

Paradoxes of Judicial Independence in Pakistan: Some Reflections from the U.S.

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Abstract

The Constitution and the political system of any country guarantees and makes favourable atmosphere to ensure independence of judiciary. However, sometimes due to certain political events or dictatorial regimes, the judiciary may face certain limitations which affect ultimately its independent and impartial character. This article focuses on the comparative analysis of judicial set up of the U.S.A. and Pakistan to jot down the weaknesses of Pakistan's judiciary in the past and to look forward for judicial independence in the country. Previously, the role of judiciary, to uphold the Constitution and rule of law in Pakistan got compromised. At present, the judicial activism practiced by the judiciary leads to confrontation with other government bodies and raises serious questions regarding the mandate, limits and powers of the judiciary. The judicial activism reflected the failure of the other political organs of the country to defend the rule of law and to perform their duties within their specified spheres as mentioned in the Constitution of Pakistan 1973. However, the Constitution of the United States had established a separate and an independent judicial organ and guarantees life tenure, an impartial method of appointment, protected salary, and a clumsy impeachment mechanism. The judiciary had armed the courts with the weapon of judicial review at the early stage of its development. Therefore, the U.S. has developed an independent and impartial judicial set up under the auspices of its Constitution and may attract the attention of global world to introduce such system in their own countries. On the other hand, Pakistan has a problematic judicial history and striving hard for an independent judicial set up and in that situation the U.S. set up could be a good example as a starting point. Although, the role of judiciary in the past is questionable but there is a little consensus that some constitutional and political factors that have undermined judicial independence in Pakistan. However, the lawyer's movement which was started at very small scale was supposed to be a good start and a way forward for future outcomes for sustainable judicial independence.

Key Words: Authoritarianism, Democratisation, Local Governments and Pakistan.

Introduction

With the development of human society, a strong need was felt to establish institution for the enforcement of law and order. When society evolved into the state, the necessity of unbiased interpretation and application of the laws was felt.

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This notion of impartial interpretation brought forth the idea of the judiciary. An independent judiciary with the power to interpret the constitution, to limit other organs of the state and defend the fundamental rights of the subjects is a common feature of the modern democratic welfare state (D. Chaudhary, *Constitutional Development in Bangladesh: Stresses and Strains* 1994). The principle of independence of judiciary has been established in the judgments of a number of foreign as well as Pakistani case law by the superior courts. The doctrine of independence of judiciary implies that the “Judiciary has to be properly organized, effective and efficient enough to quickly redress and resolve public claims and grievances, and also to be strong enough to dispense justice fairly and impartially” (*Zafar Ali Shah v General Pervez Musharraf* 2000, p.1120-1121)

Historically, the judicial independence evolved as a stronghold against the executive to control misuse of power in England. In 1610, Sir Edward Coke laid the foundation of independence of the judiciary when he nullified the Act of Parliament in *Dr. Bonham case*⁽¹⁶¹⁰⁾. In 1748, Montesquieu laid down the theory of the separation of powers. Independence of judiciary is a part of the concept of the separation of powers in the sense that it demands the separation from other departments of government. The American SC developed the concept of judicial review in *Marbury V. Madison* (1803) to check the constitutionality of the executive and the legislative actions.

The Judicial independence implies the freedom of a judge from every outside source regarding his performance so that maintenance of impartiality can be safeguarded (Lotulung2013). The manner of appointment of the superior court judges has a close nexus with the independence of the judiciary and cannot be separated from each other (Al-JehadTrustvFederationofPakistan1996). Other serious issues which want attention in respect of the judicial independence are the manner of removal, promotion and transfer of the judges. It includes the term of office of the judges, a protection from involuntary transfers, an adequate emolument, and the proper “conditions of service, pensions and the age of retirement”(Seventh United Nations Congress on the Prevention of Crime and the Treatment of offenders 1985). The character and integrity of the judges is also a matter of concern with regard to independence of judiciary as it imparts public confidence. The separation and independence of the judiciary are interlinked with each other(Mian 1993).An independent judiciary is indispensable for a democratic set up, and separation of judiciary is the prerequisite of an impartial and independent judiciary(Accountant General v Ahmed Ali U Qureshi 2008).

