



CONSTITUTIONAL COURT APPOINTMENTS MECHANISM AND JUDICIAL INDEPENDENCE; A STUDY OF USA, MALDIVES, CANADA, GERMANY, EGYPT AND PAKISTAN

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Abstract

All three branches of government, the legislature, which makes laws, the executive, which makes policy, and the people who elect these two departments of government, are impacted by the politics of the Supreme Court's judge-appointment process. In developing countries this process is very critical due to political motivated appointments. This study examines the appointment procedures of USA, Maldives, Canada, Germany, Egypt and Pakistan. It is found that only political determination can make judges appointments or removal of judges on merit. Different countries have rules and regulations for this purpose but all attached with the consent of political governments. Results are fetched based upon conceptual research study. This article highlights the issues with the Pakistani judicial appointment or removal process which is backed by powerful Supreme Judicial Council. In order to guarantee an unbiased, neutral, and efficient judiciary in Pakistan, this paper



demonstrates the urgent need to alter the constitutional and judicial procedures for choosing Justices.

Key Words: Political system, Supreme Judicial System, Supreme Courts, High Courts

1- Introduction

Judicial appointments procedures are divided in two main categories named as unitary and mixed. In unitary process, one department of political government have control on judicial appointments procedure whereas in mixed model appointment power is distributed among many branches of government and sometimes it involves different organs of civil society (Choudhry & Bass, 2014).

In United States of America, during a confirmation hearing, some political figures invariably criticize the organization. However, they criticize the court for acting extra judicial instead. More broadly, confirmation process convey a significant and widespread message to the public that the Supreme Court is constitutional and legal institution (Krewson, 2022).

The main goal of the reform in "judge quota" was to make the judiciary more efficient. To do this, a certain number of judges would be removed from office, and only those with higher qualifications would be reappointed. In china, restoring individualized judging while strengthening accountability was made possible by decentralizing judicial power to rate judges and reducing the extent and degree of administrative and political influence over judges during judgment. Legislation on the process to appoint judges has always been very important and critical (Sun & Fu, 2022).

The courts adjudicate disputes between the Center and States and uphold the rights of individuals. It preserves the Constitution's fundamental national and governmental systems. It is possible only if judges are independent and appointed on merit. But it is not possible without independent and meritorious judges. Therefore, there is a process for choosing these judges. The Indian Constitution also specifies how justices for the apex Courts would be chosen. However, there is a disagreement here between government and the judiciary in India regarding the authority of appointing superior justices. (Aggarwal & Singh, 2022).

The autonomy of courts is necessary for a true democracy because the role of constitutional courts is fundamentally represented by the concept of sureties of the power of the Constitution. Lawmakers and members of the legal profession including academics argue the selection of judges. Regarding European nations, the varied nature of the legislation is highlighted as one of the key components which uphold the ideal of autonomy and public confidence in judicial justice (Safta, 2021).



One of the most important factors in ensuring judges' freedom to make decisions in accordance with the office's oath is how they are appointed. The constitutional obligation to discuss and consult with chief justice was restored after 4th amendment in constitution but only for one and half year. After that it remained suspended for 34 years from 1977 to 2011. Now its responsibility Supreme Judicial Council to recommend nominations for judges of apex courts (Bari, 2022).

2- Material and Methods

This is a conceptual research based study on the review of the Constitutional Court Appointments mechanism and Judicial Independence for speedy Justice; A study of USA, Maldives, Canada, Germany, Egypt and Pakistan. A conceptually driven design makes it easier for the many parts of a research study to interact with one another and may maintain theory, the study challenge, and the facts strongly tied (Makrygiannakis & Jack, 2018). In a conceptual paper, new links and relationships between concepts are suggested and included rather than statistics, which isn't the primary necessity. Moreover, rather than relying on empirical investigation, the duty is to strengthen the logic underlying such links in conceptions (Gilson & Goldberg, 2015). For this study, firstly data was collected from different countries regarding the appointments procedure of judges and secondly it was compared with Pakistani judicial appointments system.

