Judicial Independence and Accountability of Judiciary in Pakistan

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Abstract

Concept of judicial independence occupies central position in a fair and just legal system. Almost all the legal systems are based on the strong belief that judicial bodies will act impartially and in accordance with law. It is expected that law of the land must provide not only safeguards to preserve and promote judicial independence but also accountability mechanism in order to make the superior judiciary answerable for their misconducts etc. The study will analysis constitutional framework under the constitution of Pakistan, to preserve independence of judiciary and the extent to which judicial accountability mechanism in Pakistan is sufficient to produce effective results by comparatively analyzing the judicial accountability mechanism prevailing in United Kingdom & United States of America, in order to choose best practices and explore different forms, limits and ways to make judges accountable.

***Keywords*:** Judicial Independence, Accountability, misconduct, Constitutional, Guarantees

Introduction

There is hardly any nation in the world that does not call for independent Judiciary. In a civil society there are two closely related needs, first determination of rights and liabilities and secondly, an independent organ to adjudicate the disputes arises in case of violation of these rights. So an independent Judiciary is the need of the day since the origin of man in this universe. The main object of this study is to examine the concept of "independence of judiciary" and to analyses the extent to which the essentials of the independence of judiciary are secured under the constitution of Pakistan and analyze the relationship between independence of judiciary and accountability in the constitutional analyses perspective of Pakistan, UK and USA.

It is commonly reported that judiciary in Pakistan since its establishment, had lost independence as institution and acting as a puppet in the hands of acting government to validate their coups or extra constitutional steps .Despite constitutional safeguards judiciary fail to act as Guardian of the constitution and validated the extra constitutional steps that causes irreparable damage to its judicial independence. All these factors prompted me to work on this topic and to make a comparative study with UK and USA, where judiciary as an institution is known as guardian and interpreter of not only the constitution but also individual rights, in order to choose best practices for securing judicial independence in Pakistan.

This Article will comprise of two parts, under part I authors will strive to discuss the conceptual and constitutional framework regarding judicial independence and will also discusses judicial accountability mechanism. As far as part II is concerned, the study concludes with few recommendations regarding judicial Independence and accountability, if applied will have serious implications. As far as research methodology is concerned the research work is qualitative in nature, an exploratory research and will apply content analysis approach. Library research method was applied by researcher to collect data. By using this method data will be collected from library by collecting and reviewing instruments of study available in library such as textbooks, Journals, Law Reports, thesis etc. This method will also be used to collect data from internet search.

Part-I

1. Introduction to the Principles of Judicial Independence

Independence of the judiciary (also judicial independence) is the principle that the judiciary should be politically shielded from the other branches of government. That is, courts should not be subjected to reprehensible influence from the legislature and executive, or from personal or adherent interests. Different nations deal with the idea of judicial independence in different ways, through different means of judicial assortment, or choosing judges. One way to promote judicial independence is by granting life or long tenure for judges, which ideally frees them to decide cases and make rulings according to the rule of law and judicial discretion, even if those decisions are politically unpopular or opposed by powerful interests. The officials of the judiciary should make sacrifices to maintain the independence of the judiciary and sustain the constitutional goals. In some countries, the ability of the judiciary to check the legislature is enhanced by the power of judicial review. This power can be used, for example, when the judiciary perceives that legislators are jeopardizing the constitutional rights. *In the words of Churchill.* "Our aim is not to make our judges wealthy men, but to satisfy their needs and to maintain a modest and a dignified way of life suited to the gravity, and indeed, the majesty, of the duties they discharge." (Jain "n.d.")

2. Defining Judicial Independence

Independence of judiciary commonly interpreted to implies three aspects including structural, individual and substantive independence. These should be granted under the constitution and sub constitutional legislation. Structural independence implies that judiciary as an institution should be structurally separated from other branches of government. Judges should not perform executive or legislative functions along with judicial functions. Substantive independence requires that judges should decide the cases freely in accordance with law, without any direction, insight or suggestion from other parties. A judge should be protected against internal interference by not only executive or legislative authorities but also by judiciary itself, in the determination of a dispute. Disciplinary measures against wrong decision should be provided under the law of the land. Personal independence requires that individual judge should be independent against external interventions. Remuneration, life tenure and dismissal procedure should be sound and protected under the law of the land (Seibert, "n.d.").Judicial independence in the words of an American Academic, is "the degree to which judges actually decide cases in accordance with their own determinations of the evidence, the law and justice, free from coercion, Blandishments, interference or threats from governmental authorities, private citizens "or powerful interest groups" .This definition implies not only individual independence but also institutional independence of judiciary. (Smellie,2012)

