

Executive Intervention in Judicial Independence in Pakistan: An Overview of the Past

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Abstract

This paper intends to investigate how the executive had interfered in the role of the judiciary of Pakistan by violating the fundamental concept of separation of power in the past. It identifies when the judiciary is not independent then the miscarriage of justice becomes the fate of the society. Therefore, it fills the gap by describing how an independent judiciary can be ensured by formula of separation of power. The qualitative method has been used to get the clear image of intervention of the executive in the independence of the judiciary in the past. For this the primary and secondary resource have been examined to investigate the issue in hand. It scrutinizes the existing literature and data related to the history of judiciary critically and formulates recommendations to enhance the role of independent judiciary for the betterment of rule of law and justice. It further explores that intervention of the executive in the role of judiciary violates the doctrine of separation of power consequently, affects democracy and its values. Therefore, this paper explores and recommends strategies and recommendations for judicial independence that can be ensured by proper execution of separation of power and systemic institutionalization. The findings of this paper would be a meaningful contribution in the existing literature.

Keywords: separation of power, independence of judiciary, interference of executive, legislature, intimidation of judges

Introduction

Independence of judiciary is the prerequisite of the rule of law and it is the essence of efficacious participatory democracy. It is a necessity that the judiciary must be separated from the executive and legislature gallantly and fearlessly for prevailing justice in any society rather than being subjected to the expediency of executive or any other institution of the state. The main objective of this research paper is to scrutinize how the executive influence the functioning of the judiciary. How in the past the decisions of the judiciary were intervened by the executive and how such intervention had affected the judges and their judgments? The paper

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investigates how political figures intimidated the judges to get their desired decisions.

The paper is divided into various parts. In the first segment it describes the concept of separation of power in the United States of America and makes a comparison between the existing concept of separation of power in Pakistan and India. Furthermore, in this segment the paper introspects how and why the independent judiciary is important for the efficacious democracy.

The second segment discusses how the civilian government had destabilized the functioning of the judiciary in Pakistan. This segment very briefly describes the era of Zulfikar Ali Bhutto, Benazir Bhutto, Nawaz Sharif to illustrate how the judges of court pressured them to heel.

Last segment of the paper investigates whether judicial independence has existed in Pakistan ever? Whether the judges were free to make decisions in Pakistan during the era of martial law administrators? To answer these questions the paper surveys the course of judicial history to analyze the impacts of the martial law administrator in the decisions of the judiciary. Paper discusses how Musharraf had used the extra-constitutional power by promulgating the proclamation of emergency and to suspend the constitution in order to substitute it with “*Provisional Constitutional Order*” to control judiciary and for sustainability of his dictatorship. In the end the article suggests recommendations and provides reasonable conclusions.

The Concept of Separation of Power

The idea of separation of power is not a contemporary concept. The separation of power is all about the independence in respect of affairs and powers of the three democratic organs of Government that are the legislature, executive and judiciary. The emancipation without the inference like the role of the legislature is to constitute the law but not to implement it likewise the function of the legislature may not be inconvenienced by the executive and the legislature may not be instructed or warned to legislate the laws which are desired by the executive. Correspondingly the purpose of the judiciary may not be infringed by the legislature or Executive.

Separation of power is an idea of “*Baron de Montesquieu*” in which he discerned the role, “power and sovereignty of the executive, legislature and judiciary”. The strategy of “checks and balance” to oversee these dispersions of powers between the institutions of state was also

nurtured by him. That system of power distribution and separation ripens up the smooth, uninterrupted and efficient democracy.

The axiom of “*check and balance*” in the “*concept of Montesquieu*” portrays the presence of challenge along with questioning sovereigns like the role and objective of the federal government in a political system. In the utterance of “*check and balance*”, the expression check infers the proficiency, obligation and rights of each power to be a watchdog on the actions of the other. The word balance upholds the capability of each power to exercise its privilege to restrict the power of the other.

The backdrop of *Montesquieu’s concept* is *Aristotle’s* work on three branches of the state but *Aristotle’s* work is precise and is not axiomatic. *Aristotle* only deciphered the three branches legislature, executive and judiciary and he further illustrated that there must be the existence of these three essentials in all codes and constitutions he said this because the decent lawgiver always considers what is beneficial for any constitution. If these all requisites are well ascertained then the constitution will be efficacious contrarily the disparities in a constitution would be due to difference in any of these requisites.

