

EVALUATION OF JUDICIAL INDEPENDENCE IN PAKISTAN (2008-13)

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Abstract

Judicial independence is considered a pre-requisite of mature democratic system but unfortunately judiciary has not been independent practically in the political history of Pakistan since its origin. The reasons may be numerous, but the fact is that executive had been indulged into judicial matters due to unstable democratic system in the country. Many civil governments were overthrown by military dictators and their coups were legitimized by the apex judiciary through implementation of 'law of necessity'. But the fact cannot be denied that Judiciary acquired more independence after 2010. This research is a qualitative analysis of the factors supporting judicial independence in Pakistan in the new millennium. It also elaborates the significance of judicial independence for the stable democratic system.

Key Words

Pakistan, Judicial Independence, Separation of Powers, Democracy, Rule of Law

Introduction

Judicial independence is considered as essential trait and prerequisite of democratic success and indispensable for guaranteeing human rights, civil liberties and rule of law (Redish 2017, Patrick 2006, Barak 2009, Moran 2015, Shelton 2010). Independent judiciary is a tool to the object of equality without distinction of the haves and the haves not, the rulers and the subject classes in the state.

Judiciary may be divided into two parts i.e. the apex courts or the superior courts/ the constitutional courts and the district or lower

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courts. The apex courts are established under jurisdiction of the constitution and the district or the lower courts are established through the common laws of the country. This Study is a qualitative analysis of the issue of judicial independence in Pakistan. The research primarily examines those factors which contributed to strengthen judicial independence during the specific era 2008-13.

Separation of Powers in the Contemporary World

Lord Acton said, that “power tends to corrupt and absolute power tends to corrupt absolutely” (Lewis 2000). The modern state has very successfully acquired abundant powers to run multiple functions of the government which may result in abuse of power. It is believed that three branches of the government i.e. the executive, judiciary and legislature should perform their functions separately and independently to ensure good and just government (Axford, et al. 2015, Neese 2014). Though the concept of separation of powers is considered peculiar characteristic of presidential system of government however, it is also adopted in the parliamentary form of government by essential alterations and variations to make the political system more efficient. It also enhances the capacity of the functions of the representative government, practices and principals of various constitutional systems. UN General Assembly has placed this concept at the top of various components of democratic system in a resolution ‘A/ RES/ 59/ 201’, passed by 172 countries in 2004 (U.N. 2005). The resolution declares “separation of powers”, along with judicial independence as necessary component¹ for the consolidations of democracy.

International Obligations

Impartial and independent judiciary is recognized as fundamental condition for implementation of rule of law and democratic stability and various international institutions have emphasized on its importance. International Convention on Civil and Political Rights in its Article 14 declares that “all persons shall be equal before the courts and tribunals”. It also mentions that “in the

¹Other components are pluralistic system of organizations and political parties, the rule of law, transparency and accountability, independent media and human rights.

determination of any criminal charge against him or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”(ICCPR 1966). Universal Declaration of human Rights also states that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in determination of his rights and obligations and of any criminal charge against him”(UDHR December 10, 1948). International Commission of Justices in its meeting held in New Delhi in 1959 declared that “an independent judiciary is an indispensable requisite of a free society under the rule of law” (Marsh 1959).

In September 1985, the United Nations in a meeting held in Milan set 20 leading principles for the member countries to make judiciary independent which were approved in the General Assembly through a resolution². The states were advised to guarantee the independence of judiciary and making appropriate laws for that purpose.

Pre-Partition India

Political history of the Indian Subcontinent has never been familiar to the concept of judicial independence. During the monarchical rule the entire powers concerning the executive, the legislature and the judiciary were concentrated in the hands of Monarch and personal wishes and the whims of the rulers of Delhi were considered as law of the country (Siddiqi 2010). Even during British era, the principle of judicial independence remained a dream. Viceroy along with wider discretionary powers was considered as the final authority due to his representation of British government (Menon 2015). He not only possessed legislating powers on a large scale but was all in all in policy making concerning foreign affairs and defense and even he enjoyed discretionary powers to follow the advice of the ministers.

² Un General Assembly endorsed independence of judiciary through a resolutions No. 40/32 on November 29th1985 and 40/146 on December 13, 1985.

