

MERIT BASED CRITERIA, DIVERSITY AND SECURITY OF TENURE: A CRITICAL APPRAISAL OF JUDICIAL APPOINTMENTS IN PAKISTAN

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Abstract

Pakistan inherited a well-reputed judicial system, on account of meritorious judicial appointments, from the British Empire. Yet the protection of the imperial interests of the judicial system, its judgments earned public confidence as the common people were successful in finding justice. After independence till today Pakistan has been unable to prepare a well-settled merit-based criterion for higher judicial appointments. This paper argues that the Constitution of Pakistan guarantees the security of tenure of judges of the higher tribunals, however, practically the judges have been subjected to arbitrary removals more often during dictatorial regimes. Pakistan should prepare a comprehensive merit-based criteria comprising of both professional and personal traits needed for higher judicial appointments. The representation of women and minorities should be ensured in the higher judiciary. The paper also advises that constitutional players should prepare the cultivation of respect for the judicial independence to protect the security of tenure of the justices.

Key Words: judicial, independence, appointments, merit-based, criteria, tenure.

INTRODUCTION

The procedure of judicial appointments and security of tenure is two salient characteristics of judicial independence. Referable to the high importance of judicial appointments the issue of the purpose of a sound criteria based on a merit principle has also become extremely important (Judges' Charter in Europe, 1997). Since its independence, Pakistan has embraced several different examples of judicial selections for the assignment of justices to the higher tribunals of the state. Each example has resulted in arguments regarding the impartiality, fairness, and transparency of the judicial selections. The arena of judicial appointments has seen a tug of war between the judicial system and the executive (Al-Jehad Trust v Federation of Pakistan, 1996). The selection criteria do not explicitly indicate any personal traits for the judicial candidates (Shah & Shah, 2008). Likewise, the tenure of judges was protected against arbitrary removals in the Constitution, but judges have faced insecurity due to a powerful executive (Shah, n.d). Further, in a modern democratic civilization, people might not expect proper dispensation of justice from a judicial system which is not reflective of all sections of society, and often, perception seems to be more powerful than reality (International Bar Association, 2009). Thus, the topic of diversity in judicial appointments has also become an important aspect of meritorious judicial appointments.

JUDICIAL APPOINTMENTS IN PAKISTAN

The judicial system inherited by Pakistan after independence from British rule had a reputation for integrity and competence. This good repute was mainly attributed to the tradition of meritorious appointments by the British Government (Khan, n.d). Judges during that point were mostly experienced for their integrity and competence. Though these courts protected imperialistic interests, their opinions were known for acquiring (and retaining) public confidence because the common man was successful in getting justice (Khan, n.d). After independence, the only criteria set for the appointment of Supreme Court Judges were that a

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candidate should be a citizen of Pakistan and have worked as a High Court Judge for at least five years, or should have practiced as a lawyer in the High Court for at least 15 years (The Constitution of Pakistan, 1956, art. 149). Similarly, the criteria for appointment as a High Court Judge was that a candidate should be a citizen of Pakistan and have served as a civil servant for at least 10 years and as a District Judge for at least 3 years, or have practiced as a lawyer in the High Court for at least 10 years, or as a judge for at least 10 years (The Constitution of Pakistan, 1956, art. 166). The same measures were incorporated into the subsequent Constitutions of 1962 and 1973, with the addition in the 1973 Constitution that a candidate for the High Court judge should not be less than forty years old (The Constitution of Pakistan 1973, arts 177, 193). It is surprising that the criteria for selection for the first appearance into the superior judiciary mention only the experience required for eligibility. Other necessary factors of merit criteria like honesty, integrity, professional competence, judicial temperament and impartiality, which could serve to pick out a candidate solely on merit, have been cut.

There are also certain differences between theory and drill in the judicial appointments system of Pakistan. Theoretically, an advocate with 15 years' experience in the High Court can become a Supreme Court justice. Yet, in reality, Supreme Court Judges are only chosen from among existing High Court Judges (International Crisis Group, 2004). Likewise, the Constitution only requires that a candidate has relevant experience as a counsel or as a High Court Judge; nevertheless, in practice there has been an agreement between the president, the prime minister and the Chief Justice that intelligence reports about the background and moral quality of the nominee shall be collected and these reports shall be weighed in forming a determination on his appointment (Ibrahim, 2010).