From the above said discussion it can be concluded that judicial independence consists of three basic elements, firstly independence as a separate institution from other organs of state or structural independence, secondly independence of judges or behavioural independence, thirdly personal independence of a judge through constitutional safeguards. The position of judiciary as an independent organ and the extent to which judicial independence is secured can be observed only if it is provided under a constitutional framework. Constitution should provide safeguards to ensure judicial independence. Judicial independence can only be secured if constitution guarantees merit based judicial selection procedure, security of tenure, adequate remuneration etc. Independence does not mean judge can act as he likes, there must be accountability mechanism to keep the judiciary to act in accordance with law, within the limits prescribed by law and to achieve constitutional aims. (Ndastu, 1983).

3. Judicial Independence in Pakistan

Pakistan inherited the judicial system from colonial masters. After Independence in 1947, the Government of India Act1935 was enforced as functioning constitution of Pakistan. In 1949, Federal judiciary of Pakistan was established and Mian Abdur Rashid was appointed as 1st chief justice of Pakistan. The principle of judicial independence was enshrined in the Objective Resolution passed by 1st Constituent Assembly of Pakistan. Principles of judicial independence occupy central position in all the three constitutions of Pakistan 1956, 1962, 1973 (Khan & Rana, 2008).

3.1. Objective Resolution and judicial independence

It was passed by 1st Constituent Assembly of Pakistan in March, 1949. It was incorporated as preamble to all the constitutions of Pakistan and was made substantive part of Constitution of Pakistan 1973 by Article 2-A added to the Constitution of Pakistan 1973 by Presidential Order 14 0f 1985.The preamble enshrines that the judicial independence shall be fully secured in Pakistan (Mahmood , 2012).

3.2 Constitution of Pakistan 1956 and judicial independence

Constitution of Pakistan 1956 was framed by 2nd Constituent Assembly of Pakistan. The founders of the Constitution was concerned about judicial independence so the organized the courts in such a way to secure independence of judiciary. Constitutional provisions for the appointment, dismissal of judges was provided under the Constitution to safeguard judicial independence. Constitution was declared as supreme law and judiciary to act as guardian of the Constitution and upholder of rule of law. Judicial review power was granted that in turn strengthen the independence of judiciary.

3.3Constitution of Pakistan 1962 and judicial independence

Judicial system under the abrogated Constitution of Pakistan 1962 was organized on the same pattern as under the Constitution of Pakistan 1956.Provisions for judicial appointment and safeguards for judicial independence was same except with the apparent difference of accountability. Under Constitution of Pakistan 1962 Supreme judicial Council was created to inquire into the misconduct or incapacity of superior judiciary to reinforce judicial accountability in Pakistan (Khan, 2009).

3.4. Constitution of Pakistan 1973 and judicial independence

The Constitution of Pakistan 1973 contains detailed provision and safeguards for independence of judiciary. Constitution was declared as supreme law and judiciary to act as guardian and interpreter of the Constitution. The provisions for rule of law, Right to fair trial, equality before law, right to be dealt in accordance with law demands independence of judiciary. Judicial review power was granted under the Constitution of Pakistan 1973.Constitution guarantee's judicial independence by providing safeguards for appointment, removal and fixed tenure for the judicial office .Constitution restores supreme judicial Council as it was under the abrogated constitution of Pakistan, 1962 and tenure of office was also fixed.

