

Can the Chief Justice of Pakistan be tried in the Supreme Judicial Council?

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Abstract: *This article delves into the intricate question of whether the Chief Justice of Pakistan can be subjected to trial within the ambit of the Supreme Judicial Council (SJC). The SJC, established under Article 209 of the Constitution, holds the authority to investigate and potentially impeach judges, including the Chief Justice, for acts of misconduct or incapacity. Drawing upon constitutional provisions, historical precedents, and legal scholarship, this article critically examines the scope, limitations, and implications of subjecting the Chief Justice to SJC proceedings.*

Supreme Judicial Council is the constitutional body to recommend appropriate action against Judges in the superior court for misconduct in Pakistan. However, Constitution is silent about the action to be taken against the Chief Justice of Pakistan. This paper will analyse the factual situation prevailing in Pakistan and give recommendations for the action to be taken in case of Chief Justice of Pakistan

Keywords: Pakistan, Chief Justice, Article 209, Removal, Supreme Judicial Council

Introduction

Constitution is regarded as supreme law of the land in all countries with written constitution. Constitution enumerates the powers and functions of each organ of a state for the purpose to prevent them from becoming despotic. The functioning organ of a Government consists of legislature, executive and judiciary. Legislature makes a law, executive enforce it while judiciary exercise the power of judicial review, which means no law should be made which is not in conformity with the Constitution. Judiciary is also regarded as the custodian and protector of mass liberties (Rafia, 2021).

According to Montesquieu, “Constant experience has shown us that every man invested with power is apt to abuse it and to carry his authority until he is confronted with limits”. There is always separation of powers or balance of power for this purpose, which also works as checks and balances, implying that no organ should be allowed unrestricted powers. In order to achieve balance, the power of one organ monitors and restrains the power of another. One of the essentials of a stable democracy is an independent judiciary which must be able to freely and fairly exercise its role as both guardian and guarantor of constitution and fundamental rights. To be custodian of the constitution, it is necessary that it should be independent which means that constitution should enumerate the qualifications, appointment procedure, tenure, and jurisdiction and removal procedure of judges of Constitutional Courts. If it is not provided by the constitution, the institution may become despotic and vice versa (Khan, 2020).

In many states where the constitution prescribes the process for appointing judges, it also stipulates the procedures for removing judges in order to maintain accountability. The most systematic procedure is adopted by the Constitution of United States of America. According to article 3 of American Constitution judiciary is an independent third limb of the Government. It has the power to hear and arbitrate cases of all nature with neutrality. It states the appointment and removal procedure of the judges of the Supreme Court. The judges hold office in good behaviour and can only be removed by the congress of United States for treason, bribery or other high crimes or transgression (Constitution of United States of America 1789 Article 3).

The Indian Constitution also specifies the impeachment procedure. It stipulates that a Supreme Court judge may be dismissed in accordance with article 124 of the Indian Constitution. After address to each House of the Parliament has, the President has the authority to dismiss a judge. A majority of members, but not less than two-thirds of the members must endorse it. This recommendation for dismissal due to established malfeasance or incapacity must be presented to the president within the same session.ⁱ

The process for removing judges from the higher courts is also outlined in the Pakistani constitution. The Supreme Judicial Council of Pakistan is a body with the authority to hear cases of misconduct against judges according to the Pakistani constitution. The Chief Justice of Pakistan's Supreme Court and the two senior-most Supreme Court judges and two Chief justices among the High Courts, who are in seniority make up the Supreme Judicial Council of Pakistan, as stated in Article 209 of the Pakistani Constitution (Chaudhry, 2020).

Furthermore, if a member of the Council is a Supreme Court judge and his behaviour is under scrutiny or he is unable to participate in an inquiry for any reason, the next senior member in line will represent him. If it is the Chief Justice of a High Court, his representative will be the next senior-most Chief Justice of another High Court.

After receiving information from any source, the Council or the President determines that a judge is either incapable of carrying out his duties as required due to a physical or mental impairment; or responsible for misdemeanours (Constitution of Pakistan 1973 Article 209(3)).

