

Failure of Judicial Independence is the Failure of Doctrine of Trichotomy in Pakistan

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DOI: 10.70670/sra.v3i1.313

Abstract

In Parliamentary form of Government, the independence of judiciary is just a dream, as direct involvement of politicians and other established institutions can be observed in it. The concept of separation of powers given by Montesquieu though based upon logics but cannot be implemented without the principle of check and balance. The notion of term 'justice' generally springs the idea of court and notion of term 'court' brings about the concept of a 'Judge'; a neutral, un-biased, upright, honest, a person of integrity presiding the court chair. Judge is a protector of public's interest and a canon of hope in demise. Appointment of judges is a primary factor which effects the independence and performance of judicial bodies. This appointment should be free from every kind of influence and interference so that the administration of justice is not hindered. Any external influence in the appointment procedure automatically makes the appointed judge slightly biased, which may be due to various factors like fear, favor, and indebtedness. The appointment procedure which the law gave after 18th and 19th amendment may be such that it gives an influence-free effect but practical applicability differs from the provisions in law due to some prevalent informal practices. The recent 26th amendment has paved way to more interference from the executive branch in the appointment procedure, resulting in curtailed independence of judiciary. A scrutinized and transparent system of appointment based on merit and certain legislative reforms needs to be introduced and implemented in the society to foster justice system and ensure independence of judiciary.

Introduction

Politics has always been remained a key factor in the legislative history of Pakistan as all the laws are drafted by and passed through the parliament and parliament is comprised of politicians. To gain control over the system and make the hold stronger, the parliamentarians play an active role in passing legislations which favor their agenda and empower themselves by passing laws which strengthen their hold over the system. Judiciary is of utmost importance when it comes to holding strength, as judges in Pakistan have very vast inalienable powers, which may become unfavorable for some political affairs at times. So, law is being changed and maximum involvement of executive branch in judicial appointments is ensured through amendments in the relevant law. Impartial appointment of judges is an important aspect of jurisprudential development, requiring judgments to be free from influence and interference. The framework for judicial appointment is crucial to ensure that judges are appointed without any political or social biases. However, it has recently been observed that interference in judicial appointments is highly impacting jurisprudential development. The judicial system of Pakistan has evolved since its inception in 1947. Initially influenced by the British colonial legal framework, its basic structure has remained intact. However, repeated military coups and political upheavals have profoundly affected the autonomy of the judiciary¹. The superior judiciary in Pakistan primarily consists of the Supreme Court, Shariat Court and the High Courts, tasked with safeguarding the Constitution and fundamental rights. However, the appointment of judges raises concerns regarding their independence, as the process is intertwined with political influences. Judicial appointments are made by the President of Pakistan based on recommendations from the Prime Minister and a judicial commission. While the mechanism appears vigorous and strong, the interplay of political motives often undermines its integrity. The executive branch possesses significant influence over judicial appointments². Political leaders often run from corridors to corridors to get appointed judges who align with their ideological positions, creating a partisan judiciary.

¹ Anees Iqbal, 'The Process of Judicial Appointments in Pakistan under the 1973 Constitution' [2012] XX(1) Journal of Humanities & Social Sciences <<http://ojs.uop.edu.pk/jhss/article/view/784/688>> accessed 11 October 2024

² Muhammad Hamza Ali Qadir Khan, 'Critical Analysis of the procedure of appointment of Judges in the Superior Courts of Pakistan' [2021] 1(1) Pakistan Journal of Criminal Justice

The influential figures in recent appointment histories and analyze cases where political affiliations swayed decisions. Political parties prioritize loyalty over merit in selecting judicial candidates. History is evident how political affiliations lead to the appointment of judges whose decisions favor ruling parties, jeopardizing the impartiality of the judiciary. Judicial activism in Pakistan has often emerged as a counterbalance against executive overreach. However, it is also shaped by political contexts, wherein activism can be seen as politically motivated³. The political influence on superior judicial appointments in Pakistan poses significant challenges to judicial independence, public confidence, and effective governance. The intertwining of politics and the judiciary undermines the essential functions of justice, creating a ripple effect felt across legal, political, and social landscapes. To safeguard the integrity of the judiciary, reforms that prioritize independence, transparency, and accountability are paramount. The establishment of an independent judicial appointment commission and measures to enhance transparency can reaffirm public trust and strengthen the rule of law in Pakistan.³ There is a detrimental impact of political interference on legal reform and the judiciary's ability to function effectively. When judges prioritize political loyalty over judicial integrity, they may hesitate to uphold constitutional rights, particularly in cases involving state actions, leading to a reluctance to address critical issues such as human rights abuse or corruption. This undermines accountability and governance, as seen in the controversies surrounding the appointments of the recent chief justice and the former chief justice. The politicization of the judiciary weakens its ability to combat corruption and enforce laws, compromising its role as a check on government power. A truly independent judiciary is essential for upholding rights and maintaining a functioning democratic system⁴.

Judges Appointments In Superior Judiciary, Historical Perspective Of Pakistan

The process of judicial appointments in Pakistan has evolved through different historical eras, including Hindu, Muslim, and British periods. At its inception, Pakistan adopted the British legal system. Before the arrival of Arabs, the judiciary in India was based on Hindu customs and traditions.⁵ When Arabs entered the region, they introduced the Qazi system, which persisted for centuries. In 17th century, the British entered India through the East India Company. In 1623, the company was authorized through a charter to establish its own courts for resolving disputes involving its employees. A significant shift occurred in 1772 with the introduction of a new judicial system, establishing civil, criminal, and collector courts (Report of the Law Reform Commission, 1967-70).⁶ Between 1772 and 1861, superior courts were established to strengthen British control. This created two distinct judicial systems: superior courts enforcing English law, while lower courts adhered to the personal laws of Muslims and Hindus. Efforts to unify these systems began under the Charter of 1833 but were realized through the Act of 1861. This act empowered the Crown to appoint and remove Chief Justices and judges at its discretion.⁷ Further organizational changes were introduced by the Government of India Act 1935, which outlined qualifications and removal procedures for judges while retaining the appointment method established in 1861. Under this act, judges could serve until the age of 65. It also abolished the traditional practice of appointing Chief Justices exclusively from barristers, allowing pleaders and civil servants to assume the role. The Act of 1935 established the Federal Court, though it was not constituted until 1937.⁸ The Government of India Act of 1935 introduced significant reforms in the structure and functioning of the High Courts in India, reflecting an effort to modernize judicial administration and safeguard the independence of the judiciary.

³ SarkarAli Akkas, 'Appointment of Judges: A Key Issue of Judicial Independence' [2004] 16(2) Bond Law Review <<https://doi.org/10.53300/001c.5462>> accessed 6 May 2024

⁴ DrBakht Munir, 'The War of Judicial Independence in Pakistan: A Critical Analysis of Leading Political Cases' [2022] 8(3) Multicultural Education <[10.2139/ssrn.4916494](https://doi.org/10.2139/ssrn.4916494)> accessed 13 October 2024

One of the major changes was the removal of a fixed numerical limit on the number of judges in each High Court, empowering the King-in-Council to determine the number of judges as required from time to time. High Court judges were formally appointed by Her Majesty, but the Act vested the Governor-General-in-Council with the authority to temporarily appoint additional judges for a maximum tenure of two years to address exceptional circumstances, such as increased workloads or unforeseen vacancies.⁹ Prior to the enactment of the 1935 Act, judges held office at the pleasure of the Crown. While this technically allowed the Crown to remove judges at any time, in practice, a convention respecting judicial independence had evolved. This convention was formalized under the Act, which specified that a High Court judge would hold office until the age of 60. Removal of a judge was permitted only on grounds of misbehavior or incapacity, and such a removal required a report from the Privy Council substantiating these grounds following a reference by Her Majesty. This codification was a significant step toward ensuring the security of tenure and the independence of the judiciary.¹⁰ The Act also revised eligibility criteria for High Court appointments, stipulating that barristers or advocates with at least 10 years of legal experience were qualified for appointment. It abolished the earlier practice of reserving specific proportions of High Court judgeships for particular professional categories, such as barristers or civil servants, deeming the system both inconvenient and restrictive. Instead, the appointing authority was given the flexibility to select suitable candidates from any eligible professional background.¹¹ Another significant reform introduced by the Act was the removal of restrictions that prevented civilian judges from being appointed as Chief Justices of High Courts. Under earlier legislations, such as the Acts of 1861 and 1915, only trained lawyers could be appointed as Chief Justices, excluding senior civilian judges from consideration. The 1935 Act eliminated this prohibition, allowing civilian judges to be appointed as Chief Justices, thereby broadening the pool of eligible candidates.

