

**RESEARCH PAPER****Independence of Judiciary and Rule of Law: Myth and Reality**

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ABSTRACT

Independence of Judiciary and Rule of Law are the back bone of any state. The justice is only possible in the state if judiciary works independently and provide justice speedily. The main objective to select this research was to discuss the literal meaning of Independence and its understanding in the realm of Judiciary and Law. The study also discusses the historical background of judiciary in Pakistan and the conceptual framework of Judicial Independence and rule of law and then a constitutional analysis of Judicial Independence in Pakistan in respect of the Constitution of Pakistan, 1973. Qualitative and primary as well as secondary sources have used for this purpose of study. A critical analysis of reality in terms of judicial independence and the threat of this reality to rule of law. Qualitative research methodology was adopted during the study. The comparative reforms and efforts over the period of time in judicial system for rule of law and lastly the research is concluded with some observations.

KEYWORDS Independence, Judiciary, Relationship, Rule of Law, Supremacy

Introduction

The Independence of the judiciary is a foundation of any equitable society, guaranteeing the rule of law and defending residents' privileges (Fakhruddin G. 2013). Pakistan, a country with a turbulent history set apart by political disturbances and sacred vacillations, the excursion towards a genuinely free judiciary has been a complicated and multi-layered one, the excursion towards laying out a free judiciary has been set apart by huge verifiable occasions, milestones, and challenges. This work delves about the significant development of Pakistan's judiciary, featuring significant milestones in the battle for legal independence and looking at the grave challenges that have shaped the trajectory of the country's legal system.

The literal meaning of independence and its understanding in the realm of Judiciary. It has been discussed in detail the historical background of judiciary in Pakistan and conceptual framework of Judicial Independence and rule of law and then a constitutional analysis of Judicial Independence in Pakistan in respect of 1973 constitution. A critical analysis and reality of judicial independence and the threat of this reality to rule of law.

Independence of Judiciary

Independent judiciary forms one integral part of law and governance issues and without it, there can be no just and democratic society. It is based on the fact that a judiciary should exist independent of external influences and politics. This is because judicial independence allows judges to render independent, objective, and just verdicts

while ensuring adherence to the rule of law and protection of the citizenry from exploitation by the executive or legislature. The following are critical components of judicial independence: Tenure - judges should be protected against unjustified dismissals and political interferences. It is important for judges not to be persuaded by others that may aim at manipulating outcomes of trials. Financial Independence: Judicial system must have sufficient funds for its operations. Judiciary is a powerful entity; therefore, financial independence gives it a degree of freedom from other arms of the state that may tamper with financial dealings in a bid to control them. It is imperative that judges remain impartial and are not influenced by their own interests, political affiliations or outside forces.

Rule of Law

The rule of law is a basic tenet of modern legal and political systems. It creates the framework for a just and orderly society, ensuring that no one, including the government, is above the law. The rule of law can be defined as a system that includes the following elements Equality Before the Law Everyone, regardless of status or position, is subject to and accountable to the law. No one is immune from legal obligations, and everyone is entitled to equal legal protection and treatment. Legal certainty requires that laws be clear, predictable, and consistently applied. Citizens should have a reasonable expectation that the law will be enforced fairly, and laws should not be changed retroactively to disadvantage them. Due Process and Fairness Legal procedures must be fair and just, ensuring that individuals have the right to a fair trial, legal representation, and the opportunity to be heard.

Scope/Importance

The judicial separation principle in every democratic institution should be considered as the pillar of democracy (International Commission Jurists, 2009). An independent judiciary is also common in most states, including Pakistan, where it acts as a check upon the power of the executive and the national assembly. Judicial independence is crucial for the purpose of assuring objectivity, fairness, and right defense.

In addition, judicial independence transcends law related values and spans into broader issues of democracy and general freedoms. In ensuring freedom of all individuals, the promotion of communication within the land and for attaining stability in the entire country, a free judiciary that will not be influenced by others outside would do much better.

Independent judiciary is critical in sustaining the separation of powers principle common in democracies. It makes it possible for the judiciary to interpret laws free from external influence. The guardian of the constitution ensures that there exist an independent judiciary whose duty is to ensure that all the actions by the government are aligned to these principles. Erosion of judicial independence may also lead to erosion of individual freedom, erosion of the rule of law, and ultimately, an autocratic state. As a means of curbing any arbitrary acts of the government it has contributed largely to the orderliness and legitimacy of the state.