The Council shall be instructed by the President to inquire into such a judge. Council may initiate an investigation for the aforementioned objective. Following an investigation, it recommended to the President that the Judge be dismissed because he was either unable to carry out his responsibilities or had acted inappropriately. On the council's advice, the president has the power to dismiss a judge. The said procedure is the only way to remove a Superior Court judge.

Background

Ensuring the accountability of the higher judiciary holds significant significance, given that the judges of constitutional courts have sworn an oath to uphold, safeguard, and maintain the Constitution of Pakistan. The responsibility for this oversight rests with the Supreme Judicial Council, comprising the most senior judges themselves. This council bears the substantial duty of ensuring that judges in superior courts adhere to the Code of Conduct, thereby maintaining their adherence to constitutional accountability. Judicial independence does not imply that judges are exempt from being responsible for their actions. Judicial independence, in the absence of judicial accountability, could potentially lead to misuse and abuse. Therefore, the notion of judicial independence inherently encompasses the idea of holding judges accountable for their actions. Fundamentally, the Supreme Judicial Council serves as the governing body of the judiciary, ensuring oversight over the activities of judges in the Constitutional Courts (Kalanauri, 2020).

Pakistan inherited the judicial system from Great Britain. This system provided, for removal of judges but nowhere is the name of Chief Justice. Same trend is in practice in Pakistan. The procedure provided by Government of India Act 1935 was that a judge could be removed by the Crown on the ground of

mental or physical infirmity or misbehaviour. For this purpose a reference was to be made by Crown to the Judicial Committee of the Privy Council which recommend his removal (The Government of India Act 1935, Section 205).

The Constitution of 1956 was parliamentary in nature. The procedure provided by it showed parliamentary spirit. This was similar to Indian constitution. The removal of a judge required an address of the National Assembly with the stipulation to be supported by the majority of the total. This address must be passed by two-third majority. Then it would be forward to the President for final order. This was an improved and balanced approach (Jamil, 2006).

The constitution of 1962 introduced a Presidential system in Pakistan. Appointment of judges was the authority of the President. For removal it was provided that the President was to appoint a Supreme Judicial Council comprised of the Chief Justice of Pakistan, two senior-most judges of Supreme Court and Chief Justices of each High court. It seems from the composition that the old model of the Judicial Committee of the Privy Council was adopted in the Constitution of 1962. The power of removal of Judges was vested both in the Executive and in the Judiciary (Khan, 2009).

The method for removal of judges in the 1962 constitution was retained in the Constitution of 1973. In 1973 constitution the power of removal of judges vested in the President and Supreme Judicial Council.ⁱⁱArticle 209 has been amended three times with slight changes but the procedure remains same.ⁱⁱⁱAll the three permanent constitutions of Pakistan are silent about the removal of chief Justice of Pakistan although appointment procedure of the CJP is different from his other colleagues.

Issue of removal of Chief Justice of Pakistan

The method of appointment of judges comes into debate for several times before the Supreme Court of Pakistan but removal method never turn out to be an issue. An eminent case that came under the scrutiny of the Supreme Judicial Council occurred in 1971. The case involved Mr. Justice Shoukat Ali, and following a comprehensive hearing, it was concluded that he should be removed from his position due to allegations of misconduct. During the proceedings, Mr. Manzoor Qadir and M. Anwar Advocates represented him, while Sharif-ur-Din Pirzada served as the Attorney General (Mr. President, (Referring Authority) v. Mr. Justice Shoukat Ali, 1971).

Another instance involved Mr. Justice Akhlaque Hussain, a Judge of the High Court of West Pakistan. In this case, the SJC recommended the removal of the respondent judge to the President based on accusations of misbehaviour (The State v. Mr. Justice Akhlaque Hussain, 1960). The removal process was discussed in relation to appointment method for the first time in Asad Ali's case, which established the principle of seniority for appointment of Chief Justices of the Superior Courts. It was also declared by the Court that the method provided under the Constitution to remove a Judge of the superior Court from his office is to commence proceedings against a judge in the Supreme Judicial Council.

