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Critical Analysis of the procedure of appointment of Judges in the Superior Courts of Pakistan

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ABSTRACT

The study covers key aspects of the theory of decentralization. It focuses on the independence of the judiciary in every aspect regarding its functioning and its appointment on higher levels. The basic structure of the Pakistani constitution has been drawn using historical rulings of the superior judiciary and the text of the constitution as the preamble read with article 175(3) of the constitution. The procedure for appointing judges has been critically analyzed from Pakistan's first constitution of 1956 to the 19th amendment of the 1973 constitution of Pakistan. It explains how the conventional or Pre-18th amendment procedure of appointment was controlled by the Judiciary alone. Resultantly, that procedure lacked all checks and balances. The 18th amendment aimed to change that oversight to ensure the independence of the Judiciary. All factors that have directly or indirectly influenced the relationship between the judiciary and the executive are discussed here. The jurisprudence that influenced the procedure and introduced a different conception of separation was discussed. Concluded whether the current procedure follows the doctrine of decentralization Concluding with proposals in the constitutional field.

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1 Introduction

Judiciary is one of the most important organs of the state. The normal functioning of the state is impossible without an independent and effective judicial system. In most countries, the Judges are appointed by the President, making it one of the most powerful institutions in the country. The mode and manner of the appointment of the judge are closely related to the independence of the judiciary which cannot be isolated (*Al-Jehad Trust vs. Federation of Pakistan* (PLD 1996 Supreme Court 324)). On the one hand, supporters of Presidential appointments believe that it ensures judicial independence when supplemented with life tenure (Hamilton, Madison, & Jay, 1788), while the opponents of presidential appointments contend that it will lead to Judicial subversion by the executive, resultantly compromising the doctrine of rule of law and separation of power. Be it the Qazi of Muslim states, or archons of the Greek city-states, the role of the judiciary and judges have increased ever since.

The most important question pertaining to the judiciary after its independence is the appointment of Judges in the higher courts. Since independence, Pakistan has experimented with both systems. The process of appointment before the 18th amendment was quite a one-man show, as the nominations were made solely by the Chief Justice to the President. This prior system vested arbitrary powers in the President on the recommendation of the Chief Justice. This situation resonates with the question of the Roman Poet Juvenal, '*Quis custodiet Ipsos custodes?*', meaning

that who will guard the guards? As the judges were themselves inducting the judges without any control and check and balance of any other organ (Ijaz, *Judicial Appointments in Pakistan: Coming full circle*, 2014).

The appointment of judges in the Higher Judiciary in Pakistan is governed by the constitution of Pakistan. Part VII of the constitution deals with the functioning and structure of the constitution. Section 175(A) deals with the appointment of judges of the superior judiciary i.e. Supreme Court, High Court and Federal Shariah Court. According to the Supreme Court (Number of Judges) Act 1997, the number of judges is 16, excluding the Chief Justice of Pakistan. Each vacancy created in a superior court may be filled according to the procedure provided for in Section 175A of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the constitution).

Appointment of Judges in Constitutional Courts remained a tight spot in the history of Pakistan. All three Constitutions of Pakistan adopted the procedure of appointment of judges as inherited from British Colonial rule. In the history of Pakistan drastic change regarding the appointment of judges of the superior court was brought by the 18th constitutional amendment. The task of appointment was given to the Judicial Commission of Pakistan, the Parliamentary Committee and the President. Now the procedure for an appointment is:

1. The nominations are made by Judicial Commission.
2. It goes to the Parliamentary Committee for confirmation.
3. For final approval, it is sent to the President

According to the plan provided for each judicial committee, they send proposed candidates to the Parliamentary committee for approval. The Judicial Commission consists of the Chief Justice of Pakistan, the four most senior Justices of the Supreme Court, a former Supreme Court Justice, the Federal Minister of Justice, the Attorney General of Pakistan, and the nominee to be the Chief Justice. The parliamentary committee may confirm or deny the appointment with a majority of $\frac{3}{4}$ giving reasons for its decision. The parliamentary committee consists of eight members, four from the senate and four from the parliament, including two from the treasury bench and two from the opposition bench appointed by the head of the chamber and then chaired by the parliamentary committee. Within fourteen days, the Parliamentary Committee referred the nomination to the Judiciary Committee through the Prime Minister. If the nominations are confirmed, the parliamentary committee will send this confirmation to the Prime Minister, who will forward it to the President for his final approval.