Aristotle asserted that one of these requisites deals with the affairs of society or public, foreign affairs and the propagation of the law while another concern about the administration of public and establishing the offices of public and the last is the formation of the judiciary and judicial system which has judicial power. In the work of Aristotle, there was no stress on the specification of these requisites.

The idea of separation of power is called the “*trias politica*”. This idea necessarily is a “doctrine for stabilizing and solidifying democracy in a state”. This idea is an ancient Greek concept which was for the very first time executed by the Roman. The Constitution of the Roman Republic wasn’t codified but was based on the concept of separation of power. The Roman Republic estate was also split up into an executive, a legislature, and a judiciary and each of the departments was autonomous and had distinct position, role and power.

The very high of the concept of “*Separation of power*” is recognized in a presidential system of government while in the usual parliamentary system fusion of power is more widespread but usually in the fusion of power the elected legislation is deemed as special and superior while the other organs of the state stay sedentary and under the cloud of that supreme elected legislature. But when there is the supremacy of separation of power then every organ of the state is entertained with the

substantial extent of liberty from the other organ. The independence bestowed by each organ guarantees that each of it is either elected or selected but functions independently of the other organ, as well as none of them is obliged to any of the others for its constant existence. Furthermore, the essence of the American Constitution is the separation of power, as well as the core of the whole constitution, based on it.

“Like Article 1 spells out that *congress has all the legislative powers* while Article 2 declares that *president has all the executive power* and Article 3 gives all *the powers of the judiciary to the Supreme Court of America.*”

The Indian Constitution distributes the power of the state into three branches, Legislature, Executive and Judiciary but this *concept of power separation* has never been firmly acknowledged and obeyed due to corresponding powers in some kind of grey regions. In *Indira Gandhi v. Raj Narain*, the *concept of power separation* present in the American or Australian constitution does not prevail or be implemented in India even though the democratic constitution of India lacks numerous powers that are extremely judicial and these powers are eliminated from the purview of the courts under democratic Constitution of India. The Constitution of India is silent on the doctrine of the political question as such a question doesn't have any room in the Constitution of India.

The Constitution of America is very stringent regarding the concept of “*Power Separation*” but the Indian Constitution exhibits flexibility while discussing the concept of power separation between the institutions of the state although the role of these institutions is appropriately distinguished. The constitution of India never contemplates the assumption by one organ or part of the State, of functions that essentially belong to another and the executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature.

The Pakistani constitution assures the concept of “*separation of power*” as its preamble ascertains the presence of independent judiciary in Pakistan. The concept of the power separation substantiated in the constitution of Pakistan can also be indicated when it lets out that in the executive branch the head of state will be the president. The legislative branch will be dealt by the Parliament or Majlis-e-shora or called as National Assembly.

The constitution of Pakistan has the concept of the “*separation of judiciary from the executive*” as well as it deals with the “*independence*”

of the judiciary” and the responsibility of the court is to “*preserve, defend and secure*” the Constitution.

However, in Pakistan there is partly separation of powers this is because of the adversative governmental influence, the ruling of the executive and the legislature which misdemeanor and indiscretion by the civilian as well as the military dictators. The main causes that create hurdles include the institutional assault and conflict, power-mongering, and feudalistic hierarchies which have always stayed as the ingredient of the political civilization of Pakistan and due to it, the power has never been equivalently shared among the organs of Pakistan.

The legislature exploited and destroyed the concept of separation of power by making several legislative and political fluctuations in the *Constitution of Pakistan* in the past. The reasonable example of unbalancing the concept of separation of power can be seen in the era of President *Pervaiz Musharraf* who wrecked the separation, independence and role of three branches of governance to sustain his executive power. President *Musharraf* had surpassed the realm of his authority as an executive leader and ultimately, the executive branch had undermined the authority of judiciary by circumventing the constitution.

The Scope and Independence of Judiciary

The idea of an independent judiciary ensures democratic dispensation of justice. Justice is vanquished when the undue interference and influence in each other's role and realm by three organs of the state, along with justice the notion of separation of power is also overwhelmed. The independent judiciary means the power of decreeing without terror or favour, peculiar liberty, fairness before the law and effective jurisdictional control over administrative and executives' actions of the government. The independent judiciary is one of the most sacred and primary necessities of any state. “As once William Rehnquist, the Former Chief Justice of the United States stated that “*independent judiciary is a crown jewel of any state which is democratic.*” He further stated that his country is entertained with such a crown jewel.”

