction

Republican system which is generally known as democracy is the most prevalent system in all over the world. In this system, elected representative are mandated by the citizens to act and take collective decisions on their behalf. The citizens are also empowered to have a check on this representative through election, right to vote, political participation and freedom of press etc. among the three organs, legislature and executive are elected bodies which judiciary is appointed by a given procedure. All these institution work collectively and in individual sphere carried out those responsibilities as granted by the Constitution. In this context, judiciary is given an important obligation to protect the fundamental rights of the citizen through it enforcement mechanism. For this purpose, independence of judiciary is essential and a central object to almost every legal system. To be custodian of the Constitution, independence of judiciary is essential and independence of judiciary means when the Constitution provides procedure for

appointment and removal of the Judges, their tenure and the jurisdiction (khan, 2020).

One of the essential elements of independence of judiciary is appointment of judges. There is several mechanism for judicial appointments adopted by various legal system in can be divided into four different categories. It include appointments made political institutions as in united States and South Korea, appointments made by judiciary itself like India, appointments by judicial council as in Pakistan and, selection through electoral system like American State Judiciary(USIP, 2009). The basic principle followed in all these procedures is that appointment should be made on merit, non-discriminatory, and protect the rights and interest of the people (Mccoll 2004).

Literature Review

In Pakistan, the procedure of appointment of judges passed through the era of Hindus, Muslim and British. At its inception, it adopted the British legal system. Before the Arabs entered this region, the local inhabitant of India established a system of judiciary based on Hindu customs and traditions. On the arrival of the Arabs to Indian Continent, they introduced Qazi System which remained for centuries. In 17th century, British came to India through east India Company. In 1623, east India Company was authorized through a charter of 1623 to decide the cases of their employee by establishing their own courts. Later on, in 1772 a new system was introduced. In the new setup, civil, criminal and collector courts were formed (Report of the Law Reform Commission, 1967-70). From 1772-1861, superior Courts were established to implement the control of British authorities. Resultantly, two distinct judicial systems was working, superior courts were enforcing the English Law while lower courts exercising the personal law of the Muslim and Hindus accordingly. An attempt was made under the charter of 1833 to unite these two systems. But this objective was achieved in the Act of 1861 by which the Crown was empowered to appoint and remove the Chief justice and Judged at his discretion. The organizational structural change was introduced by the "Government of India Act 1935" in the judicial system of India. It states the qualifications and removal procedure of the judges but appointment method given in the Act of 1861 was retained. The Judges can hold office till the age of 65 under the new law. It abolished the old method of appointing the Chief justice from among the barrister, but a pleader or a civil servant can be appointed as a chief Justice. The federal court was established under the Act of 1935 but was constituted in 1937. The structure of the judicature remained unchanged until 1947, when the two dominions were given independence (Indian independence Act, 1947).

After independence, "the Government of India Act 1935" remained an interim constitution of Pakistan till 1956 (Section 8 Indian independence Act 1947). The contents of the Act regarding to judiciary remained unchanged and enforceable. The appointment procedure never became a controversy though a sub-committee was formed by the Constituent Assembly to submit its recommendations on

judiciary. It submitted its report in 1952 and suggested that Federal judiciary shall be consist of chief justice and 2-4 other judges. The Chief justice shall be appointed by the head of the State while other judges on the recommendation of the Chief Justice. In case of appointment of judges in the High Court, the concern Chief Justice shall be consulted. The first Constituent Assembly was dissolved the Governor General in 1954 (*Federation of Pakistan v. Molvi Tameez ud Din*, 1955), and second Constituent Assembly was formed in 1955 (Mahmood, 1990). The second Constituent Assembly was successful in formulating the first permanent Constitution called "the Constitution of Pakistan 1956" (Chaudhry, 2020).