However, the Act retained certain limitations. For instance, it continued the prohibition imposed on three High Courts from adjudicating revenue-related matters. Furthermore, the administrative control of High Courts was placed under the respective Provincial Governments. Nevertheless, the Act incorporated provisions to protect judicial independence and shield the judiciary from local political pressures. High Court expenses were to be charged to Provincial revenues, and the legislature was barred from discussing the conduct of High Court judges in the discharge of their judicial duties. The Government of India Act, 1935, conferred a dignified status upon the High Courts and introduced measures to strengthen their independence and impartiality. By formalizing conventions, revising appointment practices, and safeguarding judicial autonomy, the Act ensured that the High Courts were positioned to perform their functions without fear or favor, upholding the principles of justice and the rule of law. This judicial structure remained largely unchanged until 1947, when India was partitioned, and the two new dominions gained independence under the "Indian Independence Act 1947".¹²

Early Constitutional Framework (1956 And 1962)

After gaining independence, the Government of India Act 1935 served as Pakistan's interim constitution until 1956, as specified in Section 8 of the Indian Independence Act 1947.

⁵ Rafia Naz Ali and others, 'Judicial Appointments in the Historical Context: From 1947-2005' [2021] 5(1) Pakistan Social Sciences Review

⁶ Waseem, M. (2012). Clash of Institutions in Pakistan. *Economic and Political Weekly*, 16-18.

⁷ Walsh, D. (2012, January 23). Pakistan Court Widens Role, Stirring Fears. *New York Times*.

⁸ Shah, A. (2017, July 28). Pakistan's Court Sets a Dangerous Precedent. *The New York Times*.

⁹ M. Rama Jois, *Legal and Constitutional History of India*

¹⁰ Shafaq Naz Ali and others, 'Judicial Appointments in the Historical Context: From 1861-1947' [2021] 5(1) Pakistan Social Sciences Review

¹¹ *Ibid*

¹² Siddiqi, F. (2012, January 13). *Legal Empire*. Dawn.

The judicial provisions of the act remained unchanged and continued to be enforced. During this period, the procedure for judicial appointments was not a matter of significant controversy, although a sub-committee was established by the Constituent Assembly to provide recommendations on the judiciary. In its 1952 report, the sub-committee proposed that the Federal judiciary should consist of a Chief Justice and 2-4 additional judges. It recommended that the Chief Justice be appointed by the Head of State, while the other judges would be appointed based on the Chief Justice's recommendations. For appointments to the High Court, consultation with the respective Chief Justice was required. The first Constituent Assembly was dissolved by the Governor-General in 1954¹³, leading to the formation of a second Constituent Assembly in 1955. This second assembly successfully drafted Pakistan's first constitution, known as the Constitution of Pakistan 1956.¹⁴ Under the Constitution of Pakistan 1956, the procedure for appointing the Chief Justice remained unchanged from the method outlined in the Government of India Act 1935. For High Court appointments, it required¹⁵ consultation with the respective Chief Justice and the Governor of the province. Thus, the 1956 Constitution allocated the power of judicial appointments to both the executive and judiciary.¹⁶ In 1958, following the imposition of martial law, the constitution was abrogated. While the first martial law order altered the jurisdiction of the courts, the procedure for appointing judges to superior courts remained intact. Subsequently, a constitutional commission was established in 1960 to propose recommendations for a new constitution. The commission suggested that the outgoing Chief Justice should recommend a successor. If the Chief Justice was retiring, the President would have discretion in the appointment, but the appointee should be chosen from among the Supreme Court judges,¹⁷ with preference given to the most senior judge. For other Supreme Court appointments, the commission recommended that the Chief Justice provide recommendations, which the President should accept as a matter of convention. For High Court appointments, the Chief Justice of the respective High Court, after consulting other judges, would forward recommendations to the provincial Governor and the Chief Justice of the Supreme Court. After thorough deliberation, the Chief Justice would then send the recommendations to the President, who was expected to approve them.¹⁸

The Military Regimes (1958-1971 A n d 1977-1988)

The second constitution was adopted in 1962. Contrary to the recommendations of the constitutional commission, only minor changes were made to the judiciary. The provisions related to the judiciary largely mirrored those of the previous constitution. The judicial appointment process remained largely unchallenged until the first deviation occurred when the President, with assistance from the Governor and the Law Minister of West Pakistan, personally interviewed judges for appointments. This method violated the constitutional provisions. The 1962 Constitution was abrogated in 1969 following the imposition of martial law. General elections were held in 1970, and after a period of political unrest, Zulfikar Ali Bhutto assumed leadership as the head of state. An interim constitution was introduced in 1972, retaining most provisions of the 1962 Constitution concerning the judiciary, except for an increase in the retirement age for High Court judges from 60 to 62 years.

¹³ Federation of Pakistan v. Molvi Tameezuddin, 1955 (PLD 1955 FC 240)

¹⁴ The Constitution of Pakistan, 1962 (1965). The Gazette of Pakistan. Karachi, Articles 149,166,125-140

¹⁵ Under Constitution of Pakistan, 1956

¹⁶ Constitutional Documents (Pakistan), Volumes I, II, III, IV & V, 1964, Published by the manager of Publications, Government of Pakistan Karachi.

¹⁷ Siddiqi. F. (2012, June 26). Judicial Sovereigns. Dawn.

¹⁸ Adeney, K. (2017). How to understand Pakistan's hybrid regime: the importance of a multidimensional continuum. Democratization 24:1, 119-137.

This interim constitution remained in place for a year until the adoption of a new permanent constitution in 1973.¹⁹ The provisions related to the judiciary in the Constitution of 1973 closely resembled those of the two preceding constitutions. However, the 1973 Constitution was suspended following the imposition of martial law in 1977 by General Zia-ul-Haq. Under martial law, the appointment and removal of superior court judges were placed at the discretion of the Martial Law Administrator. Judges were also required to take an oath under the Provisional Constitutional Order of 1981. Those who refused to comply were removed from office, as stipulated by the High Court Judges (Oath of Office) Order, 1977 and the Supreme Court Judges (Oath of Office) Order, 1977.²⁰ This system was later incorporated into the constitution through the Revival of the Constitution of 1973 Order, 1985, and formalized by the 8th Constitutional Amendment. In 1988, a civilian government was established under Prime Minister Benazir Bhutto. However, tensions soon arose between the Prime Minister and the President over judicial appointments. The matter was brought before the Lahore High Court,²¹ which ruled that Article 193 of the Constitution did not assign a role to the Prime Minister in judicial appointments.²² Although the decision was appealed to the Supreme Court, the Federal Government withdrew its appeal, leaving the issue unresolved. This conflict contributed to the dissolution of the National Assembly in 1990.