4. Judicial Independence and Judicial Accountability

Independence and accountability of judiciary are correlated to each other. Independence of judiciary can only be achieved, if judges are being answerable for not only their misconducts but also for their mistakes to some authority specifically and public generally. The proper functioning of an institution depends upon the accountability mechanism. All those institutions or authorities that are charged with the function of governing individuals must be accountable to them. In the words of Thomas Jefferson "Man is not to be trusted for life, if secured against all liability to account" (Sakala, 2005). Accountability generally means being answerable to some superior authority in exercise of powers conferred by virtue of some office. Judicial Accountability means that the actions of judges must not only be explained but also justified by them under the settled standards of law and in case of deviation from these standards they will be answerable to some superior authorities. There are various forms of accountability such as adjudication or legal and fiscal accountability. Adjudication accountability means judges are accountable for their decisions on the bases of legal criteria that are human rights satisfaction in compliance with law. Decision making process should be governed by human rights satisfaction criteria. There are two types of decisions;

- Interest based decisions.
- Non- Interest based decisions.

Interest based decisions did not meet the Human Right criteria. Whereas, Non- Interest based decisions meet the human right criteria within the framework of human right laws. Judges should convince the court regarding the accomplishment of human right obligations. They should be accountable for deviation from human right laws. Whereas, Fiscal accountability means judges should be accountable for malpractices e.g. bribe. There should be audit of judicial authorities to avoid corruption in judicial department.

4.1. Comparative Study of Judicial Accountability in UK, USA and Pakistan

Fear of accountability is one of the means to ensure proper discharge of judicial functions within constitutional limits. It is a sort of check and balance mechanism on judicial authorities if acts in excess of or in violation of settled constitutional principles to whom they are bound to obey under oath.

On the other hand this may be misused by authorities charged with the task of accountability to attain popular ruling. In order to avoid such malpractices and to attain constitutional goals behind the cover of accountability, constitutional infrastructure must provide appropriate accountability mechanism and objective grounds for accountability. At present there are various accountability models prevailing in democratic countries, the most common of them are legislative model e.g.UK and USA, Civil Service Model e.g. Italy and Judicial Council Models e.g. Pakistan. Now in turn judicial accountability grounds and mechanism will be discussed with special reference to models prevailing in UK, USA and Pakistan.

4.2. Comparative Study of Grounds for Accountability

The most common Judicial Discipline grounds are incapacity and misconduct. According to UN Basic Principles, misconduct and incapacity are two common grounds for judicial discipline. A comparative study of grounds of accountability of UK, USA and Pakistan expressly states that misbehaviour or misconduct is a common ground under the above mentioned three constitutions. Misconduct according to Black's Law Dictionary

"A dereliction of duty, unlawful or improper behaviour"(p 1013)

In accordance with Privy Councils Observation this word generally means to do or abstain from doing something that will create impropriety. New South Wales Supreme Court recognizes deviation from well settled principles or official privileges misuse and negligence as misconduct (Akkas, 2002). Whereas, in Pakistan power assumption without having authority under Constitution should be void, unconstitutional and could not be recognized by any court including the constitutional courts. Such power assumption recognition by judge in exercise of judicial functions will amount to misconduct under Article 209 of the Constitution (PLD2009S.C.879). In UK misbehaviour include misconduct involving moral turpitude and partiality. From the above mentioned interpretation of word it can be easily deduced that deviation from settled standards and moral turpitude constitute misconduct .These standards are mentioned under judicial code of conduct .Misconduct involves not only official but also non-official conduct. The second common ground of accountability is incapacity, it generally means incompetence. Formally, it is a state of body or mind that renders a person misfit to perform judicial functions. It was held in Bruce vs. Cole by "New South Wales Court of appeal" that unjustified delay in judgment delivery will be considered as judge's incapacity.

Corruption is the ground for accountability of US judiciary; Article 2 section 4 of US constitution enlists Treason, bribery and other high crimes as ground for judicial accountability. Corruption means exercise of judicial power for personal gains e.g. accepting bribes. These grounds are of criminal nature. These grounds in UK and Pakistan are covered under the misconduct.

As far as these grounds are concerned there is no strict interpretation of grounds, these are undefined terms under the constitution and there exists possibility of personal interpretation of terms in UK and Pakistan.