3- Literature Review

3.1-Appointment Procedure of USA and Maldives

Apex court in United States of America (USA) and Maldives is Supreme Court. In both countries, Maldives and USA, president has powers to nominate justices for appellate courts. The US President proposes a nominee and, with the Senate's counsel and consent, appoints a Judge to SCOTUS which is Supreme Court of United States. The President proposes a nominee for Supreme Court after consultation with the Judicial Service Commission in Maldives. Moreover approval from People's Majlis for the candidate is mandatory. Congress decides the composition of SCOTUS. Furthermore, the governmental part of Maldives, the People's Majlis, have authority to give the directives for the Supreme Court of Maldives (Shafie & Aziz 2019).

The distinction in selection process is very thin. In case Maldives, the Constitution requires both the president and Judicial Service Commission (JSC) for the proposal of Judges to the Supreme Court whereas, the United States' Constitution only allows executive, the president, to nominate Judges for the SCOTUS (McMillion, 2018).

The qualification for the post of justice not mentioned in U.S. Constitution which means that it is at the discretion of the President to nominate judges including Chief Justice of appellate courts after receiving approval from Senate. However, in Maldives, a person should be of 30 years,



minimum seven years of practice as judge or lawyer and must have knowledge of Islamic law (Shafie, 2021).

The confirmation of nomination in US constitution is done by senate who have an advisory role for president and then judiciary committee confirm the nomination whereas the Maldives' parliament becomes involved when the President proposes a person and sends it to the legislature for approval. At that time decision to give or refuse rests with the parliament (Shafie, 2021).

It is the duty of the Senate Judiciary Committee to investigate the nominee's professional past with reference to experience with the help of FBI. Committee also take information regarding public perception of the nominee (McMillion, 2018). While in the Maldives, the topic is raised in parliament and then forwarded to the appropriate standing committee for assessment when the parliament gets the president's recommendation. The Independent Institutions Committee is the pertinent Standing Committee to look at the selection of a Justice to the Apex Court of the Maldives (Suood, 2014).

Therefore, in the US, the Senate Judiciary Committee sends its report to Senate clearly mentioning that either nominee is confirmed or not (McMillion, 2018). In the Maldives, parliament receive reports, sent by the committee for review. The Committee is expected to indicate in the Committee report either it voted to accept or reject the Majlis' consent. The Speaker place the report on the agenda of the parliament's earliest session once the Committee submits its report after studying the issue of granting authorization to nominees who have been nominated for the Supreme Court (Suood, 2014).

The Senate Secretary verifies and forwards the Senate's final resolution of confirmation to the White House after the Senate votes to confirm the candidate for appointment. After that, the President seals a "paper called a commission." The contestant then requires dual oaths of offices which includes constitutional and judicial oath, and is finally admitted to the Supreme Court of the United States after the President signs the aforementioned paperwork. In the Maldives, the candidate for the Supreme Court of Maldives is chosen for the court, after oath of office and receiving the approval of the parliament (Jones, 2005).

3.2-Appointments of Judges in Canada

According to Supreme Court Act of Canada the Governor in Council who is actually the prime minister have power to appoint judges. This system was in practice in England at the time of coalition. The newly elected prime minister first said in 2003 that there is a "democratic deficiency" in the selecting procedure and that a more open and accountable procedure must be implemented. The new procedure, which called for the nominees to be heard in parliament, was



established in 2006. When a position needed to be filled, this new method was not always adopted, and in 2014 it was declared that it would no longer be obeyed at all (Bodnár, 2017).

In 2016 new procedure was opted where public call was made to fill the vacant positions of judges. The impartial Advisory Body received the applications after the Office of the Commissioner for Federal Judicial Affairs determined whether they met the formal requirements. The Advisory Board was required to evaluate which applicants fulfilled the Prime Minister's criteria as well as the legislative requirements before submitting the names of at least three and maybe as many as five applicants to him (Russell, 2017). Same procedure was adopted in 2017 as well. Although the selection process was strict but still a lot of criticism was made on it. For instance, the Chief Justice's involvement is not entirely apparent. The Chief Justice was approached twice throughout the selection process, the second attempt regarding a shortlist that might not include the candidate who was recommended. The parliament has two opportunities to participate in the process, but the 2nd time it just receives an explanation and no decision-related material. Nobody is aware regarding potential disagreements, if any, between both the Premier and the related minister (Bodnar, 2017).