Literature Review

Judicial independence and rule of law complement each other. Without judicial independence, one cannot even talk about rule of law, and in turn the state of lawlessness will emerge. The following connections show how these two principles are related The

Rule of Law's Guardians It is the independent judicial that acts as the defender of the rule of law. It ensures that they maintain consistency and fairness as per the constitution. Independent judges that are not influenced by political considerations tend to enforce the rule of law through fair interpretation and application of laws. **Checks and Balances** The judiciary is also separate, acting as a kind of "watchdog" over the executive and legislative branches. The rule of law requires that no branch of government gains undue advantage to circumvent its stipulated roles and hence disregard citizen rights. **Protection of Rights and Freedoms** The rule of law depends on judicial independence, as this offers a safe haven for personal rights. These rights can be taken care of by independent judges who should ensure that such government or entity does not infringe on them. Rule of law requires legal certainty; an independent judicature is a key factor in this regard (Choudhry, 2014).

Ever since independence, the Pakistani judiciary has undergone several notable changes. The system is based on the legal system of Britain; it reflects the peculiarities of social-political environment of the state. In Pakistan, judicial system runs through several ranks, each level being headed by the Supreme Court. The judiciary is constitutionally mandated through the Constitution of Pakistan as per what its functions, roles and organizational structure should look like the current system of justice in Pakistan has a long history and has been influenced by different forces including history, culture and politics. It inherited a set of laws made in British-colonial era that had been amended into Pakistani law as per its Constitutional provisions of Sharia. The Pakistani judiciary is made up of the following layers the upper level is constituted by the Supreme Court, whereby High Courts are located in each province and then subordinated courts that encompass the district and other subdivisions. Additionally, under the constitution of Pakistan, there is an elaborate provision regarding the creation and operations of the judiciary. Judiciary should protect fundamental rights, mete out fairness between all parties at law and prevent abuse of power by the executive and the legislature. However, the background of Pakistani judiciary had episodes of interference, dictatorship as well as the threat of independence.

Pakistan's law system has been shaped by its colonial legacy. The law had already been established during British rule in the sub-continent that constituted the early grounds of the modern day judicial system. After being independent from Great Britain in 1947, Pakistan built its judicial system on the one that Great Britain left behind for them.

During the first years of independence from England the colonial era legal system continued. However, similar to the British model, the judiciary also inherits strengths and weaknesses such as hierarchical form of governance and common law as well as the latter's principle. Initially, judges had been educated under the British legal system.

Following their enactment, the 1962 and 1973 constitutions brought about sweeping transformations on the legal landscape. 1962 saw centralization of authority which consequently impacted on the autonomy of the judiciary. In contrary, 1973 constitution (which is still valid) has been giving more independence for the judiciary as a separate part of the state power.

During the last decades of the 20th century, the Pakistani Judiciary assumed a leading role in the country. This led to increased judicial activism which saw the court intervening in matters of general concern. Some landmark court cases like Asma Jilani case during the seventies paved way to the judiciary taking part in safeguarding fundamental human rights.

The struggle for judicial independence in Pakistan has been punctuated by major milestones. A notable event is, perhaps, bringing back the judiciary after times of having military rule or the lawyers' protest held in 2007. This period witnessed some judicial rulings including the notable lawyers movement case that underscored constitutionalism and the supremacy of the law over man. The fact that these milestones remain standing shows how the judiciary was able to stay independent despite difficult times.

The lawyers' movement of 2007 is one of the biggest milestone events in the efforts towards judicial independence. It was fueled by the removal of chief justice Iftikhar Muhammad Chaudhry by the then president Pervez Musharraf. The people protested in large numbers to have chief justice Chaudhry reinstated, and this showed that they wanted an independent judiciary. Civil society joined the community at large and the members of the law sector to demand freedom of the courts system. The movement eventually succeeded, restoring Chief Justice Chaudhry, and serving notice that the Judiciary forms a barrier against dictate.

Setting up the Judicial Commission of Pakistan (JCP) in 2010 was critical in efforts to create transparent processes for making judges appointments. They include senior judges, legal experts, and other Judicial Commission of Pakistan members who together with others make recommendations regarding judicial appointments, promotions, and transfers. Such an institutional strategy is introduced in order to safeguard the judicial appointments from any bias influences.