4.3. Comparative analysis of Judicial Accountability Mechanism

Accountability effectiveness depends on characteristics of accountability mechanism. Accountability mechanism should not be of such a nature that it creates tensions between independence and accountability but to reinforce independence. There are usually two types of accountability mechanisms firstly, informal that is exercised by Chief justices by advising, keeping in view individual judges independence and judicial rules. Secondly, formal mechanism that involves some formal constitutional rules and models. There are four types of models to make the judges accountable namely, Executive Model, Legislative Model, Judicial Model and Mix Model. These models are named according to the composition of authorities associated with the task of judicial Accountability. UN Basic Principles on Judicial Independence, vests accountability powers to the Parliament or Judiciary. According to executive model judges should be accountable to the executive branch of state. This model is undesirable because it will imbalance the judicial independence by interference of executive in judicial functions and judges should be pressurized by the executive to get favourable ruling in interested cases. Legislative Model is practiced in many countries e.g. UK, USA where judges are answerable to the Parliament for misconducts. Whereas under Judicial Model, judges are answerable to the judicial branch only e.g. Pakistan.

Under the Constitution of Pakistan 1973, Supreme judicial Council is constituted which consists of judiciary only. Under the mixed model an institution should be created that consists of member selected from the three organs of state.

4.4. Accountability Mechanism in Pakistan

As far as Pakistan is concern this idea is relatively important, because accountability of judiciary is new concept. Prior to the Constitution of Pakistan 1962, there was legislative model of accountability just like in UK and USA under the 1956 constitution. However, under the abrogated constitution of Pakistan 1962, Supreme judicial Council was created for judicial accountability and this mechanism was retained in current arrangements under the 1973 Constitution. In Pakistan judiciary is accountable to the constitutionally constituted body, the Supreme Judicial Council (Hereinafter termed as SJC) under Article 209 of the Constitution. It was held in "Tika Iqbal Muhammad Khan vs. General Pervaiz Musharraf and 2 Others" that Superior Court Chief Justices and Judges shall be accountable to the Supreme judicial Council only by adopting the procedure mentioned under article 209 of the Constitution. SJC was to consist of five members including Chief Justice and two most senior judges of Supreme Court and two most senior justices of High Court appointed on Seniority bases. In case of vacancy the next senior judge shall be appointed respectively. Supreme judicial council of Pakistan consists of judicial members only to promote institutional independence of judiciary. It is clear manifestation of doctrine of separation of power in Pakistan. Supreme judicial council has to perform dual function firstly, to prepare Judicial Code of Conduct to be observed by judiciary and secondly, to inquire into the conduct of the judge complained. According to "Supreme judicial council Procedure of Inquiry , 2005", Supreme judicial council take cognizance of matter ,upon receiving any information about the misconduct, physical or mental incapacity of a judge of Constitutional Court either through its own member or public provided that information must be supported by sufficient material necessary to constitute a prima facia case for inquiry. Thereafter, information is placed before chairman of Supreme judicial council and he will forward the information to any member of council to inquire whether information contains sufficient material for inquiry or not. The member will communicate his opinion to the chairmen either positively or negatively. Then meeting of Supreme judicial council shall be called for discussion and inquiry about information. Supreme judicial council after examining the information, reports to the president through its chairman of its finding about the alleged ground for removal. Council may give right to defence to the complained judge and may issue a show cause notice to the judge for explaining the alleged conduct within a period of 14 days. Attorney General of Pakistan may assist the council for smooth running of proceeding. On finding guilty or incapable in report of Supreme judicial council, President may remove the judge from office. ("Supreme judicial council Procedure of Inquiry",2005) The Council's decision will be expressed in majority and its report is just recommendatory and not mandatory, it is president's discretion to remove or not. If Article 209 is read along with Article 48, final authority to remove will be exercised by President on Prime Ministers advice.

There is an ambiguity in Article 209 that, in case of inquiry of misconduct by judge that is member of Council, that judge will be replaced by next senior most judges but in case of inquiry against Chief Justice of Pakistan the Article 209 is silent. The question arises that whether acting chief justice will be member of the Council in case of such a situation, if yes than Article 180 expresses that an acting Chief Justice will be appointed only in case of vacancy or incapability of Chief Justice. This problem was faced in March 2007, when president send reference to the Council for inquiry against Iftikhar Muhammad Chaudhry. He was suspended and acting chief justice was appointed under Article 180.Later on, a writ petition under Article 184(3) was filed by "Iftikhar Muhammad Chaudhry" to challenge the reference. Supreme Court declared the removal of Iftikhar Muhammad Chaudhry and appointment of acting chief justice unlawful and restores the "Chief Justice Iftikhar Muhammad Chaudhry". Accountability mechanism under Article 209 is self-explanatory but the said Article has no provision regarding chief justices membership in case of Chief justices accountability.