Judicial Independence: A Historical Perspective of Pakistan

The importance of judicial independence was realized soon after the emergence of Pakistan when Sir Abdul Rashid, first Chief Justice of Pakistan stated in 1949 that judicial independence cannot be established without independent judiciary free from the influence of other two branches of the government i.e. the legislature and the executive (Rashid 1949, 35). But unfortunately, in the formative period of Pakistan the executive powers were enhanced and misused by Governor General Ghulam Muhammad. The ‘constitutional coup’ by the Governor General changed the political phenomenon altogether and the Constituent Assembly was dissolved at the eve when it was at the final stage of drafting the first constitution of the country. The apex judiciary legalized the action of the Governor General by quoting the ‘Law of Necessity’ and opened the door of executive influence in judicial independence. But despite that the need of independent judiciary was realized and favored in the first constitution of 1956 which clearly stated that judiciary should be separate from executive as soon as possible and practicable (Hayes 2014).

After a short democratic period, political institutions suffered due to military dictatorship imposed by General Ayub and later Yahya Khan as his successor. The judiciary again came under direct executive control after Ayub Martial Law on October 7, 1958 when court taking a plea from Hans Kelsen’s “Pure Theory of Law³” declared that the successful revolutions grants successors to mold the former laws and impose a new set of laws in the state (Aziz 2007). The constitution of Pakistan 1973 established by the first elected civil government was based on the principle of collective responsibility and check and balance provided provisions to make judiciary independent and free. It provided privileges to the judges, their legal actions and their services within or without jurisdiction limits, under the ‘Judicial Officers Protection Act 1850’ (Pakistan 1996). Section 135 under ‘Civil Procedure Code’ (CPC) provided immunity to the judicial personalities like magistrates and the judges from arrest during going to or returning from the court or during the trial process in the court(CPC 1908).

³ Hans Kelsen was an Austrian Jurist and writer of many books.

Similarly, the ‘Pakistan Penal Code’ (PPC) under section 77 provided provisions concerning immunity for the legal acts during judicial activities of the judges (PPC 1860).

‘The Contempt of Court Act 1976’ and the article 204 of the Constitution of 1973 provided provisions for punishment to the person indulged in contempt of court. The above-mentioned clauses determined that the person alleged contempt of court might be punished with maximum imprisonment for six months or fine or both (Pakistan 1976, Pakistan 1973). However, the court was provided power to remit the sentence or discharge the accused at any stage if it was satisfied of bona fide situation of an unconditional apology submitted by the accused. Similarly, article 209 clause 7 of the constitution provided provisions for service protection of the apex court judges (Pakistan 1973). According to that provision judges of the Apex courts could not be dismissed from the office without legal process provided in the said article. These provisions clearly depicted the intention of the lawmakers to ensure judicial independence in the country.

The provisions provided by the constitution 1973 were eclipsed later during military regime of General Zia ul Haq. Justice Yaqub Ali was removed by him in 1977 (Wasti 2009, 103) and similarly, about 12 judges of the High Courts, 4 judges of the Supreme Court and the Chief Justices of the Supreme court and the Baluchistan High Court were removed from services under PCO promulgated by himself in 1981. Under the PCO, General Zia acquired power to appoint and remove the judges of his own accord without any consultation (Jalal 2014, 238). After Zia Judiciary made attempts to ensure judicial independence and assumed power to settle political cases involved into interpretation of Article 58-2b. It adjudicated the issues of presidential ministerial relationship and limits on judicial powers. In 1993, the Supreme Court announced presidential order illegal and restored elected government in Muhammad Nawaz Sharif vs. President of Pakistan case. In 1994, the Supreme Court indicated in Sharaf Faridi case for “immediate separation of the judiciary from the executive” (Government of Sindh vs Sharaf Faridi 1994). The statement of the court was in compatibility of the provisions of the constitution of 1973

which couldn't be entertained till that time and the judiciary practically remained under influence of the executive in contradiction to the constitution. In 1996, the Supreme Court while hearing Al Jihad Trust Case explained appointment procedure for the judges of the higher judiciary by under articles 177 and 193 of the Constitution. Ruling of the court also explained principle of seniority of judges of high court. In 1998, the Supreme Court applied the principle of seniority in Asad Ali's case on the appointment of the Chief Justice of the Supreme Court (Ahmed and Safder 2014). Though in different cases of dissolution as 'Federation of Pakistan vs. Muhammad Saifullah Khan (1989), 'Ahmad Tariq Rahim vs. Pakistan (1992), Benazir Bhutto vs. President of Pakistan (1998), the judgments of the Supreme Court reflected disparities in terms of method used in resolving them but it was considered an attempt of the apex judiciary to declare its independence and rectify its precedents (Ahmed and Safder 2014). However, removal of Sajjad Ali Shah as the Chief Justice of the country indicated an instance of dictatorship of the executive in the judicial history of Pakistan. He was dismissed by his fellow judges in 1998 as front men of the executive and the provisions provided for the concerned procedure in article 209 were ignored. This incident revealed that judiciary itself had played in the hands of powerful executive (Burki 1999, 92).