3.2.1- Removal of Judges in Canada

The judges of the Supreme Court of Canada are appointed for a fixed term but are subject to removal by the governor general at the request of the Senate and House of Commons (W. P. M. K, 1946)

3.3- Judicial Appointments Procedure in Germany

Legislative supermajority appointments model is being practiced in Germany which appoint, a renounced constitutional courts, the German Federal Constitutional Court (FCC). According to this model, the legislature is in charge of choosing judges under a legislative supermajority appointments paradigm. According to the political structure of a nation, one or both chambers of the legislature are in charge of choosing judges (Harding, Leyland, & Groppi, 2008).

The law, which stipulates that 50 percent of the judges will be chosen by chambers of the German legislature, lower house which is elected directly, Bundestag, and the upper house which is not elected directly, Bundesrat. The number of judges on the FCC or the necessary percentage to appoint a judge are not specified in the Basic Law. Four senior judges who had lifelong tenure were added to the eight members of each senate at first, making twenty-four judges in total. Furthermore, over period, both the quantity and duration of judges have altered (Geck, & Egidio, 1988).



The Bundestag picks justices by making an Electoral Committee of 12-persons, through indirect method, which meets in secret. Party list method is used to ensure lawful representation of opposition parties on the Electoral Committee, members are chosen via a party list method. Whereas two-thirds simple majority is necessary to choose a judge in the Bundesrat, a legislative chamber that chooses judges. In reality, nominees are chosen by a special advisory group before the full assembly votes. Prior to the vote, this group, which is mostly made up of ministries of the federal states and carefully chosen party members, negotiates with potential judicial nominees to ensure their success. To prevent repeated nominations, this group works with the Bundestag's Electoral Committee in coordination. Appointments to the FCC typically adhere to a quota system because both, the CDU and the SPD have historically controlled German politics. Each mainstream party will nominate 50 percent of the judges to each of the two senates of the FCC, in accordance with a contract (Kommers, 1976).

Moreover, the small Electoral Committee's insufficient representation of all political groups in the Bundestag, according to critics of this arrangement, renders it undemocratic. Additionally, the discussions on candidates are controlled by tiny group of influential party leaders in absolute conviction, making entire procedure opaque and shielded from media scrutiny (Fohr, 2012).

3.3.1 Removal of Judges in Germany

Judge punishment and dismissal fall under the supervision of the Federal Constitutional Court. FCC judges will only be removed forcefully when they are irreparably unsuitable for duty, have received an unappealable punishment for a "disgraceful conduct" or a term of more than 6 months of jail. The President have authority to dismiss a judge based on a 2/3rd simple majority of the FCC's bicameral legislature meeting in session. But no judge is dismissed in near past (Seibert-Fohr, 2012).

3.4 Judicial Appointment procedure in Egypt

The Supreme Constitutional Court (SCC) was created under the Egyptian constitution, which started its operations after the passage of implementing lawmaking in 1979. SCC has been working from 2011, firstly under the rule of the Supreme Council of the Armed Forces (SCAF) and further under Morsi's regime. Role of SCC is very critical and controversial in whole political system of Egypt. To avoid conflict with Mubarak's dictatorship, the SCC frequently postponed making decisions on politically sensitive issues, such as electoral legislation and military courts for civilian's trial (Brunner, 2009).

3.4.1 Appointment rules

A candidate for Judge must meet at least one of the following conditions



- 1- Possess prior judicial experience or have held a comparable post, as required by law.
- 2- Prosecutor at senior position.
- 3- Nine years work experience as lawyer including four years' experience in court of appeals.
- 4- Law academician with at least nine years work experience (Hajjaji, 2018).

Only 68 female judges are working in whole judicial system at the moment. The supreme judicial council neither made a declaration forbidding the selection of other categories nor made these categories subject to applications. Resultantly, only senior prosecutors are capable of being appointed (Hajjaji, 2018).

3.4.2 Appointment Stages

There are six stages in whole judicial appointment procedure starting with advertisement in the local media for SJC vacant position. Second step is interviews of candidates based upon their experiences. Thirdly, SCJ make list of potential candidates and send it to ministry of Justice who make all necessary security checks. Fourthly, National Security Agency (NSA) make all investigations of candidates and their families. In terms of political affiliations, the SJC and the Ministry of Justice have a zero-tolerance approach, especially when it comes to those with Fundamentalists, liberal parties, or other similar organizations. At fifth stage medical examination including blood and urine samples only to ensure the either candidate is alcoholic free or not. At last stage president's appointment ruling is made to confirm the position for the candidate. Names of selected candidates are published in two main stream local newspapers (Aidaros, 2022).