Al-Jahad Trust Case (1996)

As a result of the elections, Nawaz Sharif became the head of government. His administration made no significant changes to the judiciary, despite calls from the opposition leader to form a parliamentary committee to verify the credentials of candidates for superior court judgeships.²³ This proposal aimed to distribute power over judicial appointments among the three branches of government. Tensions over executive authority between the President and the Prime Minister led to the dissolution of the National Assembly in 1993. Benazir Bhutto's second term is considered a period of judicial crisis, particularly due to her government's violation of seniority conventions when appointing Justice Sajjad Ali Shah as Chief Justice of Pakistan in 1994, despite him being fourth in seniority. Additionally, several appointments to the Lahore and Sindh High Courts were made against the Chief Justice's recommendations. In response, constitutional petitions were filed in the Supreme Court, seeking clarification on the constitutional provisions related to judicial appointments.²⁴ This case, known as the Al-Jihad Trust case or the first judges' case, marked a significant step toward judicial independence. In the first judges' case, the Supreme Court interpreted the term "consultation" in Articles 177 and 193 regarding judicial appointments. The Court also ruled that ad hoc judges could not be appointed to permanent positions in the Supreme Court, although acting appointments could be made for no more than ninety days. Additionally, it stated that an additional judge in a High Court could become a permanent judge if he met the required qualifications. It also clarified that vacancies in the judiciary should be filled within thirty days, and in the case of a death, no longer than ninety days. The Court further held that if an acting Chief Justice made recommendations for judicial appointments, it would be unconstitutional, as he could not act as consulted in the appointments. The consultative process, the Court emphasized, should be based on consensus rather than arbitrariness. This judgment is considered a landmark case in Pakistan's judicial history.²⁵

¹⁹ Khan, H (2nd ed.). (2009). Constitutional and political history of Pakistan. Pakistan. Oxford university press. Page 108 & 148, 562-568

²⁰ Brasted, H., Ahmed, I. & Orakzai, S., B. (2019). Whither Pakistan: The Ambivalence of Constitutional Road Mapping? Governance and Political Adaptation in Fragile States. Macmillan

²¹ Chaudhry, G., M. (2020), the constitution of Pakistan. 1973, Lahore: Federal Law House, 234-236

²² M.D. Tahir v. Federation of Pakistan, 1989 (P L D 1988 S C 416)

²³ Habib, R., I., Akhtar, N. & Madni, A. (2019). Relationship of Superior Judiciary and Executives during Democratic Regimes in Pakistan: An Analytical and Historical Study. Pakistan Journal of Social Sciences (PJSS)

²⁴ Sajjad, S. (2012, July 27). Justice, Samosas and the Ostrich. Dawn.

²⁵ Al-Jihad Trust V Federation of Pakistan, 1996 (PLD 1996 SC 324)

The Democratic Interlude (1988-1999)

In 1997, Nawaz Sharif again became the Prime Minister. Tensions quickly arose between the executive and judiciary over the formulation of anti-terrorism laws and the establishment of special courts. Despite the Supreme Court's ruling, the government proceeded with judicial appointments without consulting the Chief Justice.²⁶ However, the government later confirmed the Chief Justice's recommendations, resolving the controversy. Shortly after, the appointment of the Chief Justice was challenged in the Supreme Court, arguing that it violated the established convention of seniority and fitness. As a result, the appointment was annulled, and the senior-most judge was appointed as Chief Justice.²⁷ In 1999, another military regime was imposed, suspending the 1973 Constitution and declaring a state of emergency. In 2000, a new law, *the Oath of Office (Judges) Order*, was promulgated, requiring judges to take an oath under the new law, with those refusing to do so losing their offices. Under martial law, the Chief Executive was given sole discretion over judicial appointments. The issue of judicial appointments and the conflict between the executive and judiciary continued. Tensions peaked in March 2007 when the Chief Executive suspended the Chief Justice. Following a nationwide movement led by judges, lawyers, and civil society, the Supreme Court restored the Chief Justice in July 2007.²⁸ As per above the evolution of Pakistan's judicial appointment system has been deeply influenced by historical transitions, constitutional developments, and political struggles. From its foundations in pre-colonial traditions to the adoption of British legal principles, the system has undergone significant changes. Post-independence, successive constitutions attempted to balance executive and judicial powers, but political interventions, martial law regimes, and constitutional deviations often disrupted this balance. Landmark cases like the *Al-Jihad Trust case* and nationwide movements for judicial independence underscore the judiciary's quest to establish its autonomy. Despite persistent conflicts between the executive and judiciary, these events have laid the groundwork for a more independent judicial system, albeit with ongoing challenges.

Appointment Of Judges In Present Scenario

The Roman poet Juvenal's question, "*Quis custodiet ipsos custodes?*" (Who will guard the guards?), resonates deeply within Pakistan's contemporary constitutional debates on judicial appointment processes. A key criticism of the traditional system for appointing judges was its reliance on judges effectively selecting their successors.²⁹ This concern was particularly significant regarding the superior judiciary, comprising the High Courts and the Supreme Court of Pakistan, where constitutional accountability mechanisms were exclusively controlled by the judiciary itself. This arrangement was conspicuously devoid of checks and balances. An overview of the appointment procedures from the earliest form of 1973 constitution till the recent 26th amendment will provide an insight of such criticized appointment system.³⁰

Pre-18th Amendment

Before the passage of the 18th Amendment, the Constitution outlined a process for judicial appointments in which the Chief Justice of the Supreme Court proposed a panel of candidates to the President, who then selected one from the panel. Similarly, for High Court appointments, the Chief Justice of the respective High Court submitted a panel to the President through the provincial Governor and the Chief Justice of Pakistan. The Chief Justice of Pakistan and the provincial Chief Justices held pivotal roles in this process.³¹

²⁶ White Paper on the role of the Judiciary 2003, Published by Pakistan Bar Council, Supreme Court Building, Constitutional Avenue, Islamabad.

²⁷ Malik Asad Ali v. Federation of Pakistan, 1998 (PLD 1998 SC 161)

²⁸ Mr. Justice Iftikhar Muhammad Chaudhry v. The President of Pakistan, 2007 (Constitution Petition No.21 of 2007)

²⁹ Sakala, L.E.(2005). The accountability of judiciary accountable to whom is there such a mechanism. Namibia.

³⁰ Rumi, R. (2010, April 11). The Task Ahead. News International

³¹ Roznai, Y. (2013). Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea. American Journal of Comparative Law 61:3, 657-719

In the landmark *Judges' Case 1996*, the Supreme Court significantly limited the President's executive discretion in judicial appointments, rendering it nearly ineffective. The Court ruled that the President was generally bound by the Chief Justice's recommendations. If the President chose to deviate from these recommendations, the reasons for such a decision were subject to judicial review. The interpretation of constitutional provisions regarding judicial appointments effectively centralized power in the hands of the Chief Justice of the Supreme Court. These so-called progressive interpretations led to the same underlying issue: the dominance of a single institution over the judicial appointment process.³² The Chief Justice emerged as a pivotal figure, exercising control over the executive by appointing like-minded judges to judicial positions. Simultaneously, this power allowed the Chief Justice to influence colleagues in their judicial duties. The Constitution already grants the Chief Justice substantial administrative authority, such as serving as Chairman of the Supreme Judicial Council for disciplinary actions against judges³³, forming and dissolving benches of the Supreme Court, and transferring cases between benches. Adding appointment powers to this extensive authority made the Chief Justice the ultimate decision-maker in nearly all matters related to the Supreme Court. This position enabled the Chief Justice not only to check the executive but also to exert considerable control over the judiciary's internal functioning.

18th Amendment

The judiciary's monopolization of judicial appointments did not sit well with the political class, as it left them without any meaningful role in the process. Similarly, the legal fraternity and the intelligentsia disapproved of this concentration of power, as it effectively turned the Chief Justice into an all-powerful figure in the affairs of the Supreme Court, elevating the office to a quasi-constitutional status that the framers of the Constitution had never intended.³⁴ In response to these concerns, political parties agreed to reform the process through constitutional amendments following the 2008 general elections.³⁵ The newly established political setup undertook a comprehensive revision of the Constitution to reverse unconstitutional amendments introduced by military regimes that had undermined its federal-parliamentary character.

The 18th Amendment to the Constitution, enacted in 2010 as *Constitution Eighteenth Amendment Act*, aimed to achieve three primary objectives³⁶:

1. Repeal amendments introduced by military rulers that had significantly altered the Constitution's essence.
2. Restore the federal character of the Constitution by abolishing the Concurrent List, granting provinces full autonomy over subjects not included in the Federal Legislative List.
3. Introduce a new process for appointing judges to the superior judiciary, addressing the issues raised by past experiences.