But despite of all these efforts the issue of judicial independence remained ignored and constitutional safeguards provided for the services of the judges became null and void by another military ruler General Pervaiz Musharraf when after imposition of Martial Law, he removed 6 judges of Supreme Court and Chief Justice of Pakistan and 7 High Courts judges in 2000 (HRW 2007). The most painful and unbelievable event of removal of the judges of the apex court of Pakistan was held on November 3rd, 2007 through Provisional Constitutional Order 2007. This episode of removal of the judges includes arbitrarily dismissing of Chief Justice and 12 other judges out of seventeen and chief justices of two High Courts and 48 judges out of total 77 judges of High Courts. The removed chief justices and other judges were kept in undeclared house arrest for more than three weeks after their removal from the service. The sacked Chief Justice Chaudry

Iftikhar remained house arrest till March 21, 2008. After new elections in 2008 their detention came to an end when newly elected PM Yousef Raza Gilani declared the entire sacked judges free (Perumal 2013, 82).

The above instances on the one hand proved the intention of the military dictators to use judiciary as a tool to prolong their illegitimate rule; it also revealed on the other hand, the contradiction in various provisions of the constitution of 1973 regarding services of judiciary. For example, according to article of the constitution 203 the judges of the High Courts are considered as retired if they don't accept their service as the judge Federal Shariat Court or transfer as a judge of any other High Court according to article 200. However, 18th amendment in the constitution 1973 has amended provisions concerning these articles and contradictory provisions have been replaced.

The above discussion proves contradictions of practices to the provisions of the constitution or the contradictions of the law itself, which resulted in a great hindrance for independence of judiciary and separation of powers in the previous decades. The rulers used different tactics to undermine the independence of judiciary with intention to continue arbitrary practices which further damaged democratic system in Pakistan. Policies contradicted to constitutional provisions, military coups, suspension of constitution, declaration of state of emergency and continual threat to the judges' hindered judicial independence. But with the passage of time higher courts kept their efforts to ensure judicial independence and different factors contributed to take initiatives for change in the beginning of new millennium. First of them was obviously judicial enthusiasm against the former executive control over judiciary but decreased popularity of Musharraf regime also played an important role. The growth of vibrant electronic media in Pakistan also became a factor which highlighted such issues and created awareness among masses.

Removal of the Chief Justice

The apex judiciary initiated to become more independent during the office of Iftikhar Choudhry against the usual interference or suppression by the executive. Iftikhar Choudhry sworn on 29th of June

2005, for the office of Chief Justice of the Supreme Court after the former Chief Justice Nazim Hussain Siddiqui(Neudorf 2017, 237). He was renowned for taking suo motu actions on a large scale to tackle political and human rights issues. He also dealt high-profile cases like privatization of Pakistan Steel Mills, recovery of the missing persons, election of the President of the country, holding of office of military general along with the office of the President of the country, and postponement of the general elections in the country. Several measures were taken against the high-profile police officers in the case concerning missing persons and privatization of the Pakistan Steel Mills (PSM). It disclosed various irregularities and corruption allegation. That was for the first time in history that the apex courts were acting against actions of the executive officers. Hussain Asghar, Director General of Federal Investigation Authority was transferred to Gilgit Baltistan due to submitting a fake report in the court. Many executive police officers were transferred to Balochistan and the court declared in verdict that disciplinary action would also be initiated against them if they refuse to join their new places of posting (Supreme Court 2013). Supreme Court decisions against the cases of Haj corruption scandal, New Murree Project, Pakistan steel Mills etc. was a sign of judicial activism. The court action against above brutalities and ill performance of police officers, corruption, and selection of improper persons to fill up lucrative posts revealed real suo motu powers of the apex judiciary (The News 2011).