1.1 Statement of Problem

The powers of constitutional courts are vested in the constitution, namely to interpret laws, respect fundamental rights, rule of law, and resolve issues between different governments or between two governments. The judiciary is the third main pillar and institution of the state whose nature requires special attention and is independent of politics or any other non-democratic factors. This can only be done if the judiciary works in the spirit and sense of the constitution. The functions of the judiciary depend on the structure and factors that influence the structure of the courts. Thus, for the independence of the judiciary, it is necessary to separate the institutions of other state pillars acting according to the doctrine of separation of powers. The doctrine of separation of powers is stipulated in clause 3, section 175 of the constitution. So, from the perspective of the above discussion, the main issue raised is;

“Whether the appointment of the superior court judges is based on merit or are these appointments relied upon political support or background”?

To reach the answer to the above question, several other questions arose, leading to the desired conclusion.

1. Why are these judges not appointed by attempting certain exams like the lower court judiciary?
2. Is this appointment process as stated in article 175A justified and on merit without any nepotism?
3. On what grounds are these practising lawyers elevated for the higher court judicature?

1.2 Objectives of the Study

The purpose of the research project is to critically analyze Article 175 (A) of the Constitution of the Islamic Republic of Pakistan 1973 (referred to as the Pakistani constitution). This article solely deals with the appointment of higher court judicature. The main idea behind the study is to find out the loopholes in the appointment system of the judges

which doesn't require any kind of exam or theoretical paper but instead depends upon mainly the advice of the judicial commission.

The Supreme court is the custodian of the constitution of the country. If anything goes against the constitution the Supreme court automatically intervenes so that nothing goes against the constitution. The purpose of this research revolves around the rectification of some misunderstandings which arise in the mind of young lawyers when they think about being part of the higher court judiciary.

To know more about it we must focus on the basic structure of the constitution which could be extracted from the preamble as in (Hakim Khan vs Government of Pakistan 1992).

1. Islamic way of life.
2. Democracy and federalism.
3. Separation of powers.
4. Independence of judiciary.
5. Guarantee of rights.

The independence of the judiciary is included as the basic structure of the constitution and the same spirit and consistency should be seen in the whole constitution. The judiciary has to interpret the constitution and uphold public rights. Independence of the judiciary is only possible when the judges sitting there shall be free from any threat and influence whatever type it may be whether political or otherwise. If the appointments of judges have the shadow of political or other influence then it would consequently result in a slave judiciary that will work for the political welfare of the party choosing it and its independence would be preached. In such conditions, the basic structure of the constitution will get offended (Asma Jilani V. The Government of Punjab).

1.3 Background of the Study

The appointment of judges in constitutional courts can directly affect the functioning and composition of the judiciary which can also be separated given the idea of separation of powers. Judiciary independence is essential for a healthy democracy and smooth enforcement of the constitution (Mikuli, 2018). Unfortunately, in Pakistan, the independence of the judiciary is being undermined. Threatened by a vague appointment procedure, which in itself is contrary to the spirit and basic structure of the constitution.

Article 175 (3) of the 1973 constitution of the Islamic Republic of Pakistan provides that "*the judicial branch shall be gradually separated from the executive branch within [fourteen years] of its entry into force*". But the involvement and power of the Prime Minister and the parliamentary committee make the whole process ambiguous and it is impossible to make a separation between the judiciary and the executive. As in art. 90 Prime Ministers of Pakistan are identified as the head of state, but at the same time, the involvement of the parliamentary committee and the role of the Prime Minister is beyond imagination. The entry here will also explain the theoretical issue following the historical development of the concept of separation of powers, ideas put forward by a prominent jurist, as part of the federal constitution that deals with the separation of powers. Concerning the division of power and appointment of judges, articles and studies of different jurists. This section ends with the conclusion of the issue, followed by suggestions. He will try to derive the basic structure of the constitution and see if the separation of powers and independence of the judiciary are part of the structure of the constitution.

1.4 Significance of the Study

It is an inalienable right of every citizen of Pakistan to be dealt with justice equally and it can only be ensured when the judiciary will be independent. The independence of the judiciary can only be made possible when the appointing system will be unbiased and free from all kinds of corruption. Pakistan being an independent country must ensure that the legislature the executive and the judiciary must be free from all sorts of pressures which would result in a prosperous society providing equal rights to the citizens. Public trust in the judicial system is essential for exercising public rights. This can only be done if citizens trust in the independence of the judiciary.

In modern democracies, the rule of law and the protection of fundamental rights become inevitable subjects. No one can oppose someone's rights by being pressured by someone themselves. Public trust in the judicial system is essential for the exercise of public rights. This can only be done if citizens trust in the independence of the judiciary.

1.5 Literature Review

This topic is a very widely discussed one and many scholars have researched a lot of stuff regarding this topic. Their findings are very much important to be mentioned here so that they could help out about what are the issues that have not been highlighted and need the limelight so that they could also be solved.