Independence of judiciary is the “*sine qua non*” of democracy and the nations following the road of democracy and social equality assess the independence of the judiciary. Independent judicial system ensures a free and fair society under the rule of law and due to an impartial judiciary, the rule of law can be achieved as rule of law is also responsible for good governance in a state. The free and fair judiciary has the utmost

importance in maintaining the rule of law in a state. The judiciary had a check on and controls the arbitrary acts of the administration.

The Interference of Civilian Governments in Judicial Independence

Civilian Governments had impeded the judicial independence in Pakistan by using various ways either harassment, inducement, bribing and intimidating. In these circumstances whether the judiciary struggled to be independent or how the judiciary performed its function during such regime should be necessarily described.

In Earlier Years of Pakistan

After the independence of Pakistan, the resolution was passed by *Liaquat Ali Khan* in March 1949 that dealt with the purposes and objectives of a constitution so it was called as “*the Objectives Resolution 1949*”. “*The Objectives Resolution 1949*” states about the presence of an independent judicial system of Pakistan. So, the very start of a journey of Pakistan ensured the existence of an independent judicial system. But later governments only named them a democratic but never interpreted the principle of it. Such governments expected to get decisions of their desires by political pressure, bribery as well as by corrupting the independence of the judiciary. Usually, such acts done by the government interfere with the judicial system and destroy the just verdicts. But all governments, even martial or civilian, destroyed the independent functioning of the judiciary. Till the year of 1955, the judiciary of Pakistan had a crucial and fundamental role in measuring the legitimacy of political transformation. But later many of the blunt judges played a part in destabilizing the independent judicial system. Few examples of it are

“General Iskandar Mirza (*The State v. Dosso*)” in 1958 and “General Ziaul Haq (*Nusrat Bhutto v. COAS*)” in 1977 and “General Pervaiz Musharraf (*Z. A. Shah v. P. Musharraf*)” in 1999. This is called the dark era of constitutional history.

Maulvi Tamizuddin Khan v Federation of Pakistan, is an example where the judges were coerced or humiliated by the executive as one of the judges *Cornelius* stated that the Governor stressed and prejudiced the other judges when the suit was proceeding in the court consequently, the Federal Court overturned the verdict of Sindh High Court.

The Era of Zulfikar Ali Bhutto

In the era of Zulfikar Ali Bhutto many good and evil strategies were made to harass and pressurize the justices and judges of courts during the case proceedings of the government vide interest cases. Once the Chief Justice of the Lahore High Court was called by *Prime Minister Bhutto* on a general sitting, in this gathering the prime minister asked the chief justice to decree all the cases in the interest of the government as at that time the government was losing all the cases but the Chief Justice denied to agree with the Prime Minister and even didn't surrender then the Prime Minister started to pressurize the chief justice along with his siblings. The chief justice and his family were threatened to be slaughtered or their house would be burnt. Even the special assistant to *Zulfikar Ali Bhutto* used to coerce the justices and judges of courts.

In "*Zulfikar Ali Bhutto, Benazir Bhutto, Nawaz Sharif*", when courts did not fulfill their desires, they used to ridicule the judges and justices of the court. This was the reason the judicial system and judiciary of Pakistan remained failed to challenge all these political or executive powers but even in pressure and threats of being intimidated, endeavored to give just decisions. But these all three prime ministers while being in government never did substantiate the independence of the judiciary. Never martial law nor civilian government did support the concept of power separation or independence of the judiciary. In the civilian government, *Prime Minister Zulfikar Ali Bhutto* era remained very disadvantageous to the independence of the judiciary. Five out of seven amendments made by Bhutto in his regime were against the independence of the judiciary.

First Regime of Nawaz Sharif

In the first period of *Nawaz Sharif* in 1993, *Justice Sajjad Ali Shah* was embarrassed and victimized so he resigned. Justice admitted that he received many phone calls to alter the verdict according to the will of the government.