Owing to the rise in the functions of a modern welfare state, the significance of the judiciary has increased manifold. It gives life to the dead letters of law by interpreting and applying them. It also substantiates the twin concepts of trichotomy of powers and checks and balances by limiting the executive and the legislature to their constitutionally allotted field. In this way, it guarantees fundamental rights, due process of law and democracy. As a result, judicial effectiveness and access to justice is improved. The necessity of judicial

independence is also recognized universally and is embodied in various international documents. Independence of judiciary implies freedom from external pressures and internal weaknesses which can be established by providing constitutional and statutory safeguards regarding security of tenure, fair procedure of appointment, promotion and accountability of the judges, separation of the judiciary from the executive and financial autonomy.

The main objective of the research is to identify as to what extent judiciary is independent in Pakistan and how the situation can be improved. It is a comparative study for laying down the parameters for Pakistan's judiciary. Therefore, it identifies the best provisions and practices of the U.S.A. system and find out the solution best suitable to our circumstances to attain the goal of judicial independence. The present research would mainly revolve around the following research questions:-

1. What is independence of the judiciary? Why does it matter?
2. What are the factors which contribute towards the independence of the judiciary in the U.S.A.?
3. How is the judicial independence affected by constitutional and political developments in the history of Pakistan? What are the recent developments to ensure judicial independence in Pakistan?
4. What structural reforms are needed in the judicial set up of Pakistan to make it as independent and impartial as in the U.S.A.?

In order to explore these questions, the article has been organized in four parts. Part II explores the concept of independence of judiciary in the U.S, its development, structural factors responsible for the promotion of judicial independence and limitations on the judicial jurisdiction. Part III considers the concept of independence of judiciary, numerous setbacks to its independent nature and efforts for its revival during the civilian as well as Martial Law regimes in Pakistan. Finally, Part IV of this article concludes and summarizes the key arguments.

Independence of judiciary in the U.S.A.

Judicial independence has been a core political value in the United States since the founding of the republic (ArieandWheeler2013).The principles of supremacy of law, separation of powers, checks and balance, federalism and individual rights are the backbone of the Constitution of the U.S.A. The establishment of justice is one of the objectives of the Constitution. It was the first Constitution that evolved the federal judicial system and ensured the independence of judiciary by granting life tenure and protection against diminution of salary. The constitutional journey of more than two hundred years has gained a coordinate independent judicial organ. In the United States, judicial independence has taken various forms and is promoted by different constitutional and statutory provisions, political conventions and judicial interpretations.

Development of Judicial Independence

In 1789, the first Congress enacted the Judiciary Act which worked out a system of federal courts. The first SC remained unfortunate during its first decade and incapable of leaving any impact on American history. The most important opinion delivered by the SC is in the case of *Marbury v Madison* (1803). The SC led by CJ Marshall held that Marbury had a vested right to the commission. Madison was found legally and morally bound to deliver commission. The court declared invalid a portion of Judiciary Act which vested the court with authority to grant the relief. Although Marbury failed to get the relief, the SC successfully claimed the power of judicial review. Marshall further held that the written Constitution is the paramount law. The jurisdiction of the SC “over cases arising under the Constitution”(U.S. Const. art. III, s. 2) and the supremacy clause of Article IV were adopted by the court to secure its authority of reviewing public actions. Marshall claimed the power of judicial review by stating, “It is emphatically the province and duty of judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret the rule. If two laws conflict with each other, the courts must decide on the operation of each (Marbury v Madison 1803, p.178).”