Mr. Muhammad Waseem in his article “Judging Judiciary in Pakistan” published in 2012 stated that the most pressing topic relating to the independence of courts is the appointment of judges. In this case, the extent of the judiciary’s institutional autonomy has been significantly affected by the context of political influence. Multiple examples of arbitrary appointment, transfer, promotion, and suspension of judges by excluding them from taking the oath on the Provisional constitution order (PCO) while army rule can be documented across Pakistan’s political and judicial history. During the civilian government in the 1990s, the court struggled to reclaim control of the situation. The 1996 Al-Jihad trust case, particularly concerned with the appointment of judges, constituted a milestone historical moment of judicial independence. It contributed to the advancement of the constitutional provision necessitating consultation with Pakistan’s Chief justice to be effective, meaningful, and deliberate, eliminating any opportunity for arbitrariness (PLD 1997 SC, 84). The Supreme Court’s decision made it mandatory for the government to acknowledge the chief justices’ recommendations while appointing judges to the Supreme court or High courts, as the case may be.

Rafia Naz Ali and Muhammad Jan wrote in their article “**Critical analysis of the role of democratic institutions in the appointment of the judges of Superior courts in Pakistan**” published in July 2018 that the procedure of appointment of judges was that which Pakistan inherited from the Government of India Act 1935. According to which seven judges including the chief justice shall comprise Federal Court. As in the Interim Constitution of 1972, the president shall appoint the Chief Justice and other judges were to be appointed by the President after consultation with the Chief Justice. According to the Constitution of the Islamic Republic of Pakistan of 1973, the appointment of the Chief Justice is the authority of the President and other judges were to be appointed after a consensus between the President and the Chief Justice. Furthermore, it is also stated that the appointment procedure should be transparent, so the public would have reliance on it for the protection of their rights and justice. In the cases, Al-Jihad Trust v. Federation of Pakistan and Asad Ali v. Federation the Supreme Court interpreted various articles of the Constitution and tried to clarify the method and qualifications for appointments to the Superior Courts, but the issue had not met its end.

2 Pre-18th Amendment Appointment Procedure

The Constitution of Pakistan is the supreme Law of the land and obedience to such is the sacred duty of every citizen of Pakistan. The Constitution of Pakistan not only enjoined citizens to obey the Constitution, but also provided punishment for its violation, stating that anyone who violates, attempts to violate, or conspires to violate it will be guilty of high treason. According to the 1973 Constitution, the Supreme Court is the guardian of the Constitution, since the enforcement of Fundamental Rights and interpretation of the Constitution are the supreme duties of the superior judiciary. The judiciary is the custodian of rights and liberties. It is tasked with enforcing of rule of law in Pakistan and providing appropriate redressal if a breach occurs. The Constitutional Courts are also mandated to review legislative or administrative action to determine whether the legislative measures enacted or the administrative action taken that a civil claim has violated any of his legal rights. Because of that important position, a state's judicial arm not only works as an arbiter between citizens and the state but also as a monitor over the executive and legislative branches' actions (Yasmeen & Ali, 2011). The independence of the judiciary must be ensured before performing the duty as a custodian of the constitution. According to Hamid Khan, judicial independence can be achieved when the constitution contains provisions for the appointment of judges, their terms, dismissal, immunity and impartiality. No institution in the modern democratic world can function autonomously; there must be a separation of powers as well as checks and balances to prevent these institutions from becoming autocratic (Khan, Role of Independent Judiciary in Countries of South Asia, Particularly in Pakistan). The matter of appointment of judges into superior courts has always been a matter of great importance. In all three constitutions of Pakistan, it inherited the British rule procedure in these judicial appointments.

According to the findings, people do not engage in independent reading; instead, they merely believe and advocate unreliable interpretations of various sources. This behaviour demonstrates a lack of institutional or informal

platforms suitable for the dissemination of undisputed and true religious information regarding this sensitive problem. This relationship has also been observed in past studies, which concluded that the cultures value the sexuality of women. Despite this, women's mental and physical health is an issue that is undervalued and regarded as an unpleasant topic. As a result, women avoid discussing their sexual issues because they fear being judged by others (Montemurro et al., 2015).

2.1 History of Judicial Appointments in the Subcontinent

The East India Company was the first recognized authority under the Charter of 1623 to adjudicate amongst their servants in their courts. Meanwhile, Calcutta Supreme Court was established and consisted of a Chief Justice and other Judges with civil, criminal and administrative authority. The High Court act 1861 abolished the *Sadar Adalats* and Supreme Court that was established during the Mughal dynasty and established the High Court of Judicature for each executive municipality. It consisted of 15 member judges and Chief Justice. Professional requirements for these judges were also specified, as was the process by which they were appointed. The act also stipulated that one-third of Judges should be selected from civil servants and barristers, while the remaining one-third seats of judges were reserved for subordinate judiciary and pleaders (Husain).