Suo motu actions taken by the Chief Justice were contradicted to arbitrary actions of Musharraf who considered them as interference into executive matters. The Chief Justice was summoned into the President House by Musharraf and was charged for continuous misconduct in the presence of the Prime Minister and some military officials (Jalal 2014). He was threatened for initiation of judicial trial in case of his resignation from the office of the Chief justice. He was also offered other lucrative post in return, but he rejected the offer against Musharraf's expectation. Iftikhar's refusal infuriated General Musharraf and he restrained Iftikhar as the judge and the Chief Justice by alleging him unfit for these posts. Musharraf filed a reference

against Chaudry Iftikhar alleging him supporting his son⁴ to advance his official career (Chaudhry 2015). Iftikhar was also alleged himself for his continuous demand for provision of extra ordinary protocol comprised of high profile police officials and senior bureaucrats. So, after his suspension state of emergency was declared in the country on 3rd November, 2007(Kalhan 2010, 99).

Lawyers Movement

Dismissal of the Chief Justice was a powerful step taken by executive to continue its control on judiciary. Iftikhar succeeded in achieving legal and moral support against his dismissal and reference under article 209. The lawyers and urban civil society launched a powerful movement for restoration of the sacked judges during the emergency (Naqvi 2010). This movement also gained support of political parties including PML (N), one of the major political parties in the country who was already against Musharraf regime.

Election 2008 and Judicial Activism

The movement for restoration of the sacked judges continued till the general elections 2008. PPPP established the government after achieving majority and it was expected that the government would reinstate the sacked judges including Iftikhar Muhammad Choudhry, the sacked Chief Justice. A long march was launched from Lahore to Islamabad by political workers and the lawyers (Burki 2011, 122). Lahore was sealed by law enforcement agencies. However, the agencies could not stop the procession containing huge number of the participants. Aitzaz Ahsan, the central leader of the ruling party was also leading the movement for the sake of President of Supreme Court Bar Association (Nayar 2007, 203). Electronic media also favored the movement and broadcasted live programs and news bulletins. Finally, judges were restored at the night between 15th and 16th of March 2009 and Iftikhar Choudhry became the Chief Justice of Pakistan on 22nd March 2009 (Perumal 2013, 82).

The emergency declared by Musharraf was considered a coup against judicial system of the country. It was a powerful stance taken by judiciary against anti judicial forces for the first time in the country. It was also important for judiciary itself after the restoration of sacked judges. Apex judiciary was enjoying full support of civil society and lawyers' community

⁴ Arslan son of Iftikhar Chaudhry was a professional doctor and was alleged to be appointed as police officer with illegal support of his father.

who have now been more confident after successful movement. Freedom and activism of vibrant electronic media in the country also enabled the people more informative and educated through news bulletins and live coverage of the important events.

Judicial Independence and the 18th Amendment

After restoration of the sacked judges, the most important event was the 18th amendment in the constitution which dually affected judicial powers. The 18th amendment was a collective achievement of the democratic forces. It restored the original form of the constitution 1973 which was already characterized by judicial independence. “Concurrent List,” was eliminated which revealed lawmaking concerns for the both federal and the provincial governments and the federal law prevailed due to presence of controversy between the federal and the provincial laws. Elimination of the concurrent list delegated about 40 law making areas to provincial assemblies concerning contracts, marriage laws, possession of fire arms, curriculums of education, labor, bankruptcy, and environmental pollution and every provincial assembly was declared free and independent for law making in above areas. These reforms made the provinces more autonomous and strengthened the federal system in the country (Fair 2014, Jalal 2014, Shah 2014).

The 18th amendment also empowered judiciary once again. It made a check on judicial powers on one hand, which had been continuously exercised by judiciary to legitimize military coups. Now military coups or unlawful transformation of the government was restricted through addition of a new clause into the article 6 of the constitution. This article clarified that some act of high treason mentioned in article 6, section 1-2 would not be justified by the apex judiciary. It established an affected check on judiciary which often had been a tool in the hands of military dictatorship in the name of necessity.

On the other hand, it also extended judicial powers concerning appointment of the judges in the apex courts. The judiciary was empowered to appoint judges of the apex courts along with the executive whose procedure was revealed in clause 175 (A). Before the

amendment the executive solely enjoyed this discretionary power (Smith 2017).

