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## The Process of Judicial Appointments in Pakistan under the 1973 Constitution

*(A Comparative Analysis of the Constitutional Provisions over the Process of Appointment of Judges of Superior Judiciary before and after the Eighteenth Amendment in the light of the Judgments of the Supreme Court)*

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### Abstract

The process of the appointment of judges of the superior judiciary has been the subject of great interest in Pakistan. In the Al-Jihad trust case (1996), the Supreme Court's interpretation of the constitutional provisions resulted in the power of appointment fall into the hands of the Chief Justice of the Supreme Court of Pakistan. This did not go well with the legislature and the executive, since they were left with no meaningful role in such appointments. The political setup established after the general elections gave a new facet to the process of appointment by adding Article 175A in the Constitution with the objective of balancing the role of the executive and the judiciary in such appointments.

The purpose of this paper is to analyse and critically evaluate constitutional provisions relating to the process of judicial appointments before the Eighteenth Amendment, and the reasons for altering the process under Eighteenth Amendment in the light of the Supreme Court judgments.

**Keywords:** Appointment of judges; the Supreme Court of Pakistan; 18<sup>th</sup> Amendment; Al-Jihad Trust case

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## Introduction

The process of appointment of judges has always been of great interest and significance in democracies. The interest proceeds from the fact that the process of judicial appointment is invariably linked with judicial independence which is the corner stone of almost all types of democracies. The primary objective of judicial independence may be summarized as

The court shall decide cases on the basis of impartial assessment of facts and its independent and impartial application of law over it, and there should be no impression of influence, direct or indirect from any internal or outside authority (United States Institute of Peace, 2009).

Wealth of deliberations and discussions has been made around the world over the process of judicial appointments with the objective to make judiciary independent from the executive and legislative control in the discharge of its judicial function. The approach towards the process may differ from one state to another, but the diversity in the process of judicial appointments in different democracies itself shows their interest in respect of significance and importance of judicial independence. (United States Institute of Peace, 2009)

The situation in Pakistan is no different from the above discussion. The constitutional framers while drafting the constitution kept in mind the fundamental principle of judicial independence and different constitutional provisions (Article 175, (3), Constitution of Pakistan, 1973) in letter and spirit including the preamble is reflective of the same principle.

The judicial independence is even more essential to countries like Pakistan and India which has written constitution. The Constitution prescribes tracheotomy of powers of all governmental organs and adds limits to their powers by providing the system of checks and balances, such scheme of Constitutional powers and checks and balances could work only when the judicial organ is independent in its judicial affairs.

Constitution and political History of Pakistan witnessed a great constitutional duel over the process of appointment of judges between the executive and judiciary in order to have final say in the matter. The importance of the process of judicial appointments lead to a series of constitutional events, showing the interest of the legislature and executive on one hand, and the effort of the supreme court to

liberate itself from the Executive control on the other. Such efforts and struggle between the governmental organs could broadly be categorized in to three phases in our constitutional history.

1. The first phase which started from the passing of Constitution of Pakistan in 1973 till the passing Supreme Court Decision in Al-Jehad Trust case in 1996.
2. The second phase started from the passing of Supreme Court Decision in Al-Jehad Trust Case in 1996 which lasted till the passing of Eighteenth Constitutional Amendment Act.
3. The third phase is on-going; it started with the passing of Eighteenth Constitutional Amendment Act, which altered the original constitutional process.

#### **1. The First Phase: The Process of Judges' Appointment (1973 till 1996)**

The constitutional framers expressly excluded the role of Parliament in the process of appointment and required two Constitutional functionaries i.e. President of Pakistan and Chief Justice of Supreme court, to appoint judges for superior judiciary through the process of consultation; (Article 177 before Constitution Eighteenth Amendment Act, 2010) of course the President in parliamentary democracy is to act on the advice of the Prime Minister (Article 90, Constitution of Pakistan). The process required the two Constitutional functionaries to engage in consultation in case a vacancy occurred at the superior courts. A judge would be appointed by the President pursuant to consultation with the Chief Justice of Pakistan. (Article 177, Constitution of Pakistan before Constitution Eighteenth Amendment Act, 2010)

The participatory process between the Executive and Judiciary was, in principle quiet sound and logical in order to ensure the appointment of judges for superior judiciary in a fair and transparent manner. The inclusion of Judiciary in the process of appointment surely was commendable on the part of the constituent assembly.