To realize these goals, Article 175A was added to the Constitution, creating an entirely new system for judicial appointments. This article established two distinct bodies tasked exclusively with appointing judges to the superior judiciary, marking a significant shift in the process. These bodies are the Judicial Commission and the Parliamentary Committee.

³² Law, D. S. (2008). A theory of judicial power and judicial review. *Geo. LJ*, 97, 723.

³³ Article 209, Constitution of Pakistan, 1973

³⁴ Chaudhry, Barrister A.G. (1995). *The Leading Cases in Constitutional Law*, Lahore: Sehar Publishers

³⁵ Charter of Democracy, May 2006

³⁶ Constitution (18th Amendment) Act, No. 10 of 2010.

The Judicial Commission's primary function is to nominate and recommend candidates for judgeship to the Parliamentary Committee. The Parliamentary Committee, in turn, has the authority to assess the nominee's suitability and reject the recommendation if it deems the candidate unfit.³⁷

The Judicial Commission

Article 175A, introduced through the 18th Amendment, redistributed the Chief Justice's power of appointment to a body that includes representatives from the judiciary, executive, and legal community. Instead of the Chief Justice holding sole authority, the Commission now makes decisions on nominations by majority vote, with each member, including the Chief Justice, having a single vote.³⁸

Under the original Article 175A, the Commission comprised the following members:

- The Chief Justice of Pakistan (Chairperson)
- The two next most senior judges of the Supreme Court
- The Federal Minister for Law and Justice
- A retired judge nominated by the Chief Justice
- The Attorney General of Pakistan
- A senior advocate nominated by the Pakistan Bar Council

This diverse composition ensured a broad range of perspectives, knowledge, and input from the judiciary, executive, and legal community. The strong representation of judges in the Commission guaranteed that the judiciary maintained a decisive role in recommending nominees to the Committee, while providing equitable participation for other stakeholders.

The Parliamentary Committee

A key feature of Article 175A was the decentralization of appointment powers, shifting authority from individuals (such as the Chief Justice, President, or Prime Minister) to collective decision-making bodies. The Committee consists of eight members, equally divided between the National Assembly and the Senate, with equal representation from the treasury and opposition. Members are nominated by the Leader of the House and the Leader of the Opposition in both houses of Parliament. The procedure given by the eighteenth amendment⁴⁰ was:

1. The appointment process begins with the Commission, which nominates a candidate by majority vote.
2. The Committee can either approve or reject the nomination. To veto a nominee, the Committee requires a three-fourths majority of its total membership.
3. If the Committee fails to veto with a three-fourths majority, the nomination is automatically confirmed and sent to the President for final approval.
4. The Committee must act within 14 days of receiving the nomination; otherwise, the nomination is deemed confirmed.⁴¹

This process ensures both a participatory approach and a system of checks and balances, giving equitable representation to different institutions while retaining the judiciary's prominent role.

³⁷ Ibid

³⁸ Saroop Ijaz. Judicial Appointments in Pakistan: Coming Full Circle. LUMS Law Journal. vol. 1. No. 1 (2014): 93-95.

³⁹ Waseem, Mohammad. "Judging democracy in Pakistan: conflict between the executive and judiciary." Contemporary South Asia 20, no. 1 (2012): 29.

⁴⁰ Sattar, B. (2012). 18th constitutional amendment & need for passage of the 19th constitutional amendment. IPRI Policy Brief.

⁴¹ Article 175A (12), Constitution of Pakistan, 1973

19th Amendment

Shortly after the passage of the 18th Amendment Act in 2010, several of its provisions were challenged before the Supreme Court under its Original Jurisdiction (Article 184(3)) on various grounds, including the contention that Article 175A violated the fundamental constitutional principle of judicial independence. Rather than addressing all the issues at once, the Supreme Court issued an interim order suggesting that Parliament amend Article 175A to better align the judicial appointment process with the principle of judicial independence⁴². Interestingly, the Supreme Court avoided declaring the amendment null and void, despite having the precedent from Indian constitutional jurisprudence to do so. This restraint was influenced by Parliament's own position during the passage of the 18th Amendment, which asserted that the fundamental principles of the Constitution had not been altered. The Supreme Court's decision to refer the matter back to Parliament was in line with this intent, marking a unique instance in the Court's history where it returned a constitutional amendment with recommendations instead of outright invalidating it.⁴³ In its interim order, the Supreme Court made several recommendations regarding Article 175A. First, it proposed increasing the number of Supreme Court judges in the Judicial Commission from three to five. Second, it recommended that the Parliamentary Committee conduct its proceedings in camera, as mandated by Article 68 of the Constitution of Pakistan.⁴⁴ Third, the Court suggested maintaining written records of the Committee's proceedings. Fourth, it emphasized that the Committee should provide well-reasoned justifications when rejecting a nominee recommended by the Commission. Fifth, it proposed explicitly including the Supreme Court's power of judicial review over the Committee's decisions in the Constitution. Lastly, the Court recommended that if it overturned the Committee's veto, the Commission's nominee would automatically be confirmed. This decision was notable for its collaborative approach, emphasizing dialogue between the judiciary and legislature to preserve constitutional harmony while addressing concerns about judicial independence. The Supreme Court's short order was swiftly followed by the enactment of the 19th Constitutional Amendment (*Constitution Nineteenth Amendment Act, 2011*), which amended Article 175A in line with the Court's recommendations given in *Supreme Court Bar Association vs. the Federation of Pakistan, 2010*. Most of the Supreme Court's suggestions were incorporated into the 19th Amendment.⁴⁵ However, there was a notable deviation: if the Parliamentary Committee rejected a nomination, the Judicial Commission was required to propose a new nominee. This effectively excluded the Committee's decisions from being subject to judicial review by the Supreme Court (Article 175A (12), Constitution of Pakistan, 1973).

Interpretation of Article 175A by Supreme Court

The detailed judgment by the Supreme Court not only addressed the question of whether the Parliamentary Committee's decisions were subject to judicial review but also elaborated on the roles and significance of the two constitutional bodies established under Article 175A (*Sindh High Court Bar Association vs. Federation of Pakistan, 2011*).

Key aspects⁴⁶ of the judgment included the following:

⁴² *The Supreme Court Bar Association vs. the Federation of Pakistan, 2010 (CMA NO. 2981 OF 2010)*

⁴³ *Ibid*

⁴⁴ Khan, S.M. (2011, December 30). "Darkest Day" for Judiciary: National Security has Trumped Fundamental Rights. *Express Tribune*.

⁴⁵ *Constitution (19th Amendment) Act, 2010, No. 1 of 2011*.

⁴⁶ PLD 2011 SC 879

- 1.The Supreme Court reaffirmed its constitutional authority to exercise judicial review over the Committee's decisions.
- 2.It defined the distinct roles and importance of the Judicial Commission and the Parliamentary Committee in the judicial appointment process.
- 3.The Court clarified that its earlier judgments, including the landmark Al-Jehad Trust case, remained valid and would continue to govern the future appointments of superior court judges. The Court emphasized that the rationality and objectives of the judicial appointment process, as originally envisioned in the Constitution, had not been fundamentally altered by Article 175A. It also noted that the participation of both the executive and judiciary in the process had been retained, ensuring the applicability of previous rulings.⁴⁷ This decision carried significant implications, as it effectively reverted the judicial appointment process under Article 175A to the framework that existed before the 18th Amendment.

Critical Analysis of the Supreme Court's Interpretation of Article 175A

- 1.Impact on the Participatory Process: The Court's interpretation of the Committee's role significantly undermined the participatory nature of the new process by limiting the Committee's influence.⁴⁸ In practice, the Committee was left with no meaningful authority, as it could only deliberate on matters outside the Commission's purview.
- 2.Judicial Review of the Commission's Proceedings: While the Court asserted its constitutional right to review the Committee's decisions, it remained silent on whether it could review the proceedings of the Commission, leaving a gap in oversight.
- 3.Reversion to the Pre-18th Amendment Process: By emphasizing the applicability of the Al-Jehad Trust judgment, the Supreme Court effectively reverted the new appointment process to the previous system. This interpretation diminished the executive's role in judicial appointments, rendering it largely inconsequential under the new framework.⁴⁹ In essence, the judgment reinstated the judiciary's dominant position in judicial appointments, despite the constitutional reforms intended to create a more balanced and participatory process.