Marshall Court used this power to review and strike down the state laws in some very important cases(*Fletcher v Peck* 1810)and ensured the supremacy of the Constitution and the laws of the federation over that of the states(*McCulloch v Maryland* 1819, *Cohens v Virginia* 1821, *Martin v Hunter’s Lessee* 1816).The SC under the brilliant leadership of Chief Justice Marshall asserted its authority to review the state laws by providing a broad interpretation to the commerce clause,(*Gibbons v Ogden* 1824) the contract clause,(*Trustees of Dartmouth College v. Woodward* 1819) and the “necessary and proper clause”(Osborn v Bank of the United States 1824). Marshall formulated the principles of constitutional construction in an era when United States was in the process of transition from a confederation to “a more perfect union”(U.S. Const. pmb1 n.d.). He captured an activist court for thirty four years and was successful in enforcing his own opinions about public policy. Marshall was not only the Chief Justice but, he was the SC.

Marshall’s successor, Justice Taney, no doubt, strengthened the influence of court by asserting the judicial power in *Dred Scott v Sanford* (1857) but damaged its credibility and prestige. The SC led by Chief Justice White asserted judicial power at the cost of the rights of African Americans by striking down the Civil Rights Act of 1875 in the civil rights cases. In 1925, Chief Justice Taft ensured the application of the first amendment’s freedom of speech to the states (*Gitlow v New York* 1925). The SC led by Chief Justice Hughes practiced judicial review to strike down the new deal legislation (*Schechter Poultry Corp. v United States* 1925, *Carter v Carter Coal Co* 1936). However, the Stone Court upheld the Congress’s economic legislation (*National Labor Relations Board v Jones &*

Laughlin Steel Corporation 1937) and protected the court from political retaliation but at the cost of judicial independence.

After Marshall, Chief Justice Warren was the one who brought innovations to the tradition set by his predecessors. In *Brown v Board of education* (1954) he overruled “separate but equal doctrine” (*Plessy v Ferguson* 1896). Chief Justice Burger gradually, turned the judicial activism of Warren court into judicial self-restraint. The most controversial cases decided by the SC, when Burger was the Chief Justice, were *US v Nixon* (1974) and *Roe v Wade* (1973).

Under Chief Justice Rehnquist’s leadership, the SC in a per curium opinion adjudicated the result of a presidential election (*Bush v Gore* 2000). Chief Justice Roberts, who is ruling the present SC, is considered more conservative than his predecessor.

Structural Factors Promoting Judicial Independence

The framers of the Constitution used separation of powers as basic feature of the new Constitution. Hamilton advocated this separation to ensure an effective, not a limited government. James Madison argued against the accumulation of all powers in the same hands to prevent tyranny (Madison 2013). The first three distributive articles of the Constitution define the structure of the state organs. They vest the Congress (U.S.Const. art. I), the President (U.S. Const. art.II), and the judicial branch (U.S.Const.art. III) respectively with the legislative, the executive and the judicial authority. The Constitution creates a coordinate distinct judicial branch and confers “the judicial Power of the United States ... in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish” (U.S.Const.art. III).

The constitution confers the extensive powers of appointment on the President but limits it by subjecting it to the advice and consent of Senate(U.S. const. art.II, s.2, cl.2 n.d.).The nominations are approved or rejected by the majority vote of the Senate. The President formally appoints the candidate when the Senate signifies its will. In addition to the President and the Senate, the appointment process is influenced by the American bar association, interest groups, political organizations, former justices and the sitting members of the court.

The Constitution ensures independence of judiciary by declaring that “the Judges, both of the supreme and inferior Courts, shall hold their offices during good behavior”(U.S. Const. art. III, s.1 n.d.). Service during good behavior implies that a judge can hold the office until he dies or decides to retire or resign(Krislov 1965, p.9). This life tenure serves as a shield against the political pressure that comes with the periodic accountability to an electorate (Lazarus 2013)

Life tenure is not an absolute guarantee. It is qualified by good behavior. This security can be terminated by impeachment if the judge is guilty of misbehavior. The only method, the Constitution provides for their removal from office is on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors (U.S. Const. art II, s.4 n.d.). The House of Representatives frames

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the Articles of impeachment (U.S.Const. art.I,s.2,cl.5 n.d.). “The Senate has the sole Power to try all Impeachments”(U.S.Const.art.I,s.3,cl.6 n.d.). In order to remove, a judge must be convicted by a two-third majority of the Senators present (U.S.Const.art.I,s.3,cl.6 n.d.).

