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Independence of Judiciary in Pakistan: An analysis 18th & 19th Constitutional Amendments

Rafia Naz Ali

Department of Law, Islamia College University, Peshawar 25120, Pakistan

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Contact: rafia@icp.edu.pk

Abstract

Democracies exist all over the world. In democratic states, elected officials make collective decisions on behalf of the people. People of a state are allowed to regulate their elected officials by unique institutions such as regular elections, the right to free political participation, universal adult suffrage. The paper aimed to highlight judicial independence in the light of 18th and 19th constitutional amendments. In the state where democracy is assured, government agencies (executive, judiciary, and legislature) operate in individual and collective domains to fulfil their constitutional responsibilities. Every person has a direct relationship with these critical institutions, especially the judiciary. The parties' grievances are filed with the state's administrative body in the event of a violation of duty or citizens' rights. Judicial independence is essential for the state's citizens' rights to be protected. If there is judicial independence, there will equal rights for the citizens. This descriptive study would analyse the current judicial appointment method introduced by 18th and 19th amendments and its effects on judicial independence.

Keywords: amendments, appointments,commission, committee, independence of the judiciary

Almost every civilized nation considers the Constitution as a powerful law of the country. The judiciary serves as a custodian of the Constitution by exercising the right of judicial review. To be the custodian of the Constitution, the judiciary must be independent. The Constitution guarantees judicial independence by establishing procedures for the appointment, tenure, dismissal, and jurisdiction of judges (Khan, 2006).

The question of judicial independence has been debated for centuries. It's a fascinating topic that changes shape and color with each passing generation. The decision would be based on the issues that the judiciary is experiencing. The International Commission of Jurists' Centre for the Freedom of Judges and Lawyers (2004), for example, has stated that "the judiciary finds itself under tremendous pressure in many countries, particularly where there are political and constitutional problems, armed conflicts, or post-conflict instability". When democracy is in jeopardy, executive interference is common, and the judiciary's resources are reduced, the bench is particularly vulnerable(Naizi, 2016). Counter-terrorism efforts have also aided in increasing pressure on the courts in many countries. An independent judiciary is critical for the protection of human rights. An autonomous judiciary protects citizens' and federation units' interests. The federation structure cannot progress until a court with complete structural independence emerges (Sheikh, 2008).

Historical Context

Pakistan's judicial system was modeled after that of the United Kingdom. For financial and administrative matters, the judiciary was not independent of the executive at the time. The judicial functions of the courts constituted under the "Acts of 1861 and 1935" were mandated (Hussain, 2007). In 1954, when the Governor-General dissolved the First Constituent Assembly (Molvi Tameez Uddin v. Federation of Pakistan, 1954), the judiciary first clashed with the

executive (Molvi Tameez Uddin v. Federation of Pakistan, 1954). A major constitutional problem was addressed in the Usif Patel case (as cited in (Bhatti & Shaheen, 2019). The current judicial setup remained unchanged when the 1956 Constitution was enacted, although it was given the right of judicial review to ensure judicial independence (the Constitution of 1956, Article 148). The 1956 Constitution was repealed in 1958, and martial law was declared. In 1960, the Supreme Court legalized the said martial law in a constitutional case (State v. Dosso, 1958).

The provisions of the 1956s Constitution relating to the judiciary were incorporated in the 1962 constitution (Khan, 2018). In 1969, another Martial Law was imposed, nullifying the 1962 Constitution. The Constitution of 1973, like the two previous Constitutions, attempted to guarantee the judiciary's independence. The 5th constitutional Amendment was enacted to accomplish this goal by separating the judiciary from the executive branch (Talbot, 2009). In 1977, the Constitution was revoked, and new martial law orders were issued, severely undermining the judiciary's independence (Chaudhary, 2019). During the civilian government period, relations between the executive and judiciary remained strained (1988-1999). The First Judge's case, also known as the Al-jihad confidence case, is regarded as a watershed moment of judicial independence. The Supreme Court interpreted the Constitution's numerous clauses concerning the judiciary in this case ("Al-Jehad Trust v. Federation of Pakistan, 1996" as cited in Iqbal, 2012). The suspension of the 14th Amendment, which limited the Supreme Court's judges, was another significant move toward freedom (Khanta, 2007). Martial law orders issued in 2002 threatened judicial independence once more. A new government was created as a result of an election.

Constitutional Amendments

On May 14, 2006, the leaders of the two political parties signed the Charter of Democracy (CoD), an agreement between them. Several recommendations relating to judicial reform were included in the Charter, especially regarding the selection of Superior Court judges. The Charter suggested a Tribunal based on the advice of the nominations for Superior Court judges. The nominations will be forwarded to the Prime Minister by the board. These steps were commendable, but they risked politicizing the appointment to the Superior Courts during the selection process. The Prime Minister and the Joint Parliamentary Committee were given a lot of discretionary power due to this procedure. A Judicial Commission made up of members of the judiciary, the bar, and individuals were proposed by the Pakistan Bar Council (Charter of Democracy,2006).