4.5. Accountability of Superior Judiciary in UK and USA

As far as accountability of superior judiciary in UK and USA is concern, there are two accountability avenues under the Constitution of USA and Constitutional Reform Act 2005 of UK. These avenues are impeachment mechanism and "Good Behaviour" checks on judicial tenure for life. Article II of the US constitution clearly establishes that the only method of accountability is impeachment. The term impeachment is not defined under constitution.

According to Black's Law Dictionary "Impeachment is the act (by a legislature) of calling for the removal from office of a public official, accomplished by a written charge of the official alleged misconduct" (Garner,1999). Article1 $2 clause 5 states that sole power of Impeachment is granted to the House of Representative that exercises it by passing Article of Impeachment through majority vote and works as a prosecutor. Whereas Article 1$3 clause 6 of US Constitution expressly states that power to try Impeachment belongs to the Senate and it sits as a court for passing judgment in Impeachment cases. Constitution provides accountability mechanism only and left the task of framing rules to regulate impeachment process to the Senate (Tribe, 2000). These Rules were framed by Senate termed as "The Rules of Procedure and Practice in the Senate when sitting on impeachment trial" composed of 26 rules (Smelcer, 2010). House Judiciary Committee not mentioned under the constitution plays an important role in impeachment process. It investigates the crime; collect the evidence and drafts article of impeachment containing charge against the person subjected to removal (Tribe, 2000). Impeachment motion started in House of Representative and drafted article of impeachment shall be preferred to the House and House by majority vote can recommend impeachment of the judge and send message to Senate for trial for impeachment and conviction of charged person and thereafter appoints managers of House to present the articles before Senate. Then Senate swore to sit as a court of trial to do justice impartially and summons to the impeached judge. Then at prehearing trial stage motions shall be filed not only by Committee but also by impeached judge and argues these motions. Then evidentiary phase starts and after opening statement witnesses are examined and cross examined .Impeachment Trial Committee plays an important role to collect evidence during trial. Then committee submits its report to the senate and deliberation phase starts and Senate considers committees report. After deliberations and reviewing committee report voting stage starts and senate vote on each and every article. If 2\3 majority of Senate votes in favour of conviction then judges shall cease to hold office and disqualify for public office immediately (Smelcer, 2010). Removal from Office and disqualification to hold office are the only punishments for impeachable offences under Article 1 $ 3 clause 7. According to Article III $ 2 clause 3, President cannot grant pardons or reprieves in impeachment cases. It was held in Rex.vs.Sussex case that the Congress can remove officers only by impeachment.

Just like USA there is legislative model in UK as well and under section 33 of Constitutional Reform Act 2005,UK Supreme Court judges enjoys life tenure and can be removal through the presentation of an address by both houses of legislature to the King in case of misbehaviour. Removal proceedings can be initiated by any member of House of Commons but there must be prima facie case against the judge to justify the necessity of address. In 1906, it was held in Mr. Justice Grantham Case, that address cannot be preceded without a prima facie case against the judge. House of common after inquiring the matter forward it to House of Lords .It was held in Fox‟s Case that House of Lords cannot proceed upon case without prior inquiry by House of common(Nash, 2007). Under the Constitutional Reform Act, 2005 judges enjoy their judicial tenure subject to removal by an address presented by both houses of legislature.

By comparative analysis of application of various models of judicial accountability, one must acknowledge that while applying theses models, balance should be maintained between judicial independence and accountability, that judicial accountability mechanism should not be so stretched that it hamper the judicial independence and should not be so flexible that it fail to produce desired objectives, a right balance should be thereby maintained.

Part-II

Key Findings with reference to Judiciary in Pakistan

As stated earlier that the object of the study is to analyse the extent to which judicial independence is secured under the constitution and effectiveness of accountability mechanism and thereupon present findings and suggest recommendations to cope defects and anomalies.

1. Strengths of Current System

This is analyzed that independence of judiciary is not only guaranteed but also secured through the constitutional guarantees of independence of judiciary under the Constitution of Pakistan 1973.These guarantees are as follows:

1. 1.Judicial appointment mechanism under the Constitution of Pakistan is institutionally secured by constituting Judicial Appointment Commission to shields the political impact and dominance of any particular branch only e.g. executive, legislature.