The concern for financial autonomy of the judicial organ is revealed in Hamilton’s comment that “[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support (Fairfield 1981). In order to ensure financial autonomy, the Constitution enumerates, “the Judges, both of the supreme and inferior Courts, shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office”(U.S.Const.III,s.2,cl.2 n.d.). The judiciary was dependent on the Congress for the appropriation and on the executive for the administration of the funds. Presently, judicial department formulate its own budget and present it to the legislature for incorporation into a government-wide budget document (Arie and Wheeler 2013).

Limitations on the Juridical Jurisdiction

The American Constitution and democratic set up establishes certain checks on the judiciary. However, these checks may undermine independence of judiciary by subjecting the judiciary to political branches. The congress allows the federal district courts to share original jurisdiction with the SC. The appellate jurisdiction of the SC is subject of the will of the Congress (U.S.Const.III,s.2,cl.2 n.d., Ex parte McCordle 1868).The Constitution creates a SC and gives the Congress authority to create, organize and abolish lower federal courts (U.S.Const.III,s.1). However, the Congress cannot abolish the SC. The judiciary has neither force nor will, but merely judgment (Hamilton 2013). It has no authority to enforce its own decisions. The judiciary is dependent on the executive branch for the enforcement of its orders(Redlich and John Attanasio, Understanding Constitutional Law 2012, p.11) The Constitution has also bestowed the Congress with the authority to override judicial decision.

Independence Of Judiciary In Pakistan

Pakistan is a Federal Republic with powers of the state distributed among the legislative, judicial and executive branches. The administration of justice in Pakistan is categorized into the superior judiciary and subordinate judiciary. The former is established by the Constitution and comprises of the Supreme Court (SC), High Courts and Federal Shariat Court (FSC). The latter includes the civil, criminal, administrative and special courts that are created under sub constitutional laws and are subject to the supervisory control of the High courts.

The statement that the roots of the present lie deep in the past never looks true as it is in the case of the orderly development of the jurisdictional aspects of the higher judiciary in Pakistan (Mannan 1973, p.11). (Newberg, 1995, p.36-37, ix)

and (Ahmed, 2012, p.122) has periodized the numerous phases of constitutional growth in Pakistan. Therefore, the constitutional and political development of Pakistan can be classified into following periods:

Democracy (1947-1956); A Nightmare

At the time of independence, Pakistan inherited a healthy judicial system having an impartial appointment procedure and competent judges (Khan 2008, p.309). The Government of India Act (1935) was adopted with certain modifications, as the interim Constitution of Pakistan. The Act secured the status, salary, pension and tenure of the judges (Indian Independence Act, 1947 s.10, cl.b n.d.). The power of appointing CJ and other judges of the federal court was given to the Governor General. In March 1949, the constituent assembly adopted the Objectives Resolution which enumerated the Independence of the judiciary as one of the main feature of the future Constitution (The Objectives Resolution, 1949 para 10 n.d.). The constituent assembly made a significant amendment in the provisional Constitution which conferred jurisdiction on the High Courts to issue prerogative writs (The Government of India Act, 1935 s.223A n.d.).

The Governor General proclaimed emergency and dissolved the constituent assembly. This dissolution was challenged in the chief court of Sindh (CCS) for being unconstitutional, illegal, ultra vires, without jurisdiction, inoperative and void (Tamizuddin Khan v Federation of Pakistan 1955). The CCS granted the claimed relief.