The Parliamentary Committee on Constitutional Changes has proposed a new framework for appointing judges to the Superior Court's recommendations. The Charter of Democracy plan was approved by the committee. The committee suggested the Legislative Committee and the Judicial Commission. It was recommended that the committee be given the authority to establish procedures (Charter of Democracy, 2006). The House passed the Parliamentary Committee's study on constitutional amendments as the Eighteenth Amendment Bill, 2010. (Khan, 2009). The bill has received unanimous approval in Parliament. By enacting the Government of India Act, changes were made to the conventional structure. The legislature and the judiciary were given a role in the new system of appointment, which the executive overwhelmingly exercised. The Judicial Commission and the Parliamentary Committee are two new constitutional bodies that have been created.

The Judicial Commission was to select and recommend a candidate for confirmation to the Parliamentary Committee. If the committee has no objections, it is forwarded to the President for nomination. The application of new techniques leads to establishing the Pakistan Supreme Court (Chaudhry, 2010).

Multiple appeals were filed in the SC of Pakistan shortly after the 18th Amendment was enacted. Some aspects of Article 175-A, according to the petitioners, can interfere with the constitutional framework of judicial independence, as follows:

a. The CJ of Pakistan was given priority in the advisory process, as described.

b. The executive representatives of the Law Minister and Attorney General are given equal weight.

c. The Committee is given veto power if it rejects the Judicial Commission's recommendations.

d. Members of Parliament can politicize the whole procedure.

e. There is a significant omission in the article to the effect that the committee's composition in the event of the dissolution of the National Assembly is incomplete in this regard (Federation of Pakistan v. Munir Hussain Bhatti, 2011).

These petitions were heard in detail by the Supreme Court, which interpreted the new provision, Article 175-A of the Constitution (Kanaujia & Jain, 2009). The petitioners mostly challenged the Parliamentary Committee's judiciary and Committee composition, and the veto power is given to the Parliamentary Committee.

The Court has made several recommendations for bringing the judge-selection process in line with the concept of judicial independence and making it workable (Federation of Pakistan v. Munir Hussain Bhatti, 2011).

A similar statement of the judgment was sent to "Parliament" for reconsideration. Following the Supreme Court's ruling, Parliament rewrote Article 175-A as the Nineteenth Amendment, 2010, and made the required changes. To bring Article 175-A into line with the Supreme Court's recommendations, Parliament enacted the Nineteenth Amendment, which included the following changes:

a. The Judicial Commission, which selects judges for the Superior Judiciary, now includes the four most senior judges.

b. After consulting with four member judges, the Chief Justice appoints the previous Chief Justice or a judge.

c. An attorney must have at least 15 years of experience in the High Court to be a member of the Judicial Commission.

d. A member of the commission who is also a member of the commission that appoints judges to the High Court shall not be the most senior judge on the commission when selecting a Chief Justice of the High Court.

e. After the initial appointments of the CJ and all the Judges to the Islamabad High Court, the commission members will be the Chief Justices of all four High Courts.

f. After the National Assembly is dissolved, the Senate members join the committee.

g. If a nominee is rejected, it must be announced within 14 days by a three-fourths majority of the Parliamentary Committee's total membership.

h. The Prime Minister will return the nominations to the Parliamentary Committee.

i. The Committee shall refer the candidate's name approved or considered to have been confirmed to the President via the Prime Minister.

j. The Legislative Committee will meet in private and keep a written record of its discussions.

k. The Committee proceedings are not subject to Article 68, which prohibits members of Parliament from investigating judges' actions. Those changes to Article 175-A did not end the disagreements and litigation over the appointment process. Concerns about the Parliamentary Committee's powers and responsibilities persisted.

Power of the Parliamentary Committee and the Superior Courts' judgments

In the case of "Munir Hussain Bhatti," the SC (Supreme Court) of Pakistan addressed these issues and ruled that the committee's decisions were subject to judicial review. The federation used the same idea in its review petition in the Federation of Pakistan v. Munir Hussain Bhatti. The courts upheld the decision reached by the "Parliamentary Committee" under "Article 175-A". The Parliamentary Committee does not rule out considering the selection of the Judicial Commission solely based on character, morality, and financial integrity. The judicial commission has exclusive jurisdiction over the appointment and determination of competence (Sind High Bar Association v. Federation of Pakistan, 2012). The technological capabilities and other related problems were clearly outside the scope of the Parliamentary Committee. The President must sign a Judicial Commission appointment that the Parliamentary Committee has accepted. In light of these rulings, the Parliamentary Committee and President's positions have been reduced to a bare minimum. The JCP (Judicial Commission of Pakistan) gained clout in the appointment process after the 19th Amendment was enacted (Khan, 2019).

Conclusion

To ensure judicial independence, the Judicial Commission and Parliamentary Committee, two legislative bodies, were formed to nominate judges to the superior Constitutional courts. However, when the Supreme Court ruled in different decisions that the Parliamentary Committee must provide reasons for rejecting the Judicial Commission's recommendation for a judge's

elevation, these constitutional bodies failed to achieve their goals. Otherwise, it would be regarded as irrational and haphazard. Although the Supreme Court of Pakistan has settled several legal issues, the power balance between the Judicial Commission and the Parliamentary Committee is still debatable.

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