This system contains the basic flaw that it is not transparent or publicized. The Chief Justice initiates the recommendations for dates before the Judicial Commission, then the whole process, as has been discussed above, takes office without being publicized (Khan & Shah, 2003). The Chief Justice is the lone individual who evaluates the professional abilities of the proposed nominee, while the president and the prime minister, and now the Parliamentary Committee, judge the moral role of the candidate on the footing of the news reports they have pulled together (Shah & Shah, 2008). Whether there are negative or positive news reports about the proposed candidates, the general public is not made aware of the information (International Crisis Group, 2004). Khan (1999) indicated that the concept behind this scheme is that the founders of the system presumed that all the participants in the process 'are fair and unprejudiced; free from any personal interest, bias or prejudice; capable of applying objective criteria; and dedicated to the concept of independence of the judiciary' (p. 113-114). Alas, the history of judicial assignments in Pakistan has turned out this positive presumption by the founders of the system to be completely incorrect. The constitutional players, who were expected to protect and develop a full scheme of judicial appointments, subverted it for their own ends instead (International Bar Association, 2008). All the political leaders, military dictators and many of the Chief Justices exploited the absence of specific merit-based criteria and used the appointment process to oblige their allies (Khan, 1999). Though the seniority principle for the appointments of Chief Justices of the Supreme Court and the High Courts was not contained in the Constitution, it was proven through a long precedent; but different political and military rulers have since violated this convention to nominate their favourite judges as Chief Justices (Blue, R., Hoffman, R., & Berg, L., 2008).

The violation of merit was started with the appointment of Chief Justice Munir. After the retirement of the first Chief Justice of Pakistan, Justice Munir was appointed Chief Justice, superseding the claim to that role of Justice A.S.M. Akram, the most senior judge of the Federal Court (Khan, 1999). The judges of superior courts were responsible themselves for setting forth the procedure of appointing near relatives as High Court Judges. Hamid Khan saw the offices of the Advocate General and Attorney General as nurseries for the plantation of High Court Judges, yet these nurseries were restricted to the relatives of influential persons (Khan, 1999). Justice Sajjad Ali Shah has categorically said that it was a usual practice among judges in the higher judiciary of Pakistan to appoint their sons, sons-in-law and other near relatives as Advocates General and Attorney General, and then to elevate them to become High Court Judges. The judgeship, as a consequence of this practice, remained with their families for generation after generation (Shah, 2001). Still, the fast disintegration of this system began during the tenure of Ayub Khan (Khan, 1999). Khan was in the habit of interviewing judicial candidates in the company of his Companion General and the Federal Law Minister. He is alleged to have ruled out one candidate because he did not like his shoes and another candidate because his collar was a bit dirty (Shah, 2009). Likewise, his successor, Yahya Khan, appointed Javed Iqbal, a politician who contested and lost an election for a seat in the National Assembly against Zulfiqar Ali Bhutto, as a Lahore High Court Judge (Shah, 2009). Miss Bhutto belligerently tried to occupy the courts with judges considered devoted to her party's interests (Kalhan, 2013). She appointed Sajjad Ali Shah as the Chief Justice of Pakistan and in doing so left out three other senior judges simply because he was the only justice who disagreed in her favour in the judgment of the case against the disintegration of her government (Kalhan, 2013). In short, every rule, whether they were democratically elected or a military dictator violated the merit and seniority principle in the appointments of High Court and Supreme Court Judges. They totally had one factor in common: that their precedence was to appoint those candidates to the judiciary who were experienced to be ideologically loyal to them and who would thus potentially be likely to defend their political job as judges (Ibrahim, 2010; International Crisis Group, 2004; LaPorte, 1997; International Bar Association, 2009; Shah & Shah, 2008). This quandary can be solved by incorporating a provision in the Constitution requiring a candidate, in accession to the requisite professional qualifications and experience, to be of high moral fiber, personal integrity and non-affiliated with political parties. It is interesting to observe here that Article 62 (1) (d) (e) (f) (g) (2) of the Constitution of Pakistan requires a person to be of sound character to qualify as a member of the Parliament. Still, the Constitution does not dictate a similar requirement of sound character for judicial nominees. In the researcher's perspective, similar requirements as enumerated in Article 62 should be incorporated in the Constitution for judicial assignments, as this would minimize the chances of judicial appointments of political affiliates of the ruling parties.