The 1935 Act retained the same judicial provisions but introduced the Federal Court, whose judges were nominated by the Crown (Husain). After independence, Pakistan inherited the procedure of appointment of judges from the Government of India Act of 1935, according to which, the Federal Court shall consist of seven judges, including the Chief Justice.

2.2 Post-Independence Era

Following independence, the First Legislative Assembly, which also serves as the Constituent Assembly, was tasked with both framing a constitution and ordinary legislation. This Constituent Assembly established many committees and sub-committees to achieve this purpose. Among these committees, the Basic Principle Committee was the most important one. It was appointed on March 12, 1949, and consisted of twenty-four members. This committee further established three sub-committees;

1. Sub-committee for federal and provincial interrelation.
2. Sub-committee for election.
3. Sub-committee to work on the courts (Choudhury, 1969).

In its second draft, The Basic Principles Committee recommended the establishment of an Apex court, which will be called the Supreme Court and shall comprise no more than seven judges including the Chief Justice. It was recommended by the committee that the Chief Justice shall be appointed by the President of Pakistan, while the remaining judges will be appointed by the President on the recommendation of the Chief Justice (Mahmood, 1990). As the first constituent Assembly of Pakistan was dissolved by the Governor-General on October 24, 1954, it failed to complete its drafting of the first constitution. The discussions and deliberations of the First assembly led the second constituent assembly to finalize a draft of the First constitution containing 245 articles (Khan, Constitutional and Political History of Pakistan, 2017).

After further revisions and deliberations, the draft was adopted as the first constitution of Pakistan in 1956. Part IX of the 1956 constitution dealt with the Judiciary and the procedure of appointment of judges. As per the provisions of this constitution, the President shall appoint the Chief Justice of Pakistan, and the remaining judges shall be appointed on the consultation and recommendation of the Chief Justice. Unfortunately, due to political instability, the first constitution of Pakistan was abrogated on October 7th, 1958. Following the imposition of martial law, the Laws (Continuance in Force) were proclaimed on October 10, restoring the jurisdiction of all courts with limitations.

Ayub Khan desired the establishment of a presidential form of Government. On February 17, 1960, he created a constitutional panel headed by Justice Shahabuddin to investigate the shortcomings of Pakistan's parliamentary system and provide proposals for a new constitution. A presidential form of Government was proposed by this commission that will be a panacea to all the political problems of Pakistan. On the matter of judicial appointments, the constitutional commission recommended that the Retiring Chief Justice shall nominate the upcoming Chief

Justice to the President of Pakistan. While the Judges of the Supreme Court shall be nominated after the consultation between the Chief Justice of Pakistan and the Judges of the Supreme Court of Pakistan. His proposals should be accepted by the President of Pakistan (Khan, Constitutional and Political History of Pakistan, 2017).

The constitution commission presented its report on May 6, 1961, to Ayub Khan. It was reviewed by the cabinet and a sub-committee was formed to scrutinize the report and prepare one of its own. Lastly, two reports and their findings were examined thoroughly by the cabinet. Cabinet formed a drafting committee to draft a constitution in the light of these reports and the committee took four months to draft the second constitution of Pakistan. It was promulgated on March 23, 1962. In this constitution, the same procedure of appointment was adopted as was recommended by the constitution committee. According to this, the Chief Justice is appointed by the President and other judges are appointed by the President in consultation with the Chief Justice.

General Yahya Khan succeeded after Ayub Khan stepped down as the President of Pakistan on 25th March 1969. After a few years, General Yahya Khan was succeeded by Zulfikar Ali Bhutto. After the withdrawal of the Military from the political arena, an interim constitution came into force on 21st April 1972. This interim constitution also contained the provisions of Judicial Appointments and was similar to those of The Constitution of Pakistan 1962. According to the Interim Constitution of 1972, the President appoints the Chief Justice, and the President appoints other judges after consulting with the Chief Justice.

On 17th April 1972, Zulfikar Ali Bhutto appointed a committee consisting of twenty-five members from the National Assembly to draft the Constitution of Pakistan. Abdul Hafeez Pirzada took over as Chairman of the Constitution Committee from Mahmood Ali Kasuri. The draft of the constitution was presented before National Assembly for debate on 17th October 1972 and was later passed on 10th April 1973 (Khan, Constitutional and Political History of Pakistan, 2017). It came into force on 14th August 1973 and consists of 280 Articles in twelve parts and six schedules. The new constitution adopted the same appointment procedure as the previous constitutions of 1956 and 1962. The appointment of the Chief Justice is the prerogative of the President, according to the Constitution of the Islamic Republic of Pakistan of 1973, and additional judges are to be chosen after a consultation between the Chief Justice and the President.