3.4.3 Removal Procedure

It is the responsibility of Supreme Constitutional Court to have look over judges and their conduct. If Chief Justice finds anything unlawful in conduct of a judge, who is allegedly dishonest or negligent in their responsibilities, he can constitute a committee to investigate the matter. The individual, under trial, is sent on paid leave if necessary. The General Assembly of the Court makes decision about the individual's resignation following a process. Their choice would be both irreversible & ultimate (Aidaros, 2022).

3.5 Judicial Appointments Procedure in Pakistan

After 18th amendment an act of 2011 was in practice to appoint judges in Supreme Court, Federal Shariat Court and High Courts. Two forums, Judicial Commission of Pakistan and Parliamentary Committee, are used to proceed for appointments. Judicial commission works under the chair of Chief Justice and comprises of attorney general, federal & provincial law ministers, nominated members form bar councils, senior most judges of Supreme Court and chief justice of high courts. Nominations are sent to parliamentary committee (PC) for its approval. There are



eight members in PC, four each from National Assembly and Senate, who send its confirmation to president through Prime Minister for selection. This procedure was further improved on recommendations by 17-member bench when 18th amendment was challenged (Siddiqui, 2012).

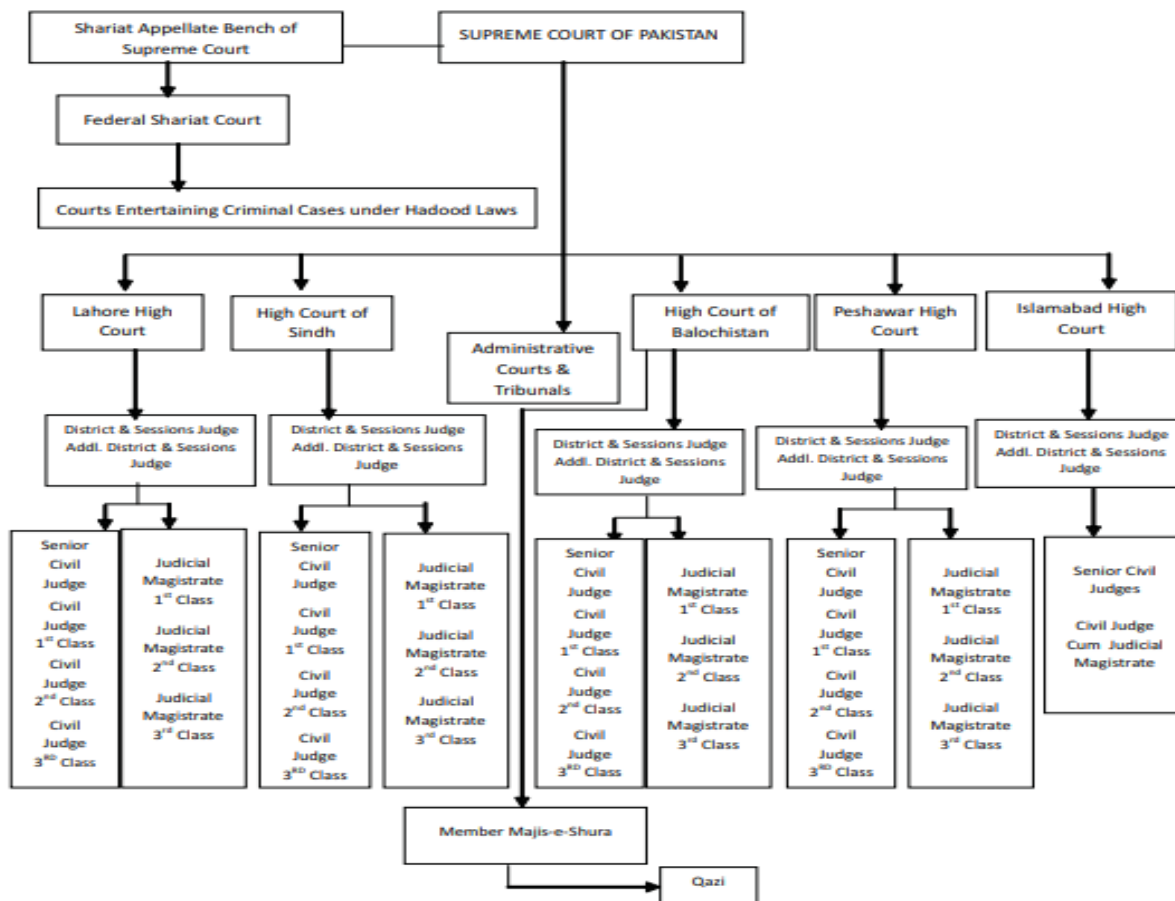
Under article 175 A of the constitution of Pakistan, president is the one who will appoint senior most judge as chief justice of Supreme Court. The Chief Justice (CJ) and most senior judge of the Federal Shariat Court are included to the Judicial Commission's membership for the appointment of those judges, with the exception of the Chief Justice, who is not included in this membership. For the appointments of chief justice and judges of high courts, provincial law minister, a nominee from bar council, 15 years of standing, CJ and senior judge of the respective court are part in composition of commission. However, for selection of CJ, the senior most judge is excluded from the commission proceedings. The President appoints the Chief Justices and justices of the Federal Shariat Court and High Courts after the Judicial Commission recommends them and the Parliamentary Committee confirms their selection (Hussain, 2011).