26th Amendment

The Constitution (Twenty-sixth Amendment) Act, 2024, was swiftly enacted by Parliament on October 21, 2024, and received presidential approval on the same day. This amendment on the face of it aims to introduce critical reforms to strengthen the legal framework, enhance transparency within the judiciary, and advance the welfare of citizens. However, same might not be the case. The International Commission of Jurists (ICJ) has criticized the 26th Amendment, describing it as “a blow to judicial independence, the rule of law, and human rights protection.” Historically, Pakistan’s judiciary has often been subdued under military regimes, with only a few judges refusing to take oaths under various legal, often unconstitutional, frameworks and provisional constitutional orders. Following the passage of the 18th Amendment in 2010, Parliament gained a stronger position to assert its authority. However, the then-Chief Justice of Pakistan, effectively compelled Parliament to enact the 19th Amendment, which conferred unprecedented powers on the Chief Justice and his fellow judges. The concept of the three pillars of the State and the doctrine of the trichotomy of powers is a foundational principle often introduced in the first lesson of political science. This separation of powers, between the Legislature, Executive, and Judiciary, is essential for the functioning of a robust democracy. It ensures judicial independence, enabling the judiciary to safeguard citizens' rights and uphold the social contract embodied in the Constitution.⁵⁰ While absolute separation of powers is unattainable due to inherent overlaps in their functions, the Constitution of Pakistan had historically maintained a careful balance among these pillars. A key provision contributing to this equilibrium was Article 175A (3), which outlined the process for appointing the Chief Justice of Pakistan. Under this article, the most senior judge of the Supreme Court was traditionally appointed as the CJP, reflecting a principle of continuity and impartiality.

⁴⁷ Ibid

⁴⁸ Kalhan, A. (2013). Gray Zone Constitutionalism and the Dilemma of Judicial Independence in Pakistan. *Vand. J. Transnat'l L.*, 46, 1.

⁴⁹ Ijaz, S. (2012, May 12). Don't Pity US, My Lord. *Express Tribune*.

⁵⁰ McMillion, B. J. (2024). Supreme court appointment process: president's selection of A nominee (updated). *White House Studies*, 18(1). Vol. 18 Issue 1, p1 28. 28p

However, the changes introduced by the 26th Amendment have altered this process. By modifying the mechanism for appointing the CJP, the amendment is expected to disrupt the delicate balance of power between the three branches of the state, raising concerns about its potential implications for judicial independence and the doctrine of trichotomy of powers.⁵² The 26th Amendment has restructured the Judicial Commission of Pakistan by adding two members from the National Assembly, two from the Senate, and one woman or non-Muslim member nominated by the National Assembly Speaker. This shift appears aimed at ensuring parliamentary supremacy in judicial appointments. The continued inclusion of the federal law minister, the attorney general of Pakistan, and a representative from the bar maintains the Commission's representative nature. However, some critics fear that the increased presence of parliamentarians could lead to excessive political influence, a concern this writer considers unwarranted. The amendment also reduces the judicial members of the Commission to a minority, potentially creating a more balanced appointment mechanism. Post-amendment, only five out of the 13 Commission members will be judges: the chief justice, the most senior judge of the constitutional bench, and the three most senior judges of the Supreme Court. Consequently, judges no longer hold the final say in appointments, reversing the dominance granted under the 19th Amendment.⁵³ A major procedural change introduced by the amendment is in the appointment of the chief justice of Pakistan (CJP). Previously, the most senior Supreme Court judge automatically assumed the role, leaving no role for the executive or Parliament. Under the new provisions, a "special parliamentary committee," comprising eight National Assembly members and four Senate members, will now nominate the CJP from among the three most senior Supreme Court judges. These committee proceedings will occur in-camera, adding confidentiality to the process. Additionally, the amendment enhances accountability by empowering the Supreme Judicial Council to recommend the removal of Supreme Court and high court judges deemed "inefficient in the performance of their duties."⁵⁵ This measure aims to ensure greater judicial responsibility and efficiency while reinforcing institutional checks and balances. Overall, the 26th Amendment introduces significant changes to judicial appointments, accountability, and bench formation. Whether these reforms deliver on their promises of enhancing transparency, democracy, and impartiality will depend on their implementation and the integrity of the individuals involved.⁵⁶

Criticism on the 26th Amendment

The government's enactment of the 26th Amendment to the Constitution marked a significant shift in the framework and functioning of the superior judiciary. A month after its implementation, it is imperative to critically analyze its impact on judicial processes and assess whether the promised reforms have materialized. The introduction of the 26th Amendment occurred under conditions of notable opacity. The legislative changes were pushed through without prior public consultation or parliamentary deliberation, bypassing the essential democratic norms of transparency and debate. The lack of a draft for public scrutiny highlighted a deliberate effort to conceal the details of this transformative legal reform until its enactment.

⁵¹ Husain, D. F. (n.d.). *The Judicial System of Pakistan*. Islamabad: Federal Judicial Academy.

⁵² Ibid

⁵³ Cohen, A., and Yang, C. (2019), "Judicial politics and sentencing decisions", *American Economic Journal: Economic Policy*, 11(1), pp. 160-91.

⁵⁴ Abbasi, A. (2024). "Plots allotment to judges a favour, misconduct: ex-CJ", retrieved February 24, 2024, from <https://www.thenews.com.pk/print/200999-Plots-allotment-to-judges-a-favour-misconduct-ex-CJ>.

⁵⁵ Chemin, M. (2024), "Judicial Efficiency and Firm Productivity: Evidence from a World Database of Judicial Reforms", *Review of Economics and Statistics*, 102(1), pp.49-64.

⁵⁶ la porta, r., lopez-de-silanes, f., pop-eleches, c., and shleifer, a. (2024), "Judicial checks and balances", *Journal of Political Economy*, 112(2), pp. 445-470.

This method of legislating, facilitated by influential political actors and supported by their uncritical allies, has been widely criticized.⁵⁷ Proponents of the amendment justified it as a corrective measure to curb judicial overreach and ensure greater accountability in the judiciary. They claimed it would shield the democratic process from the influence of unpredictable judicial interventions, streamline decision-making, and enable judges to focus on their core responsibilities. These assurances were framed as an essential recalibration rather than a retaliatory move, ostensibly aimed at rectifying systemic imbalances created by judicial arbitrariness.⁵⁸

Lack of Transparency in Bench Formation

One of the most immediate and significant changes under the amendment has been the restructuring of the *constitutional bench* in the Supreme Court. However, the criteria for the selection of its members remain undisclosed, leaving the process shrouded in opacity. While the amendment ostensibly sought to curtail the chief justice's unilateral authority in bench formation, it has instead conferred similar discretionary powers upon the executive. This shift raises profound ethical concerns, as the executive, frequently a litigant in critical constitutional cases, now plays a decisive role in determining which judges hear its cases, creating an inherent conflict of interest.