Judicial appointment Commission and Parliamentary committee works independently and maintains system of check and balance to secure the designed goal of independence of judiciary.

1.2. One of the most important guarantees of independence of judiciary is security of tenure. Under the current constitutional setup in Pakistan judges of Supreme and High Courts enjoys fixed judicial tenure subject to mandatory retirement age or removal by Supreme Judicial Council.

1.3. Judicial Accountability mechanism as given in the Article 209 of the Constitution of Pakistan is institutionally secured in order to preserve judicial independence. Judges of Superior Courts are accountable to the Supreme Judicial Council under the Constitution of Pakistan. Supreme Judicial Council is composed of judiciary only in order to reinforce the institutional independence of judiciary.

2. Weaknesses of the Current System

Constitution of Pakistan not only establishes independence of judiciary but also assure guarantees to secure and preserve independence of judiciary. Despite of these guarantees there are few weaknesses that are summarized as follows;

2.1. Judicial composition should reflect composition of population as a whole. Superior Judiciary in Pakistan is of non representative character; there is no representation of women.

2.2. Although judicial accountability mechanism is institutionally secured under the constitution but Supreme Judicial Council have no representation of Bar and layman. Grounds for accountability need interpretation to avoid risk of personal interpretation. There is no preliminary inquiry system to inquire the conduct of judges before referring the matter to the Supreme Judicial Council.

2.3. Superior Judiciary in Pakistan is accountable to Supreme Judicial Council only for gross misconducts whereas minor wrongs are unnoticed by any law in Pakistan that resulted in major wrongs. Under the current arrangements, there is lack of minor wrongs redresses system subject to judicial immunity laws.

3. Recommendations

3.1. Suggestions as to Existing Provisions

3.1.1. Judicial Independence requires that grounds for accountability should be narrowed and applied objectively to reduce the threat to judges in discharge of judicial functions. Misconduct one of the grounds of judicial accountability in Pakistan is defined under "The Supreme Judicial Council Procedure of Inquiry, 2005" but not narrowed in the sense that there is no objective grounds of misconduct. Article 209 is suggested to be amended to revise interpretation of grounds for accountability, to eliminate risk of personal interpretation of judicial accountability grounds.

3.1.2. In Article 209 ambiguity regarding Chief Justice Membership in case of Chief Justice accountability should be cleared by amending the Article and declaring that who will be Chief Justice and member of Supreme Judicial Council in case of accountability of Chief Justice because provisions regarding acting Chief Justice fail to address the issue.

3.1.3. The exclusive judicial accountability mechanism under the Constitution is through Supreme Judicial Council for specified grounds. Minor offences go unnoticed that results in major wrongs. So apart from Supreme Judicial Council, there should be judicial complaint mechanism for minor wrongs.

4. Proposed Reforms

Pakistan should strive to eliminate graft at all levels by reforms of judicial system as bellow.

4.1. Provisions should be introduced for preliminary inquiry system for inquiring into the conduct of Judge before referring the matter to the Supreme Judicial Council.

4.2. Judicial Accountability system should be made publically accessible by introducing provisions for representation or participation of lawyers and laymen in the composition of Supreme Judicial Council to make it easier for public to complaint the judicial conduct and subjected to public scrutiny.

4.3. Media Officers should be appointed at Courts for providing appropriate information to the public through media to promote accountability. e.g. USA

4.4. Adjudicational or decisional accountability can be achieved by realization of Human Rights Criteria. Provision were suggested to include international human right laws realization as substantial duty of judges and decisions should not be in contradiction to human rights satisfaction e.g. UK

The abovementioned findings have serious implications with reference to judiciary in Pakistan and if adopted will enhance judicial independence in Pakistan.

Concluding Remarks

Independence of judiciary being a well recognised principle of constitution is a keystone for sustaining rule of law in country**.** An independent and impartial judiciary is need of the day for delivering justice. People respect judiciary and have confident that there will be fair and impartial trial. While introducing any new guarantees or accountability principles, a right balance should be maintained between independence and accountability as a means to secure justice.

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