Material and Methods

The research has main focus on the concept of trichotomy of power and the independent role of Judiciary for any state, the most specifically within Pakistan and how this independent role upheld the rule of law in any system, and for this purpose the study is mostly relying on research journals, case laws and articles.

Case Laws relating to Judicial Independence & Rule of Law

Nawaz Sharif's Case (Panama Papers case, PLD 2017 SC 253) An example on a recent case involving the issue of disqualification and the accountability contributing to the debate on judicial activism. This involved graft scandal that saw the Prime Minister being implicated and was as a result, disqualified. The judiciary, in this case, proved that it is ready to take a stand against the all-powerful politicians.

Ataullah Mengal Case (1976)

A landmark case touching on constitutional matters and setting basic premises on individual freedoms *Asma Jilani vs. Government of Punjab* (PLD 1967 SC 139) This set precedents for the idea of constitutionalism as well as judicial independency. Necessity provided grounds for imposition of martial law and therefore was used to justify it. This leaves doubt to the independence of the judiciary in situations that are beyond normalcy.

Malik Asad Ali Case (1974) This case further strengthened the courts in their resolve by maintaining commitment to abiding with constitution in such unstable time as the issue of martial law.

Sindh High court bar association v. federation of Pakistan (PLD 2009 SC. 879) The removal of judges is another issue that was raised in the case. It emphasizes the

importance of having an independent judiciary (PID-1998-SC-161). A case relating to fair, equal and just trials as one of the essential elements of the rule of laws.

Constitutional Analysis & Rule of Law

1. **Article 2A- Objectives Resolution** While not directly related to judicial independence, Article 2A of the Constitution incorporates the Objectives Resolution, which emphasizes the supremacy of the rule of law, independence of the judiciary, and protection of fundamental rights.
2. **Article 175- Establishment of the Supreme Court** Article 175 of the Constitution establishes the Supreme Court of Pakistan. It provides for the independence of the judiciary by mandating that judges of the Supreme Court shall be appointed by the President of Pakistan in consultation with the Chief Justice of Pakistan.
3. **Article 175A - The Judicial Commission** This article was inserted into the Constitution through the 18th Amendment in 2010 to enhance the role of the judiciary in judicial appointments. It establishes the Judicial Commission, which plays a pivotal role in the appointment of judges to the superior courts. The Commission includes the Chief Justice of Pakistan, four most senior judges of the Supreme Court, the federal law minister, and one member each from the Pakistan Bar Council and the provincial bar councils. This provision aims to ensure transparency and accountability in judicial appointments.
4. **Article 20- High Courts** Similar to Article 175, Article 203 provides for the establishment of high courts in Pakistan and lays down the procedure for the appointment of judges. It emphasizes that judges shall be appointed by the President in consultation with the Chief Justice of the respective high court.
5. **Article 209 - Removal of Judges** While judicial independence is essential, it is equally crucial to hold judges accountable for their conduct. Article 209 provides a mechanism for the removal of judges of the superior courts, including the Supreme Court and high courts. It allows for the initiation of proceedings for the removal of a judge on grounds of misconduct or incapacity. The procedure for removal involves an inquiry committee, and the President can only remove a judge if the Supreme Judicial Council recommends it.
6. **Article 204 - Contempt of Court** Article 204 grants the superior courts the authority to punish individuals for contempt of court. This power is essential to maintain the dignity and authority of the judiciary, but it must be exercised judiciously to avoid potential abuse.
7. **Article 3 - Elimination of exploitation** Though not exclusively related to judicial independence, Article 3 declares that elimination of exploitation is a fundamental principle of policy, and it includes the independence of the judiciary as an essential element of ensuring justice.
8. **Article 4 - Right to be treated in accordance with law** This article guarantees that every citizen shall be treated in accordance with the law and that actions not authorized by law shall be void. This underscores the importance of upholding the rule of law and the independence of the judiciary in ensuring citizens' rights.

9. **Article 37(d) - Promotion of social justice and removal of economic disparity**
This provision recognizes that a just and equitable society requires the removal of economic disparities and emphasizes that the state shall ensure the independence of the judiciary to achieve these objectives.