Diversity in Judicial Appointments

The criteria for judicial appointments should also bring into account matters of gender balance and the representation of minorities, along with the condition of fulfilling the other merit requirements (International Bar Association, 2009). No one should be discriminated against on grounds other than the proven criteria, as required by article 10 of the UN Basic Principles on the Independence of the Judiciary, which reads:

In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office

must be a national of the country concerned, shall not be considered discriminatory (United Nations Department of International Economic and Social Affairs, 1985).

The higher courts in Pakistan have directly, but quite randomly discussed the demand for diversity in judicial appointments, however, this matter has not even appeared on the stage of public debate (Holden, 2011). Adult females and members of minorities receive a subtle representation in the higher judiciary. The ground behind the failure to appoint female judges in the higher courts has not been the lack of eligible candidates; instead, it has been due to a lack of political will (International Crisis Group, 2004). In reality, diversity within the judicial system in Pakistan has always been restricted to a pragmatic necessity for the lower courts to ensure the proper dispensation of justice (Holden, 2011). It has never been construed as significant for higher courts to have diverse judges, and the event has constantly been neglected by the concerned authorities (Holden, 2011). In the process of naming and promoting favored judges, minorities and women have always been ignored (International Crisis Group, 2004). During the Musharraf regime, Fakhar-un-Nisa Khokhar and Majida Razvi, the two most senior female Judges of the Lahore High Court and the Sindh High Court respectively, were stripped of their right to become Chief Justices. Both were put off in violation of the seniority principle, and after their retirements, there were no other woman High Court or Supreme Court Judges (International Crisis Group, 2004).

Security of Tenure

Justice Le Dain of Canada considered the security of tenure to be one of the most significant components of judicial independence (Valente v The Queen, 1985). Security of tenure means that judges should be appointed for life or longer fixed terms and that it is not possible to remove them discretionary or arbitrarily (Dodek & Sossin, 2010). Long tenures decrease turnover and thus creates a larger degree of consistency and predictability in judicial decisions. The more time a judge spends on the workbench, the gentler it becomes to foresee the final result of the cases pending adjudication before him (Landes & Posner, 1975). It also adds valuable experience to the profile of the judge and enriches his efficiency (Landes & Posner, 1975). Lifelong tenure and the improbability of arbitrary removal enhance judicial independence, whilst the removal of a judge before the close of his actual condition is believed to be a grave rupture of the notion of judicial independence (Hlmann & Kunz, 2011; see also Hayo & Voigt, 2007, 2010; Jackson, 2012). For this reason, most constitutions postulate life or longer and non-renewable judicial tenures (Peri, 2012; see also Jackson, 2012; United Nations Office on Drugs and Crime, 2006). The same position has been adopted by the UN in its Basic Principles on the Independence of the Judiciary (United Nations Department of International Economic and Social Affairs, 1985). Rule 11 stipulates that: "The term of office of judges, their independence, security, adequate pay, conditions of service, pensions and the age of retirement shall be adequately insured by law," and Principle 12 states that: "Judges, whether nominated or elected, shall have guaranteed tenure until a mandatory retirement age or the expiration of their condition of federal agency, where such exists."