Era of Benazir Bhutto

In the year 1996, *Prime Minister Benazir Bhutto* wanted that the suit of "judges' appointment" should be *adjourned sine die*. So, the same wish Benazir Bhutto put in front of the Chief Justice. The Government of Benazir Bhutto tried to direct the chief justice but the chief justice declined to fulfill the wish of Benazir Bhutto. This act of Chief Justice irked Benazir

Bhutto. So, the Government decided to intimidate the Chief Justice of Pakistan as he didn't respectfully fulfill the wish of Benazir Bhutto. In 1996 *Pervez Ali Shah* the son in law of the Chief Justice who was also the official residence of Chief Justice, the house of the official resident *Pervez Ali Shah* was raided without any legal warrant just to pressurize the chief justice even the chief minister instructed *Pervez Ali Shah* to say his father in law to fulfill the desires of the Prime Minister and deviate the verdict of the case. *Pervez Ali Shah* received the suspension letter when he remained ineffectual in making his father in law consented to fulfill the desire of the prime minister.

Even a member of the jury's son was transferred to a very distant area to tell the judges that the government can do anything with the jury and their siblings. All of these circumstances were faced by the judges and justices in the era of Benazir Bhutto who considered herself a civilian activist and had a slogan that her era is the era of an independent judiciary.

The bench of the Supreme Court, at last, gave a landmark verdict on judges' appointment case which was against the will of the Government of Benazir Bhutto. Benazir Bhutto in a meeting embarrassed and insulted the Chief Justice Sajjad Ali Shah up to a horizon even though Sajjad Ali Shah faced cardiac arrest on the night of the same day.

In *Al-Jihad Trust v. The Federation of Pakistan*, Supreme Court of Pakistan stated that all governments of Pakistan that might humiliate the civilian or any other humiliate and harass the judges although the civilian governments should maintain the status of the independent judiciary rather than dishonoring the judges in society. It stayed in their function to degrade and pressurize the judges and justice of all courts. For the independence of the judiciary the role of executive remained as a harsh fellow; the executive forced and harassed the judges when they applied laws to prevail justice. For that, if the judges or justice did not stand by them then they started humiliation and harassment by bad or evil deeds.

Second Era of Nawaz Sharif

In an era of Prime Minister Nawaz Sharif and the year was 1997 a political activist of the Nawaz Sharif party spread a defamatory booklet in which the chief justice of Pakistan was alleged and implicated very severely because of it a contempt prosecution was initiated against Nawaz Sharif. Then the government started to harass and intimidate the Chief Justice of Pakistan at last on the day of the verdict of the case the Chief Justice of Pakistan was attacked by the Pakistan Muslim League member that came in the leadership of their Members of Provincial and National

assemblies from various part of Pakistan while he was in court in 28th of November, 1997.

The mortification and intimidation of judges are not only for the superior courts, even the lower courts are victimized and intimidated. *Durab Patel* the justice of Pakistan once stated that “he was arrested on erroneous charges as he tried to prosecute a District Judge to do his duties that are his obligations as a judge distressing influence on the lower court of province of Sindh.

Such actions of the civilian governments who consider themselves as the promoter of democracy and rule of law not only hampered justice but also violated the concept of separation of power. The humiliation, harassment and transfer of judges for gaining political benefits were part of the judicial history of Pakistan. Consequently, it became uneasy for any judge to face the pressure of government but certainly, certain judges believed in the "theory of resist" and tried to face such pressure rather than admitting the recommendations of the executive. But many of them agreed with the executive and fulfilled their wills.

Judicial independence in Musharraf Era

It can never be withheld that there is no judiciary in the world that is self-reliant from the hegemony and interference of the aristocracy, martial, executive and the political impact even the judiciaries of the world are incapable to conduct activities on their own will. The judiciaries of the entire world are accountable and beholden to the nation for their verdicts and all the performances and statutes and regulations compelled by them. After the independence of Pakistan, these are the main three circumstances where the martial law governments overwhelmed the democratic balance of Pakistan and in such circumstances, the judicial system of Pakistan also remained unsuccessful in revolutionizing the era but also buttressed and strengthened the consolidation of illegally acquired power.

In martial law in the era of *General Pervez Musharraf*, he destabilized the independence of the judicial system of Pakistan. The *General Musharraf* bestowed vitality to the judicial locus of the judicial system amongst the national institutions of state to cover his extra-constitutional power and to assure that the government is law abiding while he always tried to deplete the backbone of democracy in Pakistan.