The events succeeding to the passing of Constitution of Pakistan which largely changed the structure of our constitution through Eight Amendment which made President all powerful in the running the affairs of the state, including the handling

of the affairs of the superior judiciary through the power of appointment, tenure of service and their removal(Constitution Eight Amendment Act, 1985)

The original process though transparent and fair, was greatly manipulated by the Chief Executive in order to appoint likeminded judges in the superior judiciary. The substantial role of Chief justice of the Supreme Court was taken as a mere formality and those judges were appointed who could serve well to the wishes of Chief Executive rather than to the people through justice (khan, Hamid 2007 pp.446-447).

The outward fair process of judicial appointment was made controversial and was hugely manipulated by the Executive, by appointing like-minded judges to secure partial and friendly decisions. The President in case of vacancies in superior judiciary would simply inform the Chief Justice in respect of a specific candidate, and such communication of the wishes of the Executive was taken as consultation, resultantly the candidate was appointed by the President regardless of the fact that Chief Justice was holding contrary view over the nominee. Such executive interpretation of the constitutional provision in practice almost excluded the role of judiciary in appointment and meant that the executive had the sole power in appointment for filling vacancies for superior judiciary.

The Executive interpretation of the constitutional appointments has been, as time witnessed, greatly misused by the executive, hence an important state institution become the judicial manifestation of the will of the executive (Khan, Hamid 2007 pp. 356-364).

## **2. The Second Phase: Al-Jehad Trust verdict (1996) to 18<sup>th</sup> amendment (2010)**

The Executive control over the judicial appointments was not entirely welcomed by the Supreme Court and it passed a hallmark judgment in 1996 in Al-Jehad trust case. The Supreme Court gave a new dimension to the constitutional provisions thereby limiting the executive role in judicial appointments. The decision came as a reaction to the executive misuse of the constitutional provisions. The court interpreted the Constitutional provisions in order to limit the untrammelled executive powers over the judges' appointment. (Khan, Hamid 2007 pp.449-450)

The series of judgments passed in the second phase not only defined the process of appointment elaborately, but also curtailed the executive role in the process, with the overt objective of making Judiciary independent from Executive control. (Al-Jehad Trust v Federation of Pakistan, 1996, Asad Ali v Federation of Pakistan, 1998, Supreme Court Bar Association v. Federation of Pakistan, 2002).

The famous and the foremost judgment titled “Al-Jehad Trust 1996” exhaustively defined the word “consultation”. The Supreme Court in its reasoning stated that the process of consultation should be effective, meaningful, purposive, consensus oriented so that there should be no room for arbitrariness and unfair play. The reasoning further stated that in absence of strong and cogent reasons to the contrary, the opinion of the Chief justice of the Supreme Court with regard to the suitability of the candidate will be binding on the president (Al-Jehad Trust vs. the Federation of Pakistan, 1996).

The judgments passed in the second phase are noteworthy as they gave a new outlook to the otherwise apparently clear constitutional provisions.

Important features of the judgments were;

1. Reducing the role of the executive in the process of judge’s appointment.
2. Liberal definition of the word “consultation”.
3. The judgment required that Consultation between the two constitutional functionaries be documented.
4. In case the President rejects the nomination of the Chief justice, the rejection must be supported by sound reasons.
5. The Primacy of the opinion of chief justice over the President in the process of appointment.

The judgments had great bearing over the Judicial appointing process, though it provided effective mechanism of checks and control over the executive power in appointments, by specifying the role of the President, it otherwise allowed the Chief Justice to have final say in the whole process, and inadvertently or otherwise, the whole power of appointment fall into the hands of the Chief Justice of the Supreme Court (Khan, Hamid 2007 p.450).