Sir Ivor Jennings represented the federation and had built historical theories to prove that Pakistan is still a dominion and that Governor General as representative of the crown had the right to dissolve the legislature (McGrath, 2000, p.201-225). He also argued that assembly had become unrepresentative and could not exist (McGrath, 2000, p.208). On appeal, the federal court accepted Jennings reasoning and rendered judgment in favor of appellant. Actually, the decision of the Sindh Chief Court was reversed on a technical ground. The Federal Court (FC) held section. 223A of the government of India Act, 1935 invalid on the ground that it was made part of the interim Constitution without the assent of Governor General.

In the case of *Reference by His Excellency the Governor General* (1955), the Federal Court declared the extra-legal exercise of emergency powers by the governor general to be constitutional under the doctrine of civil necessity. In the Court's opinion the prerogative power of dissolution revived because the constituent assembly had become unrepresentative, made itself perpetual legislature and asserted that constitutional legislation was valid without the assent of the Governor General (*Reference by His Excellency the Governor General* 1955). Justice Cornelius was the lone dissenter in these cases.

While deciding *Federation of Pakistan v Moulvi Tamizuddin Khan* (1955), Chief Justice Munir claimed the power of judicial review and set aside a legislative provision on the ground of being unconstitutional. Justice Munir believed in the philosophy of strong executive (McGrath 2000, p.201) and was

tilted towards the Governor General (Shahab 1992, p.664). Therefore, he justified the malafide act of the Governor General but this decision cast a long shadow on the future history of Pakistan (Khan, 2008, p.88). "It was a momentous ruling from which Pakistan had never fully recovered" (Jalal 1988, p.57). Justice Munir had strong political ties and had developed a prejudice against the legislature (McGrath, 2000, p.200-201). This decision weakened the credibility of the judiciary and involved the judiciary in political disputes. Thus, the ruling undermined the integrity and independence of the judiciary in its infancy. Further, it paved the way for future justifications by the judiciary of the illegal executive actions on hyper-technical grounds or self-serving doctrines (Khan 2007, p.88).

Abrogating Constitutions and Examining Judiciary (1956-1988)

In 1956, Pakistan adopted her first Constitution and replaced the Federal Court (FC) with the Supreme Court (SC). It made several provisions which are considered essential for the preservation of the judicial independence.

In *Dosso's case* (1958) Chief Justice Muhammad Munir used the Kelson's theory of revolutionary legality to validate illegal coup d'état and abrogation of the 1956 Constitution. By validating the Martial Law the court preserved its own limited powers (Newberg 1995, p.122) but gave another setback to the judicial independence. The Constitution of Pakistan 1962 established the Supreme Judicial Council which consisted of the Justices of the Superior Courts (the Constitution of Pakistan 1962, Art. 128, clause 1).

In *Asma Jilani's case* (1972), while reviewing the Martial Law of 1969 and suspension of the Constitution of Pakistan 1962, the Supreme Court not only reversed its previous verdict but also repudiated the doctrinal basis on which the Martial Law was legitimized. The judiciary realized the impact of judicial decisions on politics and took this case as an opportunity, not only to rectify the wrongs of the army generals but also to determine its appropriate place in the democratic setup (Newberg 1995, p.122). In *Ziaur Rehman's case* (1973), the Supreme Court affirmed the view that that the "Constitution contains a scheme for the distribution of powers among various organs and authorities of the state".

The Constitution of 1973 envisages the independence of judiciary (Art.2-A n.d.) And its separation from the executive (Art.175 clause 3 n.d.). The composition, jurisdiction, powers and functions of the superior Courts are prescribed in a comprehensive manner. The judicial power of the state is vested in the distinct judicial department. The Constitution made effective provisions regarding the manner of judicial appointments and removal, the tenure, salary and conditions of service of judges (The constitution of Pakistan 1973, Art.177;179;193;195;205;209; 5thSchedule). The Constitution promotes the independence of judiciary by providing for the progressive detachment of judiciary from the executive (Art.175 clause 3 n.d.).It further bound "all the executive and judicial authorities throughout the country to assist the Supreme

Court in the implementation of its decisions” (Art.190). However, this judicial independence was limited by subsequent constitutional amendments.