In his era, the government had a concern that if the judiciary would be independent then it would follow the democratic will of the constitution

and the independent judiciary will cease the extra-constitutional power of *General Pervez Musharraf* although his “*extra-constitutional power*” was a cause of the death of democracy by failing the democratic constitutional and legal procedures of the constitution as well as the independent judiciary.

In the era of the *Musharraf*, the limitation for the judiciary to be independent remained contingent and the consequences of it was the failure in constitutional governance and democracy. *General Pervez Musharraf* started to play with the constitution and laws of Pakistan to have all the powers and authority to run the state in his hands so General disclosed himself as the President of Islamic Republic Pakistan by all the illegitimate, evil and awful tactics. The supreme judiciary in the era of General was fully submissive to the dictatorial rule that was the reason in the era of general the superior judiciary lost its confidence and credibility in front of the Pakistani public.

In the regime *General Pervez Musharraf* detained command and power from Prime Minister *Nawaz Sharif* and propagated the “*Proclamation of Emergency*” and at that time the constitution overlooked abeyance after that *Pervez Musharraf* propagated the “*Provisional Constitutional Order No. 1 of 1999*” which says that “*no executive head could question the Proclamation of Emergency*” the next step of General’s government was that the judges of the higher court would take a new oath to *Provisional Constitutional Order No. 1 of 1999*. In the year of 2004, nearly thirteen judges lost their offices because they didn’t take oath in front of *Provisional Constitutional Order No. 1 of 1999* in which 5 were the members of the Supreme Court of Pakistan.

The intimidation of judges and justices could also be watched when the government of *Pervez Musharraf* struggled to overrule the principle of seniority that was revealed by the Supreme court of Pakistan in the suits of *Al-Jihad Trust* and *Asad Ali*. Government of *Pervez Musharraf* desired that three judges “*Faqir Muhammad Khokhar, Khalil-ur-Rehman Ramday and Nawaz Abbasi*” of Lahore High Court would be elevated to Supreme Court of Pakistan these appointments were condemned by Punjab Bar Council but when the petition was filed against these appointments and these appointments were considered as unconstitutional.

In the long life of Pakistan, the judiciary was misused by the executive but the Pakistani constitution never inquired about the executive action because every time by fabricating the constitution the ratifications of extra-constitutional action have been made. Every time the unlawful

amendments in the constitution of Pakistan had been made that not only destroyed democracy but also affected the rule of law.

Recommendations

The “functional autonomy” must be given to the judiciary so it may work for the dispensation of justice. The executive should not obstruct the court's daily procedures and processes. It can be ensured by following the footsteps and doctrine of separation of power that must be constitutionally protected. Separation of power is core systemic institutionalization that gives strength to any institution to an extent that it must not feel inconvenienced by the interference and pressure of other institutions.

There must be a strong framework that should not be based on personality cult. The decisions of the court should be made in accordance with law but not in accordance with the desires of any personality. The “decisional independence” must be given to a judge.

The judiciary must be independent in taking the cognizance of any matter in accordance with law, competence and its jurisdiction. This will be ensured when some laws might be legislated that should define “decisional independence” as the basic right of a judge.

There must be a policy drafting and stringent implementation that ensures judicial independence and this policy should contain a reasonable method of accountability, effectiveness and efficiency to avoid the inference and misuse of power by any institution of state in any case.

Conclusion

Independence of the Judiciary was a myth in the past. The Civilian and Martial law administrators had played with the fate of justice and had violated the doctrine of separation of power by interfering in the functioning of Pakistani judiciary to maintain their power. The impediments adopted on the part of political setups had not only scared the independence of judiciary but also had destroyed the rule of law in Pakistan. Independence of the judicial system has been performing quite abysmally in Pakistan because of constant intervention of ruling elites in moulding the verdicts of the courts for sake of their political motives by coercion or harassment, by bribing the judges of courts of Pakistan. The worst-case scenario is that martial law administrator Musharraf, had overthrown the constitution and imposed PCO to prolong his dictatorship. Hence the history of judiciary can be titled as “*era of darkness.*” There must be strict and stringent policies to ensure judicial independence in order to implement the core principles of Constitution of Pakistan, i.e.,

‘separation of power’ and ‘rule of law’ in order to bring peace and harmony in the society.

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