In the new Constitution, the method of appointment of chief justice as mentioned in the Act of 1935 remained unchanged, while appointing judges in the High Court. The concern Chief Justice and Governor of the province shall be consulted (The Constitution of Pakistan, 1956). So the Constitution of 1956, executive and judiciary were given the power of judicial appointments. In 1958, on the promulgation of Martial Law constitution was abrogated. The first martial law order change the jurisdiction of the courts but the appointment procedure to the superior courts remained intact. A constitution commission was formed in 1960 to give its recommendation for making a new constitution. The commission in its recommendation states that the outgoing Chief justice should make the recommendation for the incoming Chief Justice. In case of retiring Chief justice, the President should have discretion, but the Chief Justice should be from among the judged of the Supreme Court. It was also suggested that senior most judge should be given preference. In the appointment of other judge of the Supreme Court, the Chief Justice shall give its recommendation and the president is bound to accept these recommendations as a matter of convention. In case of High Courts appointment, the Chief Justice of the concerned High Courts after consultation with other judges sends his recommendation to the Governor concerned and Chief justice of the Supreme Court. After due discussion, the Chief Justice shall send it to the president who is bound to accept it (khan, 2020).

The second permanent constitution was implemented in 1962. As appose to the recommendation of the constitution commission, very few changed have been made to the judiciary. It adopted the provision identical to the article pertaining to the Judiciary. The procedure remained un-questioned until the first derogation was occurred when the president made appointment by interviewing judges assisted by Governor and law minister of West Pakistan. The method was in violation of the Constitution (shah, 1997).

The Constitution of 1962 was abrogated on 1969 and again Martial was imposed. In 1970, general elections were held. After a long political agitation, Zulfiqar Ali Bhutto became the head of the State and an interim Constitution was enforced in 1972. Regarding to the judiciary, it adopted the provisions of 1962 constitution except raising the retiring age of the Judges of the High Court from 60 to 62 years. It remained the constitution of Pakistan for a year when again a permanent constitution was implemented in 1973 (Chaudhry, 2019). The provisions related to

the Judiciary were similar to the two preceding permanent Constitutions. The Constitution of 1973 was held in abeyance by a martial law in 1977 by General Zia ul Haq. The martial law order made the appointment and removal of the judges of the superior courts at the pleasure of the martial law administrator. Moreover, the judges were compelled to take oath under the new law known as "the provisional constitutional order, 1981". The judges, who refused to take oath, were ceased to hold their office (High Court Judges (Oath of Office) Order, 1977 & Supreme Court Judges (oath of office) Order, 1977). This procedure was retained in other martial law order called "revival of the constitution of 1973 order, 1985", which was made the part of the constitution by 8th constitutional Amendment (Khan, 2020).

A new civilian government was formed under the leadership of Benazir Bhutto in 1988. Soon a tug of war broke out over the judicial appointment between the Prime Minister and President. The issue was challenged in the Lahore High Court where the court declares that article 193 of the Constitution did not mention the role of Prime Minister in Judicial appointments (M.D. Tahir v. Federation of Pakistan, 1989). The decision was challenged in the Supreme Court but soon the Federal Government withdrew its appeal and the issue remained unresolved for years and led to the dissolution of National Assembly in 1990.

As a result of elections, Nawaz Sharif became the head of the Government. The new government made no improvement to the judiciary though the leader of opposition demanded for the formation of parliamentary committee for the verification of the credentials of the candidates wished to be the judge of the Superior Courts. This would lead to the distribution of power among the three organs of the State on the judicial appointments. The fight for executive authority between the President and Prime Minister resulted, in the dissolution of National Assembly in 1993 (Khan, 2020). The second term of Benazir Government is regarded as the era of judicial crises when the government violates the convention of seniority by appointing Justice Sajjad Ali Shah as Chief Justice of Pakistan, who was fourth on seniority list. In addition, several appointments were made to Lahore and Sindh High Courts against the recommendations of the Chief Justice (Mian, 1999).

Several constitutional petitions were filed in the Supreme Court against the new appointments. The petitioner sought the interpretation of constitutional provision pertaining to appointments (Shah, 2001). This case is known as *Al-Jihad Trust Case* or *First Judge's Case*. This case is considered as the first step towards independence of judiciary. In the *First Judge's Case*, the Supreme Court interpreted the word "consultation" in the articles 177 and 193 related to the appointment of judges. The Supreme Court also declares that an ad hoc judge cannot be appointed against permanent position in the Supreme Court but acting appointments can be made for not more than ninety days. The judgment further says that additional judge of the High Court can become permanent judge if having the required qualifications. The permanent vacancy should be filled not later than thirty days if fall vacant, and in case of a death, maximum duration is ninety days. If an acting Chief Justice made

recommendations for the appointments, it would be unconstitutional as he cannot act as consulted in the appointments. The consultative process should be consensus oriented and not arbitrary. The decision is regarded as landmark case in the judicial history of Pakistan (*Al-jihad Trust v. Federation of Pakistan, 1996*).