Delayed Decisions and Inefficiency

The promise of efficiency and timely justice has not been fulfilled. Despite operating for over a month, the constitutional benches have failed to produce significant rulings on pressing constitutional questions, including challenges to the amendments themselves. Notably, appeals against military trials of civilians remain unresolved, even though the Supreme Court has declared the underlying detentions illegal. Simultaneously, judicial time and resources are being diverted to *suo motu* cases involving irrelevant or outdated issues, such as cases with deceased litigants or invalidated policies.⁵⁹

Judicial Activism and Public Access

The amended judiciary continues to claim *suo motu* powers, yet these assertions lack the transparency required for public confidence. The absence of livestreaming for proceedings involving fundamental constitutional questions contradicts established principles of accessibility and openness. Public engagement in such matters is a cornerstone of democratic governance, and the judiciary's failure to embrace transparency undermines its legitimacy.⁶⁰

Ad Hoc Judicial Appointments

The amendment has also disrupted the process of judicial appointments, replacing existing practices with an ad hoc and inconsistent approach. The Judicial Commission, tasked with elevating candidates to superior courts, has yet to establish clear criteria for these appointments, despite the amendment mandating such a framework. Ironically, nominations are being solicited before these rules are finalized, leading to arbitrary and speculative decisions.⁶¹ Compounding this dysfunction is the exclusion of the judiciary's senior-most judge—who had previously developed comprehensive criteria for appointments—from the current rule-making committee. This exclusion undermines the integrity of the process and raises questions about the motivations behind these decisions.⁶²

⁵⁷ Neudorf, L. (2024). Judicial Independence in Pakistan. *The Dynamics of Judicial Independence*, pages 125- 219.

⁵⁸ Ibid.

⁵⁹ AbdulMoiz Jaferii, 'Judiciary farm' [2024] 1(1) Dawn News <<https://www.dawn.com/news/1878399>> accessed 14 December 2024

⁶⁰ Acemoglu, D., Cheema, A., Khwaja, A.I. and Robinson, J.A. (2020), "Trust in state and nonstate actors: Evidence from dispute resolution in Pakistan", *Journal of Political Economy*, 128(8),

Regional Disparities and Procedural Irregularities

The impact of the amendment is perhaps most starkly visible in the Sindh High Court. Following the Sindh Assembly's activation of provincial constitutional benches, the Judicial Commission overlooked the court's eight most senior judges while constituting these benches. This decision, made despite opposition from the province's chief justice and the chief justice of Pakistan, was approved solely due to the votes of two Supreme Court members siding with the executive. No rationale for bypassing senior judges was provided, further exemplifying the arbitrariness of the amended system. Similarly, deviations from established seniority rules have been observed in the Supreme Court. For instance, in forming a bench for a military trials case, the presiding judge bypassed two senior Punjab judges to include the Justice, without offering any explanation for this departure from standard practice.⁶³

Reform or Regression?

Although the 26th Amendment was heralded as a measure to rectify judicial arbitrariness and inefficiency, its implementation has merely redistributed discretionary power while exacerbating existing inefficiencies and institutional dysfunction. The lack of transparency, procedural inconsistencies, and increased executive influence have deepened the judiciary's credibility crisis. Far from streamlining justice or safeguarding democracy, the amendment has introduced new forms of arbitrariness, undermined judicial independence, and diminished public trust in the judicial system. For meaningful reform, a transparent, inclusive, and rules-based framework must be developed and adhered to. Without these measures, the judiciary risks further eroding its role as a neutral arbiter and protector of constitutional principles.⁶⁴ In conclusion, the evolution of judicial appointment processes in Pakistan reflects a continuous struggle to balance the principles of judicial independence, parliamentary oversight, and institutional accountability. From the concentration of appointment powers in the hands of the Chief Justice under earlier constitutional interpretations to the participatory framework introduced by the 18th Amendment, and later refined by the 19th Amendment, the process has undergone significant transformations. The recent 26th Amendment, while aiming to democratize judicial appointments and enhance representation, has sparked debates over the potential politicization of the judiciary and disruption of the trichotomy of powers. These reforms underscore the need for a careful equilibrium between empowering democratic institutions and safeguarding the judiciary's independence to ensure justice, uphold constitutional principles, and protect fundamental rights. The long-term success of these changes depends on the responsible execution of these provisions to strengthen democracy and maintain public trust in the judicial system.

Present Political Appointments and Their Impacts

There have been many politically influenced appointments in the past few months. All such appointments have devastating effects over the judicial independence and deliverance of justice.

⁶² Ibid

⁶³ Siobhán Mullally, 'A Long March to Justice: A Report on Judicial Independence and Integrity in Pakistan' [2009] 1(1) An International Bar Association Human Rights Institute Report

⁶⁴ Hasnaat Malik, 'Govt gets hands in judicial pie with appointments' [2024] 1(1) The Express Tribune

<<https://tribune.com.pk/story/2513429/govt-gets-hands-in-judicial-pie-with-appointments>>accessed 10 December 2024

⁶⁵ La Porta, R., Lopez-De-Silanes, F., Pop-Eleches, C., and Shleifer, A. (2004), "Judicial checks and balances", *Journal of Political Economy*, 112(2), pp. 445-470.

Elevation of a LHC's female Justice to SC

The Judicial Commission of Pakistan (JCP) has achieved a significant milestone by officially endorsing the appointment of a female Justice as the first woman to serve as a judge on the Supreme Court. This historic decision comes despite considerable resistance from various lawyer groups. Justice Malik, who ranked fourth on the seniority list of the Lahore High Court (LHC), faced criticism regarding the selection process.⁶⁶ In response to this decision, lawyers across the country staged a nationwide strike, halting court proceedings. This action was initiated by the Pakistan Bar Council (PBC) and the Supreme Court Bar Association of Pakistan (SCBAP), both of which expressed strong concerns about the principle of seniority in judicial appointments.⁶⁷ They argue that established seniority norms should be strictly followed when promoting judges to the Supreme Court. In the JCP meeting, deliberations were heated, with five out of the nine commission members voting in favor of Justice's nomination, which was put forth by a Chief Justice of Pakistan,⁶⁸. However, three members opposed the move, citing the importance of adhering to seniority rankings when making such critical judicial appointments. This division illustrates the ongoing tension within the legal community regarding the criteria for judicial elevation and the broader implications for representation within the judiciary. Justice Malik's appointment not only sets a precedent for future female judges in Pakistan but also highlights the challenges and debates surrounding gender representation and judicial hierarchy in a traditionally male-dominated legal system. All prominent legal organizations, including the Pakistan Bar Council (PBC) and the Supreme Court Bar Association of Pakistan (SCBAP), have expressed strong opposition to the appointment of Justice Ayesha as a Supreme Court judge. They argue that this appointment is a clear violation of the seniority principle, which has been a cornerstone of judicial appointments as established by the Supreme Court in the landmark *Al-Jehad Trust* case⁶⁹. This principle ensures that the most senior judges are promoted based on their experience and merit, reflecting the importance of maintaining an orderly and fair judicial hierarchy.⁷⁰ Hamid Khan, a distinguished senior lawyer and former president of the SCBAP, emphasized that the failure to adhere to the seniority principle can have serious negative consequences for democracy in the country. He highlighted that when judges are appointed out of turn, it undermines the integrity of the judicial system, leading to a perception of favoritism and injustice. This practice can erode public trust in the judiciary, as it suggests that judicial appointments may be influenced by political considerations rather than legal qualifications.⁷¹ Khan further articulated that such non-compliance with established norms can result in the misuse of judicial powers. He warned that out-of-turn promotions are sometimes leveraged as tools for manipulating high court judges, incentivizing them to deliver favorable judgments that serve specific interests. This can create an environment where the impartiality of the judiciary is compromised, ultimately threatening the foundation of democracy, which relies on an independent and objective judicial system.⁷² In light of these concerns, the legal community is calling for a strict adherence to the seniority principle in judicial appointments to uphold the rule of law and ensure that the judiciary remains a pillar of justice and fairness in society.⁷³

⁶⁶ Holden, L. (2023). Women judges in Pakistan, *International Journal of the Legal Profession*.

26:1, 89-104,

⁶⁷ HAQ, I. (2018), Supreme Court Bar Council. Islamabad.

⁶⁸ Ibid

⁶⁹ *Al Jehad Trust v Federation of Pakistan*, PLD 1996, S.C. 324

⁷⁰ HESSAMI, Z. (2018), "Accountability and incentives of appointed and elected public officials", *Review of Economics and Statistics*, 100(1), pp. 51-64.

⁷¹ Niaz, I. (2020). Judicial activism and the evolution of Pakistan's culture of power. *The Round Table*, 109:1, 23-41

⁷² Ibid

⁷³ HUBBARD, W. (2013), "Testing for change in procedural standards, with application to *Bell Atlantic v. Twombly*", *The Journal of Legal Studies*, 42(1), pp. 35-68.