The reasoning of the Supreme Court in those judgments could not be justified on the following grounds.

1. The Constitutional process of judicial appointment was consultative where the input of the Chief justice was required to be taken into consideration by the Executive. The process was based on “consultation” and not “concurrence” and it was never intended by the constitutional framers that the consent of the Chief Justice must be required in order to appoint judges for superior judiciary. (Gupta, Harish, 2009)
2. The reasoning of the Supreme Court was flawed on another count as the decision gave the primacy of opinion of the Chief Justice over the President in the process. The primacy of the opinion did not find source in the Constitutional provisions.
3. The judgment of the Supreme Court laid the entire burden of rejecting the nomination on the President.
4. The question of suitability of the candidate was impliedly considered to be inherent in the selection by the Chief justice, in the decision, which meant that if the Chief Justice nominates any candidate for judgeship, the selection would always be coupled with his suitability to the office, and it was up to the president to cancel the nomination of the Chief Justice on sound reasons if he was dissatisfied over the nominee. Hence the consultation was defined in negative.

The interpretation of the Constitutional Provisions over the process of judicial appointment concentrated all the powers in the hands of the Chief Justice of the Supreme Court. The so called progressive interpretations of the Constitutional provisions lead to the same problem i.e. the control of one institution over the process of judicial appointment. The Chief Justice took the centre stage as he could now control the Executive by having like-minded judges in the judicial office on one hand; it also empowered him to use such power so as to control his colleagues in the performance of their judicial function on the other.

In fact the Constitution gives enormous administrative powers to the Chief Justice, like role as Chairman in Supreme Judicial Council for taking disciplinary actions against judges (Article 209, Constitution of Pakistan, 1973), setting up different benches of Supreme Court and transfer of cases from one bench to another,

Adding the power of appointment to His already many, allowed the Chief Justice to be the ultimate arbiter in all the affairs and decisions of the Supreme Court, which meant that Chief Justice could not only control the executive through his decisions, but also his own colleagues and subordinates in the performance of judicial functions.

### **3. The Third Phase: After the 8<sup>th</sup> constitutional amendment act 2010**

Judiciary getting all powerful in appointments didn't go well with the political class, since they were left with no meaningful role in the appointments. The legal fraternity and the intelligentsia did not approve the same also because the Chief Justice become all powerful in handling the affairs of Supreme Court and ultimately made him supra Constitutional entity, which was never intended even by the constitutional framers.

In order to bring reforms into the process, the political parties agreed to amend the constitution after the 2008 general elections (Charter of Democracy, May 2006).

The political setup established after the 2008 election took the task of revising the Constitution and to undo all those unconstitutional amendments that has materially compromised with the Federal-Parliamentary nature of the Constitution of Pakistan. A number of constitutional amendments were made to different provisions of the constitution in order to achieve the following three objectives (Constitution Eighteenth Amendment Act, 2010).

1. Undo the Amendments added into the Constitution by the Military Generals that has materially affected the nature of the Constitution.
2. Resort to federating character by abolishing the concurrent list, giving provinces complete autonomy over subjects not mentioned in federal legislative list.
3. Enact a new process for appointment of judges for superior judiciary, taking into account of the past bitter experiences.

Consequently a whole new system was envisaged in the judicial process of appointment through the addition of article 175A in the Constitution. The article established two different bodies exclusively tasked to appoint judges for superior judiciary (Article 175A, Constitution of Pakistan). These bodies are

- A. Judicial Commission (here-in-after referred to as the Commission) and
- B. Parliamentary Committee (here-in-after referred to as the Committee)

The primary function of Commission is to nominate and recommend a candidate to Committee, while the later could also discuss the fitness of the candidate for the judgeship, and could reject the nominee if it holds an opinion otherwise.

### **The Judicial Commission**

The newly added article 175A through Eighteenth Amendment diffused the power of appointment from Chief Justice to body of persons representing judiciary, Executive and Bar, which meant that instead of the Chief Justice alone, the power to approve and recommend the nominee to Committee now rests with Commission to which all members including the Chief Justice has single vote and the decision on the nomination would be taken by majority.