In 1997, Nawaz Sharif became the Prime Minister of Pakistan. Shortly, differences arose between the executive and judiciary on the formulation of anti-terrorist law and establishment of special Courts. Contrary to the verdict of the Supreme Court, the government makes appointments without the recommendations of the Chief Justice, but later on the government confirmed the recommendations of the Chief Justice and ended the controversy. Soon after, the appointment of Chief justice was challenged in the Supreme Court on the plea that his appointment violates the established convention of seniority-cum-fitness. As a result his appointment as Chief justice was de notified and senior most judges become the Chief Justice (*Malik Asad Ali v. Federation of Pakistan, 1998*).

Another military regime was imposed by suspending the Constitution of 1973 and proclaiming emergency in the country in 1999. In 2000, a new law called "oath of office (judges) order" was promulgated and judges were asked to take oath under this law. Those who oppose the oath will cease to hold their office. Under the martial law orders, chief executive was given the sole discretion to make appointments. The appointments of Judges and its procedure remained a never ended issue between the executive and judiciary. It reached to its peek when the Chief executive suspends the Chief Justice in March 2007. After a nationwide movement by the judges, lawyers and civil society, he was restored by the Supreme Court in July, 2007(*Mr. Justice Iftekhhar Muhammad Chaudhry v. The President of Pakistan, 2007*).

Material and Methods

The methodology of this research paper is descriptive-analytical in nature. The independence of judiciary is taken as independence variable while different procedures for the appointments are taken as dependent variables. The study shows that independence of judiciary depends on the procedure adopted for the selection of the judges of the superior Courts.

Result and Discussion

The study's primary purpose is to analyze the method of appointment of judges in various eras and in all three constitutions of Pakistan. For this purpose all the legislative acts and constitutions were studied. Initially, the method of appointments and dispensation of justice depend on the customs and traditions of the locality. With the passage of time, changes were brought to the judicial system by introducing formal judicial system, but having a strong role of the head of the State. With the arrival of the British to India two distinct systems were introduced, exercising British, Muslim and Hindu law. Soon after, uniformity was brought by the introduction of several enactments.

After partition, Pakistan framed its first constitution in 1956. To ensure independence of judiciary, a detailed account was provided in the Constitution about judiciary. It provides a method of appointment where the head of the State and Government were given a due role. The Constitution of 1962 was dictatorial in nature and president was given a discretionary power in the appointment method. The Constitution of 1973 was parliamentary in nature like 1956 and provide the same method as mentioned in the 1956 Constitution. It became a constitutional issue when several petitioned were filed in the Superior Courts to interpret the Constitutional provisions related to appointment procedure. It remained an important legal and political issue in Pakistan which lead to the dissolution of Assemblies and Constitutional 18th and 18th Amendments.

Conclusion

It is concluded as; the procedure of appointment is an indispensable essential to the independence of Judiciary. For this reason it remained a legal and political issue in the history of Pakistan. If the judges are dependent on a person for their appointment or removal, then it is impossible to achieve impartiality. Different legal systems adopted different methods for the selection of judges to ensure dispensation of justice and independence of Judiciary. These legal and political issues lead to Pakistan to shift from a conventional method to a more democratic procedure in 2010. In 18th amendment (2010), new constitutional bodies were introduces in the form of Judicial Commission and Parliamentary Committee. In 19th amendment, the process was made more democratic by enhancing the role and number of member of Judicial Commission.