Appointment of Present Chief Justice

CJP has been appointed to a fixed three-year term beginning on October 26, according to a notification from the Ministry of Law and Justice. His appointment aligns with Articles 175A (3), 177, and 179 of the Constitution.⁷⁴ Just the day before, a Special Parliamentary Committee, consisting of both government and opposition members, nominated the Justice for the CJP position. Following the previous CJP, the next in line was another Justice, the senior-most judge.⁷⁵ However, under the Constitution (26th Amendment) Act, 2024, a 12-member parliamentary committee will select the new CJP from a panel of the three most senior Supreme Court judges. The committee submitted its recommendation for the appointed CJP to Prime Minister, which was subsequently approved by the President.

Analysis of the Present CJ's Steps and reaction by peer members

The process of judicial appointments in Pakistan has undergone a significant transformation, with ruling political parties increasingly exerting influence over nominations for superior court judges. This trend marks a departure from previous practices, where the judiciary largely retained control over the selection process. The growing role of executive influence has sparked debate over the implications for judicial independence and the broader democratic framework. Chief Justice of Pakistan (CJP) had called a meeting of the Judicial Commission of Pakistan (JCP) on December 6, 2024, to deliberate on nominations for additional judges in the Peshawar High Court (PHC) and Sindh High Court (SHC). The SHC has proposed 12 candidates, while the PHC has recommended nine for consideration. Similarly, the Lahore High Court (LHC) awaits approval for seven additional judges in an upcoming JCP meeting. A review of the nominees for these high courts reveals that ruling political parties, primarily the Pakistan Muslim League-Nawaz (PML-N) and Pakistan Peoples Party (PPP), have succeeded in embedding their influence within the process. Several nominees reportedly have direct affiliations with these parties or maintain strong professional ties with senior lawyers linked to the PPP and PML-N. This development is a consequence of the 26th Constitutional Amendment, which enhanced the executive's role in judicial appointments. The amendment allows for greater participation of parliamentary and executive representatives in the JCP, thereby amplifying political influence in what was previously a judiciary-dominated domain.⁷⁶

Historical Context: From Judicial Independence to Political Interference

The current shift contrasts sharply with the dynamics following the restoration of judges in 2009. During that period, executive influence over judicial appointments diminished significantly, and the judiciary assumed a dominant role in the selection process. The enactment of the 19th Constitutional Amendment further entrenched judicial control by increasing the judiciary's representation in the JCP, albeit amidst criticism from executive and bar representatives.⁷⁷ Under then CJP, the judiciary solidified its dominance through the framing of the JCP Rules of 2010. These rules vested the CJP with broad discretionary powers, sidelining the input of the executive, the law minister, and bar councils. Critics argued that this centralization of authority led to favoritism and nepotism, with judicial appointments often favoring individuals connected to the lawyers' movement or the chambers of influential figures.⁷⁸ Despite attempts to address these concerns, including boycotts of JCP meetings by the executive and bar representatives, efforts to amend the JCP Rules proved futile. Successive CJPs formed committees to consider proposed reforms, but none produced tangible results.

⁷⁴ Safta, (2021). M. Appointment of constitutional judges. A comparative law perspective. In *Expanding Edges of Today's Administrative Law* (pp. 133-153). Societatea de Stiinte Juridice si Administrative.

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ GADUGAH, N. (2017), "Rawlings, 415 past government officials, institutions grabbed state lands", retrieved November 23, 2024, from <https://www.myjoyonline.com/news/2017/November-7th/rawlings-jake-414-past-govt-officials-institutions-grabbed-state-lands.php>

⁷⁸ Ayaz Gul, 'Critics concerned as Pakistan parliament moves to pick new chief justice' [October 2024] 1(1) VOA News <<https://www.voanews.com/a/critics-voice-concerns-as-pakistan-parliament-takes-charge-of-picking-chief-justice/7830355.html>> accessed 11 December 2024

Resurgence of Executive Influence

The passage of the 26th Constitutional Amendment has marked a resurgence of executive and political influence in judicial appointments. The amendment's provisions have enabled the ruling political parties to exert direct influence on the nomination process, even for appointments to constitutional benches of the Supreme Court and high courts. Notably, the appointment of judges to the Sindh High Court illustrates the growing role of the executive in shaping judicial benches. During JCP meetings, executive members have actively influenced decisions, often overriding the preferences of judicial representatives. This reintroduction of political influence contrasts sharply with the judiciary's relative autonomy in the post-2009 era.

Broader Implications and Emerging Debates

The increasing politicization of judicial appointments has reignited debates about the criteria for selecting judges. Some legal experts argue that politically affiliated lawyers should be considered for judicial positions, contending that complete neutrality in judicial appointments is unattainable. They advocate for the inclusion of "democratically sensitive" judges who are attuned to political realities and public concerns. Others warn that such an approach risks undermining judicial impartiality and eroding public trust in the judiciary. The perception that political affiliations may influence judicial decisions could weaken the judiciary's role as an independent arbiter of justice and guardian of constitutional principles.⁷⁹

Impacts of Politically Influenced Appointments

In recent decades, Pakistan's judiciary has taken on a political role alongside its legal responsibilities. As the opposition strategizes its next steps, the courts may be pivotal in shaping the landscape.⁸⁰ A significant development in Pakistan's political landscape is the rise of the superior judiciary, which includes provincial high courts, the federal court of Islamic law, and the Supreme Court, as a powerful and proactive authority. Traditionally, Pakistan's military held the primary power, but as elected institutions and political parties seek to expand their governance, conflicts between institutions have become common. Within this competitive environment, Pakistan's superior judiciary has emerged as a key player, mediating disputes between political and state elites.⁸¹ Over the past fifteen years, the superior judiciary has transitioned from merely resolving political disputes to assuming a guardian role within Pakistan's political landscape. It has restricted the powers of elected institutions and vetoed their policies and actions to align politics with its own preferences.⁸² This shift has led the judiciary to frequently challenge and undermine both elected and unelected bodies. Opposition parties and officials aiming to confront civilian and military governance have increasingly turned to the assertive courts for support. The judiciary's prominent position and protective intentions were particularly evident during the recent events surrounding former Prime Minister's ousting.⁸³ The Supreme Court mandated ex-PM to participate in a parliamentary no-confidence vote against him, deeming his attempts to obstruct the process and call for early elections unconstitutional. This ruling divided public sentiment, with some viewing the court as a defender of constitutional order, while others labeled it a "judicial coup."⁸⁴

⁷⁹ Hasnaat Malik, 'Justice Shah puts Chief Justice Afridi in a tight spot' [December 07, 2024] 1(1) The Express Tribune <<https://tribune.com.pk/story/2514339/justice-shah-puts-chief-justice-afridi-in-a-tight-spot>> accessed 10 December 2024

⁸⁰ ALMEIDA, C. (2018), "Pakistan's Politics and Judiciary", retrieved March 25, 2018, from <https://www.dawn.com/news/1397406>

⁸¹ Friedman, B. (2009). *The will of the people: how public opinion has influenced the Supreme Court and shaped the meaning of the Constitution*. Farrar, Straus and Giroux.

⁸² Epstein, L., & Martin, A. D. (2010). Does Public Opinion Influence the Supreme Court-Possibly Yes (But We're Not Sure Why). *U. Pa. J. Const. L.*, 13, 263.

⁸³ Constable, P. (2017, November 27). Pakistan Caves to Protest Demands by Forcing out Law Minister after Days of Unrest. *Asia & Pacific. The Washington Post*.

⁸⁴ Almeida, C. (2012, July 15). *Judging the Court*. Dawn.

⁸⁵ Asma, R. (2012, January 12). *Judiciary Always Supports Army Rule*. Express Tribune.