So, it can be argued that this amendment assured proper use of powers by judiciary as well it strengthened judiciary as independent and free branch of government. The important clauses of the constitution distorted during military regimes of Zia and Musharraf were also removed through this amendment (Fair 2014). The both previous amendments had deep effects on the constitution and had legitimized military dictatorship through judicial verdicts. They had also distorted democratic norms because military dictators amended the constitution to achieve constitutional support for their unconstitutional policies and acts.

After its revival, the apex judiciary took bold decision against improper policy and actions of the dominant executive and trialed many cases of national importance as a separate and independent institution. The cases like National Reconciliation Order (NRO), privatization of Pakistan Steel Mills (PST), the oath of the judges of the apex judiciary under PCO, Right off loans, Decisions of Parliamentary Committee, National Insurance Company Scandal, dedicatedly breaches of embankments of the rivers during flood in 2010, Illegal Promotion of Bureaucrats, Rental Power Stations, Memo gate Scandal, appointment of Chairman NAB, and Haj Corruption scandal highlighted the vibrant character of the higher judiciary and irked dominant executive. So, this period was comprised of continual contradictions between judiciary and the executive. There is a long list of such cases, but the removal of a working Prime Minister is the most important.

Prime Minister Gilani's Conviction

The two most important events occurred in this era better explain the situation of judicial independence during this era. The first event was conviction of the then Prime Minister Yousaf Raza Gillani. Contradictions between judiciary and the executive continued since origin of the PPPP government but the both branches were at daggers drawn with each other due to historical conviction released on April 26, 2012 by the Supreme Court bench comprised of seven members under headship of Nasir-ul-Mulk (Khan 2012). The National Reconciliation Order (NRO) had a great hand in conviction of Gillani. NRO was signed in 2007 between Benazir Bhutto and Musharraf, the then President of the country. This document allowed Benazir to return to the country and take part in the politics, further it was promised that she wouldn't be trialed against former cases based on corruption. NRO granted opportunity to save themselves about 8000 peoples including the then President Zardari, politicians, bureaucrats, and ministers and abolished prosecution and investigation against them(Lansford 2012, 1092). NRO was already declared null and void by the Supreme Court in 2009 declaring it contradictory to national interests and inconsistent with national constitution. The court nullified the entire actions taken by the executive under capacity of NRO and directed Prime Minister to restart the Swiss case against Zardari.

However, Gilani refused to reopen corruption cases against president Zardari by taking a plea of immunity already granted to the office of the President by the constitution. The Supreme Court rejected his plea and Gilani was convicted till the end of session of the court i.e. for less than a minute. Though the conviction was symbolic in nature, but it disqualified him for the office of the Prime Minister. This conviction was a novel instance in the judicial history of Pakistan which proved judiciary a free and independent branch of the government free from executive interference.

Conclusion

The discussion above clearly reveals that apex judiciary in the past has always been dependent on the executive and played a pliable role in favor of military establishment instead of maintaining check

against illegal and unconstitutional executive and legislative actions. It provided protection to extra constitutional actions of the military dictators and made a least resistance against undemocratic assaults of the dictators against the democratic governments (Neudorf 2017).

After 2005, the higher judiciary initiated to take suo motu actions against illegal executive actions and improper judicial policies. For the first time in the history of Pakistan, Human Right Cell was established in the Supreme Court and reforms were introduced to consider civil, political and legal matters of public interests. Judicial activism popularized the Supreme Court and it gradually began to take notices against human rights and public security matters. Authoritarian rule of Musharraf couldn't tolerate vibrant actions of the Supreme Court and tried its best to culminate judicial independence. Musharraf removed many judges of the apex judiciary including Chief Justice of the Supreme Court which eventually proved an initiative for independent judiciary. Contradicted to preceding pliable performance of judiciary, it was for the first time that judiciary took bold stance against illegal actions of the executive keeping check and balance. The media supported judiciary through its commentaries and live coverage of judicial proceedings. Suo motu actions and verdicts of judiciary reflected popular will of the people. In this period, the judiciary successfully achieved its independent status and became more strengthened. The other branches of the government like executive could hardly interfere into its matters. Though it is argued that new elected government of PPPP delayed restoration of the sacked judges like Musharraf regime which affected relations between judiciary and the executive and judiciary became a party by ignoring its proper limits and jurisdiction and indulging into extra matters, the fact cannot be denied that judicial independence further strengthened democratic process (Rizvi 2011).

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