The designation of judges on temporary contracts or on an ad-hoc basis can jeopardize the independence of the judicial system. The judges may feel vulnerable to improper executive influence and pressure (United Nations Office of the High Commissioner for Human Rights, 2003). Non-renewable tenure is necessary so that evaluators have no inducement to gratify those who make judicial appointments (Hayo & Voigt, 2010). Conversely, a secured long term tenure may be considered contradictory to the whim of the accountability of judges, as the

reliability is seen to be associated with the accountability (Jackson, 2012). Dakolias and Thachuk noted that “[l]ike all power, judicial power will grow and threaten individual liberty if left unchecked” (2000). On the other hand, Ciparick and King (2010) contend that every system of judicial accountability allows pressure to be mounted on judges which can preclude them from performing their judicial functions in a completely independent way. In the researcher’s opinion, the security of tenure is contradictory to the appointment at the delight of the appointer, but not the concept of accountability, as a sound and transparent system is demanded to get rid of judges for a readable understanding. Like independence, accountability is also needed to ensure impartial and just decisions, as otherwise there will always be suspicions of corruption and impropriety within the judiciary (Dakolias & Thachuk, 2000). Nevertheless, to guarantee that judges dispense justice in a detached and impartial manner it is imperative that the menace of their arbitrary removal should be prevented, except for just cause (Fohr, 2012; Kelso, 1993; Verkuil, 1989). The case should be subject to review by an independent body and the aggrieved judge should be supplied with the full opportunity to fend for themselves (Dodek & Sossin, 2010).

In that respect is constantly a fear that if judges with integrity challenge the faulty decisions of the executive, they may be arbitrarily removed from the post. The real cause behind removal is normally disguised using concocted charges. If a judge is successfully transferred in this way, then the executive will have no hesitation in appointing new judges of their own choice who are probable to be more compliant with the objectives of the government (Lee, 2010). Nevertheless, on that point are also examples where some judges fail to keep up the decorum and high standards expected of the highest judicial institutions (Lee, 2010). Judicial independence demands that the judiciary stays independent, not only from the government but also from other illegitimate influences. It is as important to protect the judicial reputation from being chastened by the influence of powerful non-governmental groups (Wallace, 2001). Laws differ across different societies, but the desire to deliver an encrypted judiciary is a mutual one; therefore, the concept of judicial independence should not protect judges from an investigation into possible wrongdoing (Kirby, 2001; see also Dakolias & Thachuk, 2000; Guarneri & Piana, 2016). These two opposing scenarios, of judges being removed unnecessarily on the unitary hand, and misconduct by judges on the other, make it important to decide that what type of accountability mechanism should be taken up, which does not negate the principle of security of tenure (Gilbert, 2013; Lee, 2010; Wallace, 2001). There should, in other words, be some balance between judicial independence and accountability (Geyht, 2012). In some legal powers, the executive holds the force of judicial accountability in its own hands (Wallace, 1997). In this system, there is always the possibility that the executive might use this process to eliminate unwanted judges. To ward off this apparent risk of judicial independence, it is more appropriate to place the judicial accountability mechanism within the judicial system itself (Wallace, 2001). This procedure should be fair, effective and reasonably transparent so that the public may have confidence that any example of wrongdoing will be identified and necessary steps taken (Wallace, 2001). The institution of judicial councils is considered a safer option to create a balance between judicial independence and accountability (Dakolias & Thachuk, 2000; McCormick, 2004). Nonetheless, this proportion cannot be accomplished if the judicial council is dominated by the spokespeople of the executive. If the government holds a critical act of judicial council members, then it can easily remove undesirable judges (McCormick, 2004).

In Pakistan, the tenure of the High Court and the Supreme Court Judges is fixed by the Constitution. The retirement age of the High Court and Supreme Court Judges is fixed at 62 and

65 years, respectively (Constitution of Pakistan 1973, arts. 179, 195). The condition of service for judges of the Federal Shariat Court is merely three years, which may be renewed for another term of three years, or as defined by the president (Constitution of Pakistan 1973, art. 203C (4)). This disparity between the tenures of the Federal Shariat Court, the High Court, and the Supreme Court Judges seems illogical and is not in consonance with the concept of judicial independence (Shah, 2009). The shorter term for the High Court Judges implies a potential threat to their integrity. About the time of their retirement, they may be tempted by the possibility that the executive may seek their elevation to become a justice of the Supreme Court. In this instance, they may take another three-year term with high judicial pay, prestige, honour and other fringe benefits (Shah, 2009). Aside from the disparity in the maximum age of service of 62 or 65, if compared with life tenure in America and a retirement age of 75 years in England, these two ages seem young, especially for the Chief Justices who are nominated to this post at later points in their careers (Blue, R., Hoffman, R., & Berg, L., 2008). This regular turnover of judges produces plentiful opportunities for the executive to interfere with judicial selection and get its favourite judges into the courtrooms. Frequent changes of Chief Justices have barred many incumbents in that role from impacting the management of the courts or improving the scheme (Blue, R., Hoffman, R., & Berg, L. 2008).