To grasp the implications of this ruling, one must explore how the superior judiciary has evolved into a more independent and assertive institution. Changes within its structure and culture have positioned the judiciary alongside the military as a significant, unelected power. It navigates a complex relationship with both elected and unelected authorities, oscillating between confrontation and collaboration to influence politics and policy-making.⁸⁵ Meanwhile, political and military elites strive to co-opt or control judges, aiming to align the judiciary's expanding authority with their own objectives. This dynamic fundamentally shapes the political landscape in Pakistan. Nevertheless, the judiciary's interventions also heighten expectations and stir political dissatisfaction, resulting in a complex mix of power and vulnerability stemming from its increasing assertiveness.⁸⁶ Why did the judiciary become a proactive and assertive power center in Pakistan's politics after a history of collaboration with, and submission to, the influential civil-military bureaucracy? Firstly, a combination of constitutional provisions and judicial innovations empowered the judiciary to take action against other government branches. The 1973 Constitution expanded the judiciary's review powers, allowing high courts to enforce fundamental rights against state institutions.⁸⁷ The Supreme Court also gained the authority to issue orders on matters it considered of "public importance" regarding fundamental rights enforcement. Public interest litigation emerged in the late 1980s and gained significant traction after 2006, becoming a mechanism through which the court intervened in executive and legislative affairs for the sake of the public interest. The chief justice started to take up cases *suo moto* (on their own initiative), often prompted by news reports. The choice of when to exercise *suo moto* powers rested with the chief justice, allowing them to address public sentiments and enhance the court's visibility and influence. Secondly, the judiciary distanced itself from the executive branch by assuming control over judicial appointments. This separation began in the 1990s with judicial actions that diminished the role of executive institutions, and it was further solidified by a constitutional amendment in 2010.⁸⁸ The Judicial Commission, responsible for overseeing judicial appointments and promotions, includes various stakeholders but is primarily dominated by the chief justices of the Supreme Court and high courts. Third, high court judges are mainly sourced from a legal profession that increasingly rejects procedural restraint and favors confrontations with executive leaders, whether elected or military.⁸⁹ During the democratic decade of the 1990s, characterized by weakly institutionalized political parties and frequent inter-institutional conflicts, the fragmented political landscape and the rising role of courts in addressing political disputes led judges and lawyers to perceive the state's political leadership as having limited legitimacy. This environment opened up possibilities for the judiciary to influence national politics and policies. The interplay of new jurisdictional authority, the separation of the judiciary from the executive, the judicialization of politics, and a changing legal culture contributed to the judiciary's shift toward a more ambitious and confrontational stance.⁹⁰

⁸⁶ Constable, P. (2017, November 27). Pakistan Caves to Protest Demands by Forcing out Law Minister after Days of Unrest. Asia & Pacific. The Washington Post.

⁸⁷ Epstein, L., & Martin, A. D. (2010). Does Public Opinion Influence the Supreme Court—Possibly Yes (But We're Not Sure Why). *U. Pa. J. Const. L.*, 13, 263.

⁸⁸ ABADIE, A., ATHEY, S., IMBENS, G.W. AND WOOLDRIDGE, J. (2017), "When should you adjust standard errors for clustering?" (No. w24003). National Bureau of Economic Research.

As the judiciary increasingly influences and intervenes in political processes and outcomes, the role and authority of chief justices have grown particularly important. In addition to handling public interest litigation and judicial appointments, the chief justices of high courts and the Supreme Court determine which cases are accepted for hearings and decide the number and selection of judges to hear those cases. This allows chief justices to shape their court's agenda and indirectly affect the outcomes of cases through their choices in bench selection. Given the centralized nature of the judiciary, a compliant chief justice who is aligned with military or political interests can have a substantial effect on the jurisprudence of their court. The judiciary's close ties with bar associations complicate military and political elites' attempts to manipulate and control it. As judges develop their careers as professional lawyers, they primarily focus on gaining the respect of their peers in the bar. The bar has become actively involved in political matters and has effectively organized around both political and professional issues. This inclination for collective action was vividly demonstrated during the Lawyers' Movement in 2007, allowing the bar to serve as a counterbalance to efforts by political and military leaders to dominate the judiciary. Aware of this influence, political parties and the military have increasingly sought to pressure and persuade bar leaders to indirectly sway judges. The often adversarial relationship between the bar and the bench, alongside their shared legal culture, has contributed to the judiciary's increasingly confrontational stance.

Recommendations

Pakistan stands at no. 129/142 in the world rule of law justice index, while in terms of deliverance of civil justice we stand at 128/142 and the concerning factors that add up to this number include corruption, government influence, delay and effective enforcement⁹¹. The evolving dynamics of judicial appointments underscore a complex interplay between judicial independence and political influence. While the 26th Constitutional Amendment has formalized the role of the executive in the process, it has also raised critical questions about the balance of power between the judiciary and other branches of government. As ruling parties consolidate their influence within the JCP, the challenge for Pakistan's judiciary lies in safeguarding its independence while navigating the pressures of political intervention. Transparent criteria for judicial appointments, coupled with reforms to limit discretionary powers, are essential to restoring public confidence in the judiciary and ensuring that it remains an impartial and effective institution within Pakistan's democratic framework. Minimizing political influence in the appointment of superior judges in Pakistan is crucial for ensuring an independent judiciary. Significant role will be played by:

- Establishing a transparent, merit-based selection process for judges, focusing on qualifications, experience, and integrity. This can involve standardized assessments and evaluations.
- Forming independent judicial appointment committees that include legal experts, representatives from the judiciary, and civil society members. These committees should have the primary responsibility for recommending candidates without any interference from the political personalities nor any members from the legislative branch.
- Amending the Constitution to delineate clear criteria and procedures for judicial appointments, reducing the influence of the executive and legislative branches in the selection process.

⁸⁹ Angrist, J.D. and Pischke, J.S. (2008), "Mostly harmless econometrics: An empiricist's companion", Princeton university press.

⁹⁰ Ackerman, B. (1989). Constitutional politics/constitutional law. The Yale Law Journal, 99(3), 453-547.

⁹¹ World rule of law index, Page 139, <https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIndex2024.pdf>

- Implementing public hearings for judicial nominees, allowing input from legal professionals and civil society. This transparency can help alleviate concerns about political favoritism.
- Establishing mechanisms to protect the judiciary from political meddling, such as strong legal safeguards against arbitrary removals or unwarranted disciplinary actions.
- Examining the nominee judges on individual levels, including the standards such as their reported judgements, and considering the number of their judgements overturned by the superior courts and those upheld or used as reference by the High courts or the Supreme court of Pakistan.

The JCP is the primary body for judicial appointments under Article 175-A of the Constitution. To reduce political influence:

- The structure of the JCP could be reformed to ensure greater representation of independent stakeholders like retired judges, senior lawyers, and academicians.
- Limit the role of political actors, such as the Federal Law Minister or the Parliamentary Committee, in the appointment process.
- Ensure that all decisions of the JCP and Parliamentary Committee are reasoned and publicly available to enhance transparency and minimize arbitrary influences. If the Parliamentary Committee remains part of the process, its role should be advisory rather than decisive.
- Amend the 26th Amendment to limit its ability to reject nominations arbitrarily. Empower bar councils and legal bodies to provide recommendations or oversee the integrity of judicial appointments. Strengthen protections for judges to act independently, free from political retaliation or interference, which would make the judiciary less susceptible to political pressures even after appointments.

With respect to the enacted legislature, the 26th Constitutional Amendment does not define “Inefficiency”, nor does it establish a threshold or criteria for “inefficiency”. The term “inefficiency” is vague and Subjective, exposing judges to politically influenced removals and worsening the state of judicial independence. Earlier, the grounds for removal by the SJC were incapacity or misconduct. The amendment directly violates Article 14 of the International Covenant on Civil and Political Rights (ICCPR), which guarantees the right to equality before courts and tribunals and to a fair and public hearing by a competent, independent and impartial tribunal established by law. Article 10A of Pakistan’s Constitution also recognizes the right to a fair trial. The UN Human Rights Committee, an independent body of experts mandated by the ICCPR to interpret and apply its provisions, has authoritatively held that such a right is “an absolute right that is not subject to any exception” and a “situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.