The procedure established by the Act of 1935 was upheld in all three Pakistani Constitutions. According to these Constitutions, the President has the right to nominate judges to the superior courts. The process for appointing judges was first called into question in 1988 when it was questioned that appointments to the superior courts had to be done on the advice of the prime minister if articles 177 and 193 under article 48. The issue came before the Lahore High Court in *M.D. Tahir v Federal Government*, wherein the court decides that the president has the jurisdiction to appoint the Judges of the Higher Courts (*Federal Government of Pakistan V. M.D. Tahir*). The judgement was challenged for more interpretation in the Apex court, where the matter regarding appointments remained unsettled.

2.3 Procedure Outlined in Al-Jihad Trust Case

Despite having the sole discretion of the Judiciary to appoint the judges before the 18th amendment, the apex court further curtailed the executive discretion exercised by the Head of the State in the following judgment. This case is also known as the 'Judges case' It rendered the recommendation of the Chief Justice almost binding upon the President. In case of a difference of opinion between the Chief Justice and the President, then justiciable reasons must be stated leading to that decision (Ijaz, Judicial Appointments in Pakistan: Coming Full circle).

In the Al-jihad trust case, the procedure of appointment of judges in superior courts was again called into question in connection to the separation of the executive and judiciary. In this landmark case, the word "Consultation" was interpreted and emphasized by the Judiciary. The consultation here means the consultation between the Chief Justice of Pakistan and The President of Pakistan on the sensitive matter of the appointment of judges. Such consultation should be significant, effectual and binding on the President. The appointment method should be transparent so that the public may rely on it and their rights shall be protected.

In general practice, the senior-most Judge of the court was appointed as the Chief Justice. This issue has been

brought before the courts multiple times, but the dispute and tug of war between the Judiciary and the executive have not subsided (Asad Ali V. Federation of Pakistan). The Supreme court of Pakistan strived to interpret the provisions of the Constitution related to Judicial appointments in “*Al-Jihad Trust v. Federation of Pakistan*” and “*Asad Ali v. Federation of Pakistan*” but the matter had not met its end.

3 Role of 18th and 19th amendment in Judicial Appointments

The process before the 18th amendment lacked the system of checks and balances as judiciary exercised the exclusive control over judicial appointments. In the 18th amendment, an attempt was made to make this system of appointment transparent and inclusive, and to change such a traditional model. The intent of the Legislature in the 18th amendment was to create Judicial Commission and Parliamentary committee, thus giving a supervisory role to parliament in the appointments. It was also intended that the recommendations must not come solely from Chief Justice instead it is to be the decision of the Judicial Commission. The main crux of the 18th amendment was to strengthen the parliamentary system and give provincial autonomy.

Before the enactment of the 18th Amendment, the process of judicial appointments in the constitution was that the chief justice of the supreme court proposed a panel to the President, who then elected a competent candidate from that panel. Similarly, for the appointment of judges in the High courts, the Chief justice of the pertinent High court sent a panel to the President, which was funnelled through the Governor of the Province and Pakistan’s Chief Justice.

3.1 The Objective of the Reform

It was a matter of great concern why would the political elite of Pakistan implement a reform that will ultimately undermine the Political authority and power over the appointments in Judiciary (Mehmood, 2021). A perspective in the view of many political observers is that the concerned reform or the 18th amendment as a whole was introduced to undermine the political power likely to be exercised by the Military again after ruling for a decade. Since its independence, Pakistan has been subject to military coups more than the democratically elected governments. The military rulers of Pakistan obtained “*Constitutional Indemnity*” and legitimacy from the Higher Judiciary of Pakistan. The objective of the reform was to make the judiciary independent so that it can declare any military takeover unconstitutional. Thus, through this reform, the Politicians compromised their control over the judiciary for the sake of barring military takeovers and taking shelter behind “*Constitutional Protections*” (Kureshi, 2020). Furthermore, it was believed that limiting the President's discretion in selecting judges would prevent future military rulers from abusing their power by using the courts to detain opposition leaders and violate constitutional freedoms (Sattar, 2012; Zafar, 2012). Owing to the curtailment of political power being exercised by the military, the reform was debated and conceived by a small parliamentary committee observing complete secrecy (Almeida, 2018).