The term of office of the Federal Shariat Court, the High Court and the Supreme Court Judges are protected against arbitrary removal under Articles 203C and 209 of Pakistan's Constitution. These clauses state that the justices of the superior courts shall not be transferred from office except following the process provided in Article 209; and establish a six-member Supreme Judicial Council headed by the Chief Justice of the Supreme Court of Pakistan. The other members will be "the two next most senior judges of the Supreme Court" and "the two most senior Chief Justices of the High Courts" (Constitution of Pakistan 1973, art. 209). If the President of Pakistan, on receiving some information or complaint, considers that a judge is incapable of performing his function due to mental or physical incapacity or that he is guilty of misconduct, he may send a reference to the Supreme Judicial Council to inquire into the matter (Constitution of Pakistan 1973, art. 209 (5)(a)(b)). If the Council after its inquiry reports to the president that it considers that the alleged allegation is true, then the president may remove that judge from his service (Constitution of Pakistan 1973, art. 209 (6)(a)(b)).

Nevertheless, this constitutional fixed tenure and protection against arbitrary removal from the federal agency does not provide an unbreakable shield for judges against powerful military and civil governments. Articles 181 and 182 of the Constitution of Pakistan allow the appointment of acting and ad-hoc judges in the Supreme Court and article 197 sets aside the appointment of additional judges in the High Courts. The true intent of these clauses is that these temporary appointments are to be granted only in unavoidable and exceptional circumstances, and for a very short period (Shah, 2009). It has therefore been unfortunate that these clauses have been practiced by several military and civil governments in derogation of their genuine intent. Traditionally in Pakistan, judges in the High Courts are appointed as additional judges against permanent vacancies for a period of one or two years before their confirmation as permanent judges (International Bar Association, 2008). The confirmation process is the same as that mentioned in Article 193 for regular appointments. If a judge is not confirmed then he can continue his practice as an advocate in the High Courts, unlike a permanent judge who cannot practice as an advocate in the High Courts (International Crisis Group, 2004). There are also some supporters of this pattern of appointing additional judges who think that doing so permits the lawyers to have some time to decide about their future as judges or as advocates

(International Crisis Group, 2004). Still, this exercise has always offered an opportunity for the executive to eliminate unwanted judges. Resultantly, during their temporary appointments, judges have remained under pressure to please the executive and their Chief Justices to secure their confirmation (International Bar Association, 2008). One ex-justice of the Peshawar High Court recounted that he went on some judgments which were not liked by the executive; subsequently, after the completion of his probationary period, he was not confirmed (International Crisis Group, 2004). The solemnity of the issue is argued by the disagreement shown by the Supreme Court of Pakistan with this bad practice in the Al-Jehad Trust case (1996). Likewise, under Article 200, a judge of a High Court may be changed to any other High Court, and according to article 203C which was inserted by Zia, a judge of a High Court may be changed to the Federal Shariat Court and if he passes up this transfer he will be thought to be withdrawn from his service (Constitution of Pakistan 1973, arts. 200, 203C). Every military and civil government has at some point used these articles to get rid of and punish unfavourable judges (Shah, 2009). In the end, in the Al-Jehad Trust case (1996), Justice Ajmal Mian declared that a judge of a High Court cannot be transmitted to another High Court or the Federal Shariat Court as a punishment or on extraneous grounds except in the public interest, and after consultation with the Chief Justice of the Supreme Court.