The practical application and realization of judicial independence in Pakistan not only rely on the legal framework but also on the interpretation of these provisions and the commitment of state institutions and the legal community to uphold this vital principle.

Judicial Independence & Pakistan under International Standards

Judicial independence is a base of strong legal system of any society. It is essential that judiciary should be independent to maintain the rule of law and justice. This idea is enshrined in the Constitution of Pakistan, 1973 and this idea keeps the nation's court to operate in such appropriate manner that keep rule of law intact. However, the reality of Rule of Law is quite disturbing in Pakistan over the years. Superior Courts faced various difficulties in putting judicial independence into practice in Pakistan. The Constitution of Pakistan, 1973 clearly outlined the concept of Trichotomy of Power meaning thereby there is a complete separation of power defined in Constitution between three organs of state i.e. Legislative, executive, and judicial branches. Article 175 of the Constitution deals with the establishment and jurisdiction of courts through which this Article protects our judiciary from political and executive influence. Furthermore, Judicial Activism historically proves to be a technique by Pakistan's judiciary to defend its independence. According to Asma Jahangir's 2007 article, "Judicial Activism in Pakistan A Strong Judiciary?" these actions are often regarded as an obstacle on presidential overreach. Despite of these constitutional and statutory barriers, judicial independence in Pakistan faced various problems in reality. There have been times of political unrest and military rule in the nation, which has raised questions regarding the executive branch's power over the courts. Pursuant to the ICJ (International Commission of Jurists) 2009 report, "Justice Denied A Report on the Independence of the Judiciary in Pakistan," judges have been the target of threats, intimidation, and even removal from their positions. In Pakistan, there have been initiatives to increase judicial independence in recent years. In this sense, the Lawyers' Movement and the judiciary's reinstatement in 2009 were crucial turning points. The success of the movement displayed the public's passion to conserving the rule of law and judicial independence. By means of significant rulings, the Pakistani Supreme Court has also acted in demonstrating its authority in defending judicial independence (Fakhruddin G. Ebrahim, "The Independence of the Judiciary," 2013).

Case Study about Success & Failures of Judicial Independence in Pakistan

As discussed earlier, though rule of law and judicial independence has been protected by various legal and constitutional statutory safeguards but still judicial independence has faced various difficulties in Pakistan. Over the period of time, judicial independence in Pakistan has faced many success & failures. Those success & failures are prescribed with case studies under

Panama Papers case One of the prominent example of Judicial Independence in Pakistan's judicial history is The Panama Papers. Wherein, a sitting Prime Minister was directed to left his office due to ambiguous financial income report.

Mukhtaran Mai (gang raped victim), used Pakistan's judicial system to pursue justice. This case is partial successful because her case highlighted the difficulties faced by rape victim in legal system to get justice.

In 2007, removal of Chief Justice of Supreme Court of Pakistan by Dictator Pervaiz Musharaf results a nationwide Lawyers protest movement. This Lawyer movement have a very crucial impact on the history of Judicial Independence of our country. At that time dictator Pervaiz Musharaf was forced and pressurized by Lawyer community to reappoint CJ at his post.

Failures

Blasphemy Cases & role of Judiciary Judicial Independence seems to be highly paralyzed in case of blasphemy cases. We have a lot of cases in Pakistan's Judicial System where judiciary fails to make rule of law in society like in the case of Asia Bibi case, Jaranwala Incident case and Priyantha Kumara Case.

Political & Non-Political characters Manipulation and Influence

Pakistan's judiciary faces various political and nonpolitical characters manipulation with system and their influence over system that ultimately affects Judicial Independence. Trough out the history, Judges are forced to take oath under martial law ordinances during various martial law periods causing a severe damage to judicial independence and sovereignty.

Case studies

This case is significant for reaffirming Pakistan's judiciary's independence. It questioned the president's authority to remove a Supreme Court justice and established that such removals must be based on misconduct, incapacity, or improper behavior, not political motives (**PLD 1993 SC 349**).

It is noteworthy because it addresses the issue of women's rights and gender equality. The Supreme Court ruled that women had the right to freely choose their spouses, and that the requirement for a guardian's consent to marry was unconstitutional (**PLD 1990 SC 632**).

It was crucial in maintaining the rule of law during periods of martial law. The Supreme Court affirmed citizens' fundamental rights and declared that the Constitution would not be suspended even during martial law (**PLD 1972 SC 139**).