3.2 18th Amendment

In the 18th amendment, an attempt was made to refine the procedure of appointment of judges. The new process of appointment was introduced by incorporating Article 175-A in the Constitution of Pakistan. The article deals with the whole process of appointments in High Courts, the Supreme Court and even in Federal Shariah Court. The process introduced two forums (Hussain, 2015) that play their role in the final appointment. One forum is Judicial Commission and the other is the Parliamentary committee. According to article 175-A, the Judicial Commission consists of the Chief Justice of Pakistan as its chairman, Senior Judges of the Supreme court of Pakistan, Chief Justice and Senior judges of the concerned High Court, Provincial and Federal Law ministers, representatives from the Provincial Bar councils and Pakistan Bar Council. After consultation with the Judicial Commission, it recommends or nominates names against each vacancy to the second forum i.e., Parliamentary Committee.

The parliamentary committee for the appointment of Judges in the Superior Courts consists of the following members:

1. ‘Four members from National Assembly
2. Four members from the senate’

In the first stage, the parliamentary committee consisting of the members mentioned above scrutinizes the nominations made by the Judicial Commission. Finally, the nominations are forwarded through the Prime Minister

to the President of Pakistan for final appointment.

3.3 19th Amendment

The 18th amendment in the Constitution of Pakistan 1973 was a landmark in many aspects. It strengthened provinces and provincial autonomy. Under this amendment, new institutions were formed to ensure the cooperation between provinces and the Federal government. As far as the reform of Judicial appointment is concerned, it was challenged in the Apex court. A 17-member larger bench made its recommendations in the form of reference to the President in order to refine the process of Judicial appointment. The parliament welcomed the recommendations and in the 19th amendment, these recommendations were considered. So, both the 18th and 19th amendment deals with the appointment of Judges in the Superior courts. The 18th amendment was challenged before the supreme court on the grounds that the new selection method violated the judiciary's independence, among other things. In an unprecedented step, the supreme court upheld the petition for a full-court hearing. The premise that the petition could be kept afloat was a profound argument in and of itself. The supreme court has a longstanding experience of refusing to pass judgement on constitutional amendments. Despite this, the court eventually shows significant caution by refusing to issue a decisive order. Instead, the court granted guidance on how to amend the 18th Amendment to put it into conformity with the constitution, and the dispute was referred back to Parliament. The tone and tenor of the court proceedings and order, however, indicated that dismissing the courts' advice was not solely within the parliament's discretion. The court stated, "We had two options: either to decide all these petitions promptly or to seek the collective wisdom of the people's chosen representatives in the first instance by referring the subject for reconsideration". We are obliged to take the latter path by the premise that, despite institutions having distinct roles to play, they all have common goals to achieve in conformity with their constitutional mandate.

The above-mentioned part is significant because the bench emerged to indicate that it is having jurisdiction to adjudicate (and conceivably even strike down) a constitutional amendment, consequently notifying the National assembly and bench willingness to nullify the new changes. Twin proposals were granted by the court. First, the provisions could be modified to expand the number of the supreme court's "most senior judges" on the JC from two to four. Second, the PC was obligated to articulate and explicitly explained its decision and refer to the dispute on behalf of a judgeship being accepted by pc. If the JC reaffirmed its initial decision after considering the PC's objections, the one who was late become the final Sadar and was compelled to execute the Appointing. The consequence of the statements the judges doing their jobs retains an overwhelming majority of eight out of the JC's eleven members. Consequently, the JC would have the authority to overrule the PC, which would be a substantial step backwards from the pre-18th Amendment scenario. Despite this, Parliament agreed and then intended amendments came into force in the 19th Amendment.

3.4 Role of Democratic Institutions

Pakistan's provisional constitution was based on the govt of Hindustan act 1935. In the statute, the crown had sole power in appointing judges. The three-permanent constitution uses the same mechanism of nomination with the president replacing the monarch as the head of state. The traditional process of appointing judges was changed in 2010 when the judicial commission and Parliamentary committee were established as constitutional organisations. However, the technique remains unbalanced due to the large role granted to the judicial commission and the very minor role played by other democratic institutions. Each institution should be given a balanced and democratic function in order to create a democratic atmosphere.

3.5 Evolvement due to Presidential Reference

The JCPR was formulated in response to the 18th and 19th Amendments to brief some specifics of the appointment process of the judicial appointing commission gave the CJP the authority to begin nominations. The recent instance in which the debate surrounding judicial appointments resurfaced and the justice jurisdiction inside and outside the Judicial appointing commission authority, was demonstrated in appointing CJP of the capital higher court in the year 2013. In a nutshell, CJP used his nomination power under the JCPR to oust justice, Riaz A. Khan, the highest judge on the Islamabad High Court, for his mate justice A.K Kasi then the next CJ of the capital High Court. In addition, for the appointment as Chief justice, Justice A.K. was the most presentable and prestigious judge at the JC meeting. It was true that the appointment of them both judges took place on the exact day confusing. In theory, Justice Mr AK was junior to justice Sardar Khan since when two judges are appointed on the same day, the more

experienced judge is considered senior. Justice Kasi's name was given to the president for notification after the PC upheld the JC's recommendation. Interestingly, even though the president has had no position in the selection after the new amendment Sadar gives a referral to the honest SC of Pakistan on the recommendations' legitimacy.