Yahya Khan, who succeeded Ayub Khan as Chief Martial Law Administrator, made the first overt effort to purge the judiciary when he promulgated the Judges (Compulsory Leave) Order XXVII of 1970. This law was an overt attack on the independence of the judicial system as it vested the president with the power to get rid of an unwanted judge temporarily from the bench hearing a case in which the regime was interested (International Bar Association, 2007). Subsequently, this law was ironically validated by the democratic government of Zulfikar Ali Bhutto through the Validation of Laws Act, 1975. In the words of Justice (R) Razvi (n.d.), "this law has neither any moral nor legal sanctity and its application has infringed the concept of independence of the judiciary." These measures resulted in the resignation of one judge from the Lahore High Court, along with the removal of another judge from the High Court (President v Justice Shaukhat Ali, 1971). Though the security of tenure was incorporated in Pakistan's Constitution during the Bhutto government, it was said that he did not introduce it only to promote judicial independence, but that his real purpose had been to furnish protection to his favorite judges (International Bar Association, 2009).

It is not surprising that the arbitrary sacking of judges always occurred during the dictatorial regimes. Sometimes they used disguised constitutional procedures, but on most occasions, they got rid of the judges arbitrarily simply by not providing them fresh oaths. No such incident of blatant and arbitrary removal occurred during democratic regimes (Shah, 2009). Zia further amended the Constitution of 1973 to avoid any unforeseen challenge from judges, appointing a new Supreme Court Chief Justice after shortening the tenure and forcing the retreat of the incumbent Chief Justice (Abbas & Jasam, 2009). Likewise, his Provisional Constitutional Order (PCO) of 1981 served to limit judicial independence by forcing judges to guide a new oath and by taking into account the transport of High Court Judges and cases from province to province and from the High Courts to the Federal Shariat Court (SS. 10, 11, 17). Dakolias and Thachuk (2000) considered these actions injurious to personal judicial independence. With this order, only selected judges were invited to take the new oath, unlike an otherwise similar situation in 1977, when all judges had been allowed to. Zia wanted to dispose of non-cooperative judges; so, the Federal Law Ministry prepared a list which ensured that supposedly undesirable judges should not be invited for oath (Shah). Musharraf followed the case law set by Zia and purged the

judiciary in an identical manner twice, in 2000 and 2007 (International Bar Association, 2009). Pakistan had never witnessed such a massive purge of the judiciary (Shah, 2009). For Verkuil (1989), this arbitrary removal of judges whose judgments deviate from the ambitions of the executive is contrary to the very notion of judicial independence. Indeed, ex-Pakistani Chief Justice Cornelius described it as “the rape of the judiciary” (Khan, 2009).

CONCLUSION

The Constitution of Pakistan requires only professional experience and a certain age limit for a candidate to be eligible for a judicial appointment. This is not sufficient because it renders a free hand to those responsible for judicial appointments to take anybody who delivers the prescribed age and experience without consideration of other qualities which are essential for a judicial office. A more elaborate set of eligibility standards for members of parliament has already been incorporated in Article 62 (1) (d) (e) (f) (g) (2) of the Constitution; it is, thus, imperative that a similar merit-based standard for judicial appointments should also be incorporated in the Constitution of Pakistan. This merit-based standard should include professional qualities like specific knowledge, service to the law, experience, employment accomplishments, intellectual proficiency, competence, etc. It should also include personal qualities such as unity, independence, impartiality, good manners, judicial temperament, and high moral quality. The topic of diversity in the highest judicial appointments has also been ignored to date, entailing that the representation of women and minorities has never been addressed by the constituent players and the legal community. The participation of the women and minorities in the higher judiciary should be promoted.

Though the security of tenure was guaranteed in all of Pakistan’s Constitutions and a judge cannot be removed arbitrarily under the Constitution, in practice, unflavored judges were arbitrarily taken out using several tactics. This trouble can simply be solved by embracing and developing a culture of respect for judicial independence, as sufficient constitutional guarantees of security of tenure are already present. The administrator will have to learn to respect the security of tenure of judges once they are appointed, and the judges and the general public should be collectively vigilant and willing to accept a strong stand against any arbitrary removal of a justice. Judges will also have to show solidarity against any arbitrary or unconstitutional removal of a judge.

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