The members of the Commission under the original article 175a included Chief Justice, two next most Senior Judges of Supreme Court, Federal Minister for Law and Justice, a retired Judge nominated by the Chief justice, Attorney General of Pakistan and a Senior Advocate nominated by the Pakistan Bar Council Article. (175A, (2), Constitution of Pakistan, 1973) The representation of members from different quarters meant that variety of input, knowledge and information can be at hand in judicial appointments, from judges' members from executive and lawyers community. The strength of the judicial members ensured that judges will have the final say in recommending a nominee to Committee.

Thus the process gave a fair and equitable chance to people representing different section, while retaining the majority view with the judges of Supreme Court.

### **The Parliamentary Committee**

The salient feature of the whole new process of judicial appointment under article 175A was that, it not only decentralized the power of the Chief justice into members of the Commission, it also rationally diffused the power of the executive rather taken away from individuals(President and Prime Minister) to a body of members constituting Committee.



The members of the Committee are to be nominated by the leader of the House and the Leader of the Opposition from the National Assembly and Senate respectively (Article 175 A, (9), (10), Constitution of Pakistan, 1973). The number of the members of the Committee is eight, out of whom four shall be selected from national assembly and four from senate, with equal representation from the treasury and the opposition. (Article 175 A, (9), (10), Constitution of Pakistan, 1973)

The process of judicial appointment is required to be initiated by the Commission, the nomination sent by the Commission by vote of majority may either be approved or rejected by the Committee, but in case the Committee decides to veto the nomination of the Commission, it requires  $\frac{3}{4}$  majority of its total membership, failing which the nomination of the Commission will automatically be confirmed and will be sent for the approval and confirmation of the President.(Article 175A (12), Constitution of Pakistan, 1973) Furthermore the Committee is required to take action on the recommendation of the Commission within fourteen days, in default of which nomination would be considered confirmed (Article 175A (12), the Constitution of Pakistan, 1973).

### **The Passing of the 19<sup>th</sup> Amendment Act in Response to the Recommendations by the Supreme Court in its Short Order over the Challenge of Certain Provisions of the 18<sup>th</sup> Amendment**

Soon after the passing of the Eighteenth Amendment Act in 2010, certain Amendments of the Act were challenged before the Supreme Court under its Original Jurisdiction 184(3) on various grounds including the issue that addition of article 175A violates one of the fundamental principles of the constitution, i.e. the independence of judiciary.

The Supreme Court instead of disposing all the issues simultaneously passed an interim order recommending parliament to make few amendments in article 175A, so that the process of judge's appointment should be harmonized with the fundamental constitutional principle of independence of judiciary (The Supreme Court Bar Association vs. the Federation of Pakistan, 2010). The Supreme Court could in this case, by following the pattern of Indian constitutional precedents, might have declared such amendment null and void on the touchstone of basic constitutional principles, but instead the court avoided doing so because of the stance taken by the parliament itself in passing the 18<sup>th</sup> amendment act that,

“**fundamental principles of the constitutions are not altered**” (Cited in the Supreme Court Bar Association vs. the Federation of Pakistan, 2010). So the objective of reference to parliament was based on similar intention by the Supreme Court. It is worth mentioning here that the decision of the Supreme Court is one of its kinds, as the court has never in its history sent back any constitutional amendment with recommendation to parliament.

The Supreme Court in its interim order made the following recommendations in respect of article 175A (The Supreme Court Bar Association vs. the Federation of Pakistan, 2010).

1. It was recommended that the number of judges of the Supreme Court in Commission be increased from three to five.
2. It was also recommend that the proceedings of the Committee be held in camera, as per the mandate in article 68 of the constitution of Pakistan.
3. It was recommended that the record of the proceedings of the Committee be kept in writing.
4. It was further recommended that sound reasons be recorded by the Committee in case it rejects the nomination of the Commission.
5. It was recommended that it be expressly included in the Constitutional provision that the power of judicial review shall be exercised by the Supreme Court over the decision of the Committee.
6. Lastly, it was recommended that, in case the Supreme Court cancels the veto of the Committee, it would ipso facto confirm the nomination of the Commission.