Three key legal concerns were posted by the Presidential Reference. To begin, are the proceedings of the JC tainted if someone who is not permitted to participate in them does so? Second, what recourse does the president have if he is asked to make judicial appointments that he believes are unconstitutional? Finally, did Justice Riaz A. Khan as the Highest ranking judge on the Islamabad High Court, have a genuine expectation of being considered for the position of Chief Justice?

The second question is simply because the president has no meaningful participation in the appointment process under the current constitutional arrangement. It has zero allowance to give respect to a junior judge as a senior judge. The final question is considerably more difficult to answer. The notion which ensures the most magnificently senior judge has a genuine expectation of being nominated as chief justice has been established by the Court in the past (most notably in the Judges case). Despite this, the court avoided answering the subject in the Presidential Reference's advisory opinion by declining to make a definitive ruling. The court declared that it would not settle the subject in the advisory jurisdiction rather than adjudicate on the issue of seniority and provide comprehensive, giving excuses for neglecting this tradition. If justice Riaz A. Khan believed he had been wronged, the court advised him to file a petition with the court himself.

4 The Current System of Appointment

Justices of the SC are selected by the judicial appointing commission which has the following bodies including the CJP and four more senior and aged Supreme court justices, as well as one head known as chair and four more justices including the AGP and ministry of law also taking part, and a prominent Supreme Court counsel selected by the Pakistani advocates' bar Council make up the remaining members. Once the judicial commission has approved a new name for appointment as a Supreme Court Judge, it is sent to an eight-member Parliamentary committee with equal representation from the government and the opposition, as well as the two chambers of parliament, the National Assembly and the Senate the nomination will be considered by this committee for two weeks. If approved, the name is forwarded to the President for appointment through the Prime minister. Regardless of the procedure outlined in Article 175A, the president must appoint the supreme court's most senior judge as Pakistan's Chief justice. According to the Supreme Court, the government is not permitted to decide on the seniority of judges based on a presidential referral. Another Supreme court decision resolved the issue, holding that the seniority of judges of the high court should be calculated from the date of their appointment as Additional judges of the High Court; However, if they were appointed on the same day, it should be calculated from their seniority in age. The Chief Justice and the most senior judge of the Federal Shariah Court are included in the judicial commission's composition for the appointment of the Chief justice and judges of the Federal Shariah Court, with the exception of the Chief justice, who is exempt from such a composition. Similarly, the CJP and a few more members including some high-class advocates are comprising the Commission's composition for the appointment of the Chief Justices and judges of High Courts. However, the most giant and dignified judge is not included in the selection of the chief justice. The President appoints the chief justices of the Federal Shariah Court and high courts, much as he does the Supreme Court after the judicial commission nominates them and the Parliamentary Committee confirms them (Hussain, 2015).

4.1 Judicial Independence

The conventional practice before the 18th and 19th Amendments granted the chief justice excessive power in appointing judges. The underlying political context, on the other hand, ensured that power was rarely exerted freely. Pakistan in the new era of development produces an unparalleled occurrence. Never before has there been such a powerful judiciary. The office of Chief Justice has evolved from a theoretically full of passion and powerful Sadar of the judicature in practice. Then properly comprehending this point, it may be useful to consider another case. The supreme court addressed the legality of the judiciary as the best of their concern.

There is only one constitutional method for removing superior court judges under Article 209 of the constitution: a referral to the supreme judicial council ("SJC"), which is made up of the most senior justices. Rather than referring

the cases of the 'PCO' judges to the SJC, the supreme court ousted over a hundred superior court justices in a single decision. The SJC may now be a defunct organization in respect of its unique capacity to hold judges accountable, which has a jurisprudential implication. There is also a political aspect to this. With the sweeping judgement in the 'PCO judges case,' All the judges from the 'opposing camp' were sent home, resulting in the judiciary (particularly the supreme court) becoming a homogenous and somewhat monolithic group. Given this context, the Supreme court's suggestion in the presidential reference that justice Riaz A. Khan petitioned the court himself against the JC's decision (perhaps more importantly, against the chief justice's nomination as an ex officio member of the JC) may be asking too much.