3.5.1 Role of Supreme Judicial Council for Accountability

The Supreme Judicial Council (SJC) is a special organisation made up of the highest ranking judges in the legal system, and it has been given the burdensome task of adjudicating grievances that have been presented to it. The SCJ is made up of the Chief Justice of Pakistan, called chairman, as well as the two senior judges of Supreme Court and two most senior Chief Justices of high courts. Either president send reference or Supreme Court take suo moto action against any judge, in both cases matter is supposed to be handled by SCJ (Hussain, 2011).



3.5.2 Court's structure in Pakistan



3.5.3 Removal of Judges

If SJC gives verdict against the judge, by saying that judge is incapable to perform duties, the president may order for removal of judge. But article 209 says that judge will be removed from service only on some stated grounds after following the set procedure (Siddiqui, 2012).

3.5.4 Strength of Judges in Apex courts

Court name	Supreme Court of Pakistan	Lahore High Court	Sindh High Court	Balochistan High Court	Peshawar High Court	Islamabad High Court	Federal Shariat Court
No. of positions	Chief Justice + 16	Chief Justice + 59	Chief Justice + 39	Chief Justice + 10	Chief Justice + 19	Chief Justice + 6	Chief Justice + 7 (3 ullama)

(Hussain, 2011)



4- Conclusion

In order to maintain the constitutional court's autonomy and shield it from political meddling, as well as to ensure that it is approachable to the society in which it is operating, the selection process should be set up to strike the ideal balance between these two needs. Developed countries have good system and high moral values to appoint judges on merit but case is not same for developing countries like Pakistan where every powerful institution want more power of their own wish. Egypt and Pakistan's system facing challenges while it comes to accountability of judge of chief justice. This study finds that since 1996, the Supreme Court has taken a keen interest in the Constitutional amendments governing judicial appointments and has essentially rewritten them. The Eighteenth Amendment's addition of a new judicial appointment procedure gave it the appearance of being significantly more open and efficient than the one that had previously been in place. However, the court's interpretation has fundamentally altered and equated the current procedure with the one that had previously been in place, with the sole difference being that the present procedure involves five judges of the Supreme Court as opposed to the Chief Justice alone in the earlier procedure. But in both, the judicial review & SCJ, the power balance that assembly upheld under the revision has moved back in favor of the judges. Although there are defects in the procedure, if democratic officials stay within those bounds, it will only help it improve and progress toward reaching the constitutional goal of impartiality.

5- Recommendations with reference to Pakistan

After 18th and 19th amendment in constitution of Pakistan, political powers also went in favor of judiciary resulting the indefinite powers of judiciary. They themselves are responsible to promotions, accountability and have recommendatory powers for judges' appointments. Keeping in view my recommendations for Pakistan as follows

- 1- Role of judiciary for appointments of judges should be minimized.
- 2- Judges accountability process is dependent on judges themselves who can mold everything in favor of their fellow judges. Professionals, other than judges, should also be included during the process.
- 3- Parliamentary committee should have the power to reject the nomination made by SCJ.
- 4- Role of bar councils should be increased as they are from same filed and can judge better than politicians.
- 5- Selection or nomination process should be transparent and open to all.
- 6- Fix number of female judges should be introduced for special female cases.



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