References

- Adeney, K. (2017). How to understand Pakistan's hybrid regime: the importance of a multidimensional continuum. *Democratization* 24:1, 119-137.
- Ahmed, I. (2020). Review Essay: Designing Democracy: Judges, Judicial Review and Constitutionalism in Pakistan, South Asia. *Journal of South Asian Studies*, 43:2, 369-374
- Al-jihad Trust v. Federation of Pakistan, PLD 1996 SC 324
- Brasted, H., Ahmed, I. & Orakzai, S., B. (2019). *Whither Pakistan: The Ambivalence of Constitutional Road Mapping? Governance and Political Adaptation in Fragile States*. Macmillan
- Buzdar, M., A. & Fatima, T. (2020). Frustration and motivation towards political participation in Muslim and non-Muslim young students in Pakistan. *Asian Journal of Comparative Politics*, 20-106
- Chaudhry, G., M. (2020), the constitution of Pakistan. 1973, Lahore: Federal Law House, 234-236
- Chaudhry, G., W. (2020). *Constitutional Development in Pakistan*. London, Longman Group Limited, 91
- Christine, C., F. (2017). Pakistan's Army Has a New General: Policy Implications. *SSRN Electronic Journal*, 112-123
- Federation of Pakistan v. Molvi Tameez ud Din, PLD 1955 Federal Court 240
- Garoupa, N, & Ginsburg, T.(2008) Guarding the Guardian: Judicial Council and Judicial Independence. University of Chicago Law School, Public Law and Legal Theory Working Paper No. 250, 2
- Habib, R., I., Akhtar, N. & Madni, A. (2019). Relationship of Superior Judiciary and Executives during Democratic Regimes in Pakistan: An Analytical and Historical Study. *Pakistan Journal of Social Sciences (PJSS)* Vol. 39, 313 -326
- Hassan, M., & Sabaruddin, J. S. bin. (2019). Jurisdiction of Military Courts over Civilian Terrorists in Pakistan: A Miscarriage of Justice. *IIUM Law Journal*, 27(1), 63-88.
- High Court Judges (Oath of Office) Order, PLD 1977 Central Statute, 325
- Holden, L. (2019). Women judges in Pakistan, *International Journal of the Legal Profession*. 26:1, 89-104,

- Khan, H. (2020), Constitutional and Political History of Pakistan of Pakistan. Lahore: Oxford University press, 560-570
- Khan, H. (2009). Constitutional and Political History of Pakistan. Karachi, Oxford University press, 565
- Mahmood, S. (1990). Constitutional Foundation of Pakistan. Lahore, Jang Publications, 52-83
- Malik Asad Ali v. Federation of Pakistan, PLD 1998 SC 161
- Mehmood, S. (2020). Judicial Independence and Development: Evidence from Pakistan. 77-90
- Mccoll, R. (2004). A Judge New South Wales Court of Appeal Remarks made at 'Constitutional Fundamentals and Judicial Power' Conference, University of Sydney Law School, November 27
- M.D. Tahir v. Federation of Pakistan, 1989 Civil Law Cases 1369
- Mian, A. (1999). A judge Speak Out. Karachi, Oxford University Press, 163
- Mr. Justice Iftikhar Muhammad Chaudhry v. The President of Pakistan, PLD 2007 SC 578
- Munir Hussain Bhatti v Federation of Pakistan PLD 2011 SC 407
- Nadeem Ahmad v Federation of Pakistan PLD 2010 SC 1165
- Neudorf, L.(2017). Judicial Independence in Pakistan. The Dynamics of Judicial Independence, pages 125-219.
- Niaz, I. (2020). Judicial activism and the evolution of Pakistan's culture of power. The Round Table, 109:1, 23-41
- Report of the Law Reform Commission (1967-70).Islamabad, Ministry of Law, 60
- The Indian independence Act of 1947 (1964). Constitutional Document Pakistan. Karachi, Government of Pakistan, Volume III, sections 18 and 19, 5
- Roznai, Y. (2013). Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea. American Journal of Comparative Law 61:3, 657-719
- Shah, S.A. (2001). Law Courts in a Glass house. Karachi, Oxford University Press, 215

The Constitution of Pakistan, 1962 (1965). The Gazette of Pakistan. Karachi, Articles 149,166,125-140

Shah, N., H. (1997). *Ahad Saz Munsif*. Lahore. Al-hamd publications, 49

Siddiqui, A. (2012). The Process of Judicial Appointments under the Constitution of Pakistan 1973.

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Sultan, S. & Jabeen, T. (2020). Changing Facets of Judicial Activism in Pakistan. *Review of Education, Administration & LAW*, 3(3), 523-534.

Supreme Court Judges (oath of office) Order, PLD 1977, Central Statutes, 455