### **Passing of the 19<sup>th</sup> Amendment Act in Consequence of the Short Order of the Supreme Court**

The short order of the Supreme Court was immediately followed by the Nineteenth Constitutional amendment, (Constitution Nineteenth Amendment Act, 2011) altering article 175A as per recommendation of the Supreme Court (The Supreme Court Bar Association vs. the Federation of Pakistan, 2010) Overtly, all the recommendations of the Supreme Court were added into the Nineteenth Amendment Act with the deviation that, in case the Committee rejects the nomination, the Commission is required to send a fresh nomination, implicating

that the decision of the Committee is not subject to judicial review before the Supreme Court (Article 175A (12), Constitution of Pakistan, 1973).

### **Rejection of the Nominations by the Parliamentary Committee**

Events succeeding to the Nineteenth Amendment lead to the filing of the Constitutional Petition before the Supreme Court in which veto of the Committee was challenged on various grounds, including that the action of the Parliamentary Committee was beyond its Constitutional mandate.

### **Judgment of the Supreme Court Interpreting Article 175a**

The detailed judgment of the Supreme Court not only decided the issue as to the justifiability of the decision of the Committee but it also elaborated on the significance and the role of the two Constitutional bodies established under article 175A (Sindh High Court Bar Association vs. Federation of Pakistan, 2011).

The important features of the detailed Judgment interpreting article 175A were:

1. The Supreme Court reserves its Constitutional right of judicial review over the decision of the Committee.
2. The judgment defined the Significance and role of Commission and Committee in the process of judicial appointment.
3. The judgment categorically stated that previous judgments of the Supreme Court including Al-Jehad Trust would remain intact and would regulate the future appointments of judges for superior judiciary. The Court further stated that rational and objective of the process remains the same as provided originally in the Constitution. The Court said that the process of Judicial appointments involved Executive and the Judiciary, which has not been altered by the insertion of article 175A hence the previous judgments of the Supreme Court would be applicable in future with full force.

The decision of the Court was quiet meaningful as it has reversed the whole new process of judicial appointments under article 175A to the one existed prior to the Eighteenth Amendment. The interpretation of article 175A by the Supreme Court may be critically analysed as follows:

1. The interpretation of the Supreme Court on the role of the Committee materially affected the Constitutional significance of the participatory process, by again limiting the role of the Committee in judicial appointments. Practically the Committee was left with no meaningful role in the process of appointment because they could only discuss those matters which fall outside the ambit of Commission.
2. The Supreme Court in the judgment stated that it reserves its Constitutional right of judicial review over the decision of the Committee but it remained silent on the justifiability of the proceedings of the Commission.
3. The interpretation of the Supreme Court reversed the whole new process established under the Eighteenth Amendment to the previous one. The statement of the Supreme Court with regard to the applicability of the Al-Jehad Trust judgment meant that the role of the executive would remain meaningless under the new process of appointment.

## Conclusion

The foregoing discussion reveals the fact that Supreme Court has shown great interest over the provisions relating to judicial appointments and virtually re written the Constitutional provisions relating to the judges appointment since 1996. This interest reflects the past and bitter experiences where the role of the executive was condemnable in matters relating to judiciary, but to point fingers at executive alone would be unfair, judiciary also played its fair share in undermining the democratic process in the same period. Hence it was desirable that the institutions have moved on from their past position in order to create a better participatory approach. The reason in support of the argument is that our Governmental structure under the Constitution is based on the principle of separation of powers and checks and balances, which means that the governmental functions could not be carried out unless all the governmental organs cooperate and coordinate with each other.