In *Nusrat Bhutto case* (1977), the Supreme Court once again used the doctrine of state necessity to legalize the suspension of the constitution and justify the military coup. It was declared that “In the circumstances of the present case, the principles enunciated in the *Reference by the Governor-General*(1955) will have to be invoked for solving the present constitutional deadlock” (Begum Nusrat Bhutto v The Chief of the Army Staff and Another, 1977, p.723).

General Muhammad Ziaul Haq introduced several constitutional amendments that mutilated the Constitution and harmed the independence of the judiciary. The regime fell heavy on the judiciary. All these provisions and actions taken under them undermined the independence of the judges and damaged the image of judiciary in the country.

Interpreting Judicial Independence and compromised Judiciary (1988-2007)

In dissolution cases (*Federation Of Pakistan v Muhammad Saifullah Khan* 1989, *Ahmad Tariq Rahim v Pakistan* 1992, *Muhammad Nawaz Sharif v President of Pakistan* 1993, *Benazir Bhutto v President of Pakistan* 1998), the court assumed the power to decide political cases that involved the interpretation of Article 58(2) (b). It adjudicated the issues of presidential ministerial relationship and limits on judicial powers. There are four such cases and only in *Nawaz Sharif case*(1993)the Supreme Court, declared the presidential order illegal and restored the democratic government. It was viewed as an attempt by the judiciary to assert its independence to rectify its own precedents. The Supreme Court judgments in the dissolution cases reflect disparities in terms of method used in resolving them and the consequent outcomes (Siddique 2008, p.121).

In *Sharaf Faridi case* (1994), the Supreme Court ordered the “immediate separation of the judiciary from the executive”(Government of Sindh v Sharaf Faridi 1994). In *Al Jihad Trust Case* (1996), the Supreme Court interpreted the Article 177 and 193 of the Constitution of Pakistan 1973 and explained the procedure of appointment of justices of the Superior Courts. The ruling prescribed the principle of seniority for the judges of high court. In *Asad Ali’s case* (1998)the Supreme Court applied the principles of seniority on the appointment of Chief Justice of Pakistan. Through these landmark judgments, “every avenue of interference with independence of judiciary was not only attended to but also a brilliant effort was made to interpret the relevant provisions of the Constitution in such a manner that threats to independence of judiciary posed by their misuse were minimized”(Khosa 2013).

Unfortunately, this revival was short lived and army took over power on 12 October 1999. In *Zafar Ali Shah’s Case* (2000), the Supreme Court validated the suspension the Assemblies “in the interest of the state for the welfare of the people” (*Zafar Ali Shah v General Pervez Musharraf*, 2000, p.1152). By taking

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oath under Provisional Constitutional Order (PCO), the judiciary let its independence be subverted by the military regime. The Supreme Court suffered the most in terms of integrity and prestige.

Reviving Judicial Independence and Politics of Politicizing Judiciary (2007-2013)

On July 20, 2007, Chief Justice of Pakistan was removed by military government. He was restored to his office at a time when the military was still ruling the country (Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v President of Pakistan through Secretary and others 2010). General Pervez Musharraf claimed to have accepted the verdict but on November 3, 2007, he again imposed emergency and dismissed Chief Justice Iftikhar Chaudhry along with sixty other Judges of the Superior Courts. On the same day, the Supreme Court invalidated this imposition of emergency after declaring it unconstitutional act (Wajihuddin Ahmed v Chief Election Commissioner Islamabad 2008).

On March 15, 2009, lawyers, civil society, human rights activist and political workers started another long march from Lahore to Islamabad. The success of the long march was the defining moment for the judicial independence in Pakistan. In *Sindh High Court Bar Association Case* (2009) the Supreme Court declared all the actions “taken by General Pervez Musharraf including the appointment of PCO judges to be unconstitutional” and held that “the doctrine of necessity inapplicable to an illegal assumption of power (Sindh High Court Bar Association v Federation of Pakistan 2009, p.1200;1080).