While the labels 'Politics' and 'Fiction' may seem harsh in connection to the supreme court, the attorneys' movement generated significant divisions within the legal profession; people were either for or against the movement. Because of the intensity of the movement and the irresponsibility of the administration at the time, nuance was gradually reduced until it was completely abandoned. Even today, competing groupings in bar politics are frequently referred to as pro-and anti-judiciary camps. When interpreted as for and anti the chief justice of Pakistan, these designations make a little more sense. Since 2009, there has been almost no disagreement in any major constitutional dispute (the presidential reference being one notable recent exception). Like the cabinet, there appears to be an unspoken agreement to present a united front in public despite personal beliefs. The grounds for the unity are mostly anchored in previous institutional experience, while there is certain to be some personal motivation as well. The November 2007 emergency declared by General Pervaiz Musharaf provided the incentive for this unification. The Supreme court has not abandoned the emergency's 'War time' posture. Given the judicial nomination procedure and the fact that the chief justice has just one vote out of eleven, in theory, it is perhaps interesting that the supreme court tends to vote en bloc, giving it a clear majority of eight out of eleven. Ironically, the 18th Amendment was challenged and allowed for a hearing because it infringed on the judiciary's independence. In recent years, there has been a dramatic increase in the number of references to the judiciary's independence and the risks it faces. Historically, an interventionist executive has posed a threat. This is, for the most part, no longer the case. Now that the lawyers' movement has given the judiciary more power, there is a fear that it will overcompensate for its previous lack of autonomy by pushing the independence argument too far. The public accounts committee recently requested that the registrar of the supreme court produce accounts of the court's administrative expenses. The registrar refused, claiming that doing so would jeopardise judicial independence. The registrar's specific rationale is that Article 68 of the constitution requires him to do so. **No discussion can take place in the parliament regarding the conduct of any judge of the superior courts** (in the discharge of his duties). The argument is weak because the court's administrative costs cannot be compared to individual judges' performance in performing their tasks. There is evidence of a new and assertive paradigm of judicial independence. Which has become the dominant narrative in the institutional dominance debate.

5 Conclusion

Pakistan's provisional constitution was the Govt of Hindustan Statute 1935. Under this act, the appointment of judges was left to the crown's discretion. The same procedure of appointment was incorporated in all three constitutions, as the crown is only replaced by the president. This procedure was changed in 2010 through the 18th amendment in the constitution when the Parliamentary committee and Judicial commission were formed for the appointments in Higher Judiciary. The purpose was to achieve a balance between the constitutional authorities, but various judgments of Higher courts undermined the constitutional role of the Parliamentary committee.

But still, the method is made imbalanced by the powerful role assigned to the Judicial Commission and the very weak role of other democratic institutions. For creating a democratic environment, a balance and democratic role should be given to each institution. The independence of the judiciary completely will help out more than anything else in maintaining peace and order in society as it is the only organ of the state that has a proper check and balance on the other both organs which are the executive and legislatures. If the judiciary is appointed without any nepotism and any corruption then it would result in a pure society of peace which would result in corruption-free departments because they would know the judiciary is independent and they would be punished if they do anything repugnant to the laws of the country.

At the moment the judiciary is being appointed on the basis that is already mentioned in the constitution so that there

is no ambiguity in finding out what will be the concern of it.

5.1 Suggestions

5.1.1 Amendment in 175-A

In light of the above situation, the researcher observed that Article 175-A of the Constitution of Pakistan needs clarity. The role of the Executive and Judiciary must be balanced to achieve a cooperative understanding in the appointment of judges. Currently, the role of the judiciary is more powerful than that of the executive, because the president is bound to follow the recommendations. After the 18th amendment, the role of the legislature also got strengthened but it is only ceremonial. The amendment must be done in article 175-A and the independent role of each institution must be defined and shall not be open to interpretation. Because previous indices show that the judiciary tilted unclear provisions of the Constitution and Judicial appointments to its favour.

5.1.2 Effective Consultative Process:

The process of consultation between the institutions must not be ceremonial but conclusive and meaningful. It has been observed by the researcher that the consultation between constitutional functionaries is not contributing to opinion and deliberation, and it has been averted as a formality. The constitution allows a meaningful and effective consultation between all the organs of the state to achieve better outcomes.

5.1.3 Role of Parliamentary Committee:

In the current scenario, the role of the Parliamentary committee is not independent and is unable to resist any wrong recommendation as can be ascertained from the judgments of the apex court. The constitution must incorporate the independent role of the Parliamentary committee, wherein it can take independent decisions and recommendations. By strengthening the role of the Parliamentary committee, the Legislature oversight will increase and ultimately diminish the absolute role of one institution.

5.1.4 Role of Judicial Commission:

In the whole procedure, the role of the Judicial Commission is unfettered. It exercises more powers than any other organ involved in Judicial appointments. Its role is dictatorial and authoritative in the present system of Pakistan. On the other hand, the powers of the Parliamentary committee are submissive to this commission. Thus, the powers of these two bodies should be equal for an efficient check and balance.

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