The judicial process of appointment added through the Eighteenth Amendment appeared to be far more transparent and effective comparing to the previous one, but the judicial interpretation has in essence changed and equated the present process with the previous one with the only exception that the present process involves five judges of the supreme court in comparison to the Chief Justice alone in the previous process of appointment. The balance of powers maintained by the Legislature under the Amendment has shifted the balance again towards the Judiciary both in the Judicial Commission and in the judicial review before the

Supreme Court. Having said this there are some positive points in the present system that may still work in favour of the principle of checks and balances over the role of the Supreme Court in the process of appointments. The diffusion of power from the Chief Justice to judges of the Supreme Court input of other stake holders especially the Bar Council in the process of appointments are noteworthy.

It maybe reiterated here again that primacy of the role of the judges in judicial commission and the justifiability of the decision of the Parliamentary Committee before the Supreme Court ultimately rests the power of appointment in the office of the Supreme Court, this contention is quiet substantial, but still the process has within it enough capacity that, if the same is applied in true spirit, it would make appointments in a fair and transparent manner.

The present system has indirectly followed the pattern of appointments under the Indian Constitution, where the judges of the Supreme Court play material role in the process of judicial appointments. The experience of the Indian constitutional history shows that such system has proved to be meaningful and has served in their system for attaining the ultimate objective of judicial independence. For us it is required that we should allow this system to develop in a free and democratic and transparent environment. The process though not free from flaws, but if the constitutional functionaries confine themselves to the constitutional limits, it would help the process to evolve and develop in achieving the constitutional objective of judicial independence.

## References

Al Jihad Trust v Federation of Pakistan, PLD 1996, S.C. 324.

Asad Ali v Federation of Pakistan, PLD 1998 S.C.

Brohi, A.K. (1958). *Fundamental Law in Pakistan*, Din Muhammad Press, Karachi.

Charter of democracy, signed at London 2006, between the former Prime Ministers of Pakistan, Benazir Bhutto and Nawaz Sharif.

Chaudhry, Barrister A.G. (1995). *The Leading Cases in Constitutional Law*, Lahore: Sehar Publishers

- Chaudhry, G.W. (1969). *Constitutional Development in Pakistan*, London: Lowe and Brydone
- Constitutional Documents (Pakistan), Volumes I, II, III, IV & V, 1964, Published by the manager of Publications, Government of Pakistan Karachi.
- Journal of Law and Society, 2009, A Publication of Legal Research Centre, Law College, University of Peshawar.
- Gupta, Harish (2009). *The Process of Appointment of Judges in India and the U.S.A: A Comparative Study*. Dr Ram Manohar Lohiya National Law University, Lucknow
- Khan, Hamid, (2007). *Constitutional and political history of Pakistan*, third impression. Oxford University Press.
- Khan, M. K. *The Constitution of the Islamic Republic Of Pakistan*, KLR Publications, Lahore.
- Mahmood, M. (2007). *The Constitution of Islamic Republic of Pakistan*, 5<sup>th</sup> ed.) Pakistan Law Times Publications, Lahore.
- Siddique, Osama (2008). *The Jurisprudence of Dissolution*. Pakistan Law House, Karachi.
- Rabbani, M. R. (2003). *LFO — A Fraud on the Constitution*. (1<sup>st</sup> ed.) Q. A. Publishers Karachi.
- Report on Judicial Appointments and Judicial Independence, January 2009 by United States Institute of Peace.
- Supreme Court Bar Association vs. Federation of Pakistan, PLD 2002 S.C. 939.
- White Paper on the role of the Judiciary 2003, Published by Pakistan Bar Council, Supreme Court Building, Constitutional Avenue, Islamabad.
- [http://www.supremecourt.gov.pk/web/user\\_files/File/18TH\\_AMENDMENT OR DER.pdf](http://www.supremecourt.gov.pk/web/user_files/File/18TH_AMENDMENT_ORDER.pdf) accessed on December 2011.
- [http://www.supremecourt.gov.pk/web/user\\_files/File/CPs.10-18of2011.pdf](http://www.supremecourt.gov.pk/web/user_files/File/CPs.10-18of2011.pdf) accessed on December 19, 2011.