The Eighteenth (2010) and Nineteenth (2011) Constitutional Amendments have brought fundamental changes in the process of appointment of the judges in Superior Judiciary. The amendments created the Judicial Commission and the Parliamentary Committee to fill actual or potential vacancies in the Superior Courts of Pakistan. The Supreme Court examined the 18th Amendment (2010) and referred the matter to the parliament with certain suggestions (Nadeem Ahmed Advocate v Federation of Pakistan 2010). The parliament approved some of them by enacting Nineteenth Constitutional Amendment (2011). However, the parliament refused to surrender the parliamentary committee’s power to reject a nomination.

In the light of recent amendments, the Chief Justice has only one vote in the nomination process. The committee entirely consisting of politicians had the power to reject the nomination. The 19th amendment (2011) bound the committee to record reasons for rejection (The Constitution of Pakistan 1973 Art. 175 clause 12 n.d.) but it had not been made justice able as recommended by the Supreme Court. The integrity of the members of the commission is further undermined by providing that the commission would send a new nomination if the former one is rejected by the committee. So, the executive has upper hand in this new procedure for the appointments of the judges of Superior Courts. The Supreme Court struck back in the case of *Munir Hussain Bhatti adv. v Federation*

of Pakistan (2011) by setting aside the decisions of parliamentary committee. Practically, after this verdict, the position is same as was before the 18th amendment (2010). Recently, in response to the Presidential reference, the Supreme Court held that the President and the Prime minister have nominal role with respect to the “appointment of judges and are bound to accept the recommendations of judicial commission” (Reference No.1 of 2012; Constitutional Petition No.126 of 2012).

Conclusion

The United States Constitution envisages a separate and independent judiciary. The judiciary has asserted its independence throughout its history and developed the doctrine of judicial supremacy. It created a coordinate distinct judicial branch independent of the legislature and the executive. The President enjoys the right of appointing Federal Court Judges with the approval of the Senate. These judges can only be removed through the cumbersome process of impeachment. The founders of the Constitution guaranteed judges life tenure in office and no diminution in remuneration to preserve the judicial independence. However there are certain statutory, political and practical constraints that limit this judicial independence.

Pakistan is governed by a written Constitution that emphasizes the principles of judicial review and independence of judiciary. The country for the most part of its history is ruled by usurpers with short and intermittent periods of democratic rule. During this constitutional journey, judiciary played a subservient role by legitimizing the coup d'état and illegal actions of dictators. Those who wield reigns of powers gave serious setbacks to the judiciary which made it unresponsive to uphold the Constitution, protect fundamental rights, control abuse of power and preempt corrupt practices. It is pertinent to mention here that the judges were equally responsible for this judicial crisis because they sacrificed the prestige and honor of the judicial institution at the altar of their personal gains and fears (Khan, 2008, p 368).

In recent, this activist role of the judiciary is the result of the mal performance of the executive and the legislature. The judiciary has attempted to fill that vacuum created due to the dysfunction of the executive and the legislature, by granting relief to the individuals whose rights are affected and by interpreting laws which requires construction. It also asserted itself by promoting public interest litigation and holding the executive accountable. In this scenario, a concern in respect of balance of powers arises. International commission of jurists have found this overuse of *suomotu* power controversial and urged the Supreme Court to exercise restraint (International Commission of Jurists, 2013).

The successful lawyers' movement, which in itself was a small movement, immensely contributed in bringing judiciary to its rightful place in a democratic system of government. The superior judiciary has proved itself the most powerful institution of Pakistan after delivering judgments in high profile cases against the PCO judges, the top executive functionaries, the parliamentarians, the armed

forces, the intelligence agencies, the Election Commission of Pakistan, the investigation agencies, and media persons since March 2009. While doing so, the judiciary caused interference in the executive functions and faced humiliation in the implementation of its verdicts. This judicial activism also invited criticism from the lawyers, media, jurists and the civil society. The judiciary is partially independent in Pakistan but history has given it an opportunity to counterbalance the past mistakes and develop as an impartial and independent institution.

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