It is significant for emphasizing the rule of law in a highly sensitive context, as well as addressing issues of free expression and the judiciary's role in ensuring the protection of fundamental rights (**2010 SCMR 1**).

The Supreme Court removed Prime Minister Nawaz Sharif from office in this case, citing his failure to explain the sources of his family's wealth in the Panamagate scandal. This case highlighted the role of the judiciary in holding powerful politicians accountable (**PLD 2017 SC 265**).

Efforts to strengthen judicial independence

One of the key ways to protect judicial independence is by establishing safeguards. These safeguards include things like tenure and removal procedures. Tenure

provides judges with job security, which helps prevent them from being influenced by external pressures. Removal procedures, on the other hand, ensure that judges can only be removed from their positions for valid reasons, such as misconduct or incapacity. These measures help maintain the independence of the judiciary.

Overall, the ongoing efforts to strengthen judicial independence aim to ensure that judges can make fair and impartial decisions without any external pressures. These efforts include establishing safeguards, promoting transparency and accountability, providing resources and training, and international cooperation. By supporting these efforts, we can help maintain a strong and independent judiciary, which is crucial for upholding the rule of law and protecting individual rights (Oxford Handbook of Judicial Studies).

Conclusion

To conclude this whole debate, it will not be wrong to say that the judicial independence and rule of law is part and parcel of each other. Rule of law in any state can only be confirmed by following the defined principles of trichotomy of powers. In our Constitution, Article 4 defines rule of law and Article 185 and 199 defines judicial independence but still it is bad luck for Pakistan that either judiciary in Pakistan has been a center of politics or under influence and pressure of political system. Judicial support to some specific political ideology should never be support and followed in either way. The only way out is Judicial independence and the concept of trichotomy and I would like to say that with judicial independence there should be judicial accountability.

Recommendations

Another crucial step is to promote ongoing education and professional development for judges. By providing them with opportunities for training and staying updated with legal developments, we can enhance their expertise and decision-making abilities. This not only strengthens their independence but also ensures that they are well-equipped to handle complex legal matters.

Efficiency within the court system is also vital to judicial independence. Investing in modernizing court infrastructure and technology can help streamline judicial proceedings, reduce delays, and minimize the potential for external interference.

Transparency and public trust are essential components of a strong judiciary. Initiatives such as public access to court proceedings, publishing judgments, and engaging with the public through education and outreach programs can help foster transparency and encourage public participation. When people have confidence in the judiciary and understand its workings, it strengthens the rule of law.

Accountability mechanisms play a crucial role in maintaining judicial independence. Regular review and improvement of disciplinary processes for judges are necessary to ensure that any misconduct or unethical behavior is addressed appropriately. By holding judges accountable, we can maintain public trust and confidence in the judiciary.

Lastly, protecting judicial independence from political interference is of utmost importance. It is crucial to establish clear separation of powers and ensure that political actors respect the decisions made by the judiciary.

1. Canada: Canada has made strides in enhancing judicial independence by establishing an independent Judicial Appointments Advisory Committee. This committee recommends candidates based on merit, ensuring a fair and transparent selection process.

2. Germany: In Germany, they prioritize judicial independence by having a separate Federal Constitutional Court. This court safeguards the constitution and ensures the judiciary remains independent, protecting individual rights and upholding the rule of law.

3. Australia: Down under, Australia has taken steps to strengthen judicial independence through an independent Judicial Commission. This commission handles complaints against judges, ensuring accountability while maintaining the judiciary's independence.

4. United Kingdom: The UK has a long-standing tradition of judicial independence. The judiciary operates separately from the executive and legislative branches, maintaining a system of checks and balances. They also have a transparent and merit-based appointment process for judges.

5. South Africa: Since the end of apartheid, South Africa has made significant progress in judicial reform. They established the South African Judicial Service Commission, responsible for appointing judges and maintaining their independence. This commission includes representatives from various sectors, ensuring a fair and inclusive selection process.

These examples showcase different approaches to strengthening judicial independence and the rule of law. By studying them, there is a need of best practices and explore strategies for implementing similar reforms in other countries.

Remember, these are just a few examples, and there are many more countries with successful judicial reforms. It's fascinating to see how different nations tackle the important task of strengthening their judiciary. ("Judicial Independence in the Age of Democracy")

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