A controversy aroused regarding to removal of Chief Justice of Pakistan on 9th of March, 2007 when the President filed a Reference before the Supreme Judicial Council against the CJP. Justice Iftikhar Chaudhry challenged it through a Constitutional petition before the Supreme Court. The petition was heard by thirteen members of the Court. The full Bench decided the matter in favour of the petitioner which led to the reinstatement of Chief Justice (Iftikhar Muhammad Chaudhry v. President of, 2007).

In its decision the Supreme Court declare that Supreme Judicial Council is a medium created by the Constitution for inquiry purpose. It is not given status of a court. The measures takes places under article 209 of the Constitution of 1973 are in the nature of inquiry and not of a trial.

The Council after inquiry will submit its report to the President. The opinion of Supreme Judicial Council regarding to the fitness of a judge has a worth but it has no power to give it decision which is binding in nature. It was also declared by Supreme Court in Khan Asfand Yar Wali Case and Malik Asad Ali Case that the findings and report of Supreme Judicial Council are not binding but only

recommendatory in nature.

Constitution never conferred Supreme Judicial Council with any powers to restrain the Chief Justice of Pakistan or even a Judge from performing his duty. It did not enjoy any powers like the Supreme Court of Pakistan as original jurisdiction where it is sanctioned by the Constitution to issue commands, instructions or decrees as may be necessary for administration of justice. It did not had inherent powers to issue any kind of direction like High Court which it had under Section 151 of the Code of Civil Procedure and under Section 561-A of the Code of Criminal Procedure.^{iv} This judgement shows that Supreme Judicial Council is at very weak plinth in case of removal of judges. The full Court did not adjudicate the question that what would be the removal procedure if the Chief Justice of Pakistan was questioned for any infirmity or misconduct (*Iftikhar Muhammad Chaudhry v. President of Pakistan*, 2007) .

The combination of unclear procedures and inconsistent implementation, with a pace that can be both swift and frustratingly slow, causes significant unease within the legal community. This unease is particularly pronounced among certain judges whose complaints have been left unresolved and unresolved (Pirzada, Dawan, 2023)

Suggestions

Following are the suggestions for removal of Chief Justice on account of any incapability or misdemeanours:

1) Impeachment process

United States of America is one of the strongest democracies of the world having almost an ideal process for the appointment and impeachment or removal of judges to ensure stable democracy and dispensation of justice. Likewise Indian Constitution shows its democratic norms by implementing a kind of impeachment of judges made it accountable to law. The Constitution of Pakistan is salient about the removal of chief justice of Pakistan and procedure given in Article 209 is not clear regarding impeachment or removal of judges having several ambiguities and flaws. Pakistan may introduce an impeachment process like United States of America and India through a constitutional amendment.

2) Full court proceeding:

Another suggestion may be to make the inquiry proceeding of the Supreme Judicial Council as full court proceeding in case of Chief justice of Pakistan. All the Judges of Supreme Court will participate and conduct a fair inquiry of the matter and forward its recommendation which must be of binding nature to the Head of the State. This procedure will eliminate the element of bias which was faced by Justice Iftikhar Chaudhry in its removal proceedings.

3) Independent commission:

Seven people could make up an independent commission. There might be the president, three former Chief Justices of the Supreme Court, a renowned attorney, two lawmakers—one from the Treasury Bench and the other from the opposition. Supreme Court Registrar will serve as the Commission's secretary.

Conclusion

All the Constitutions of Pakistan are silent regarding the method of removal of Chief Justice of Pakistan. Neither this question was raised nor decided in the history of Pakistan. At one occasion, when this question could be decided in Iftikhar Chaudhry case, but the Full Court did not consider it. It is therefore, suggested that Constitution may be amended to secure removal of Chief Justice for gross violation through impeachment; full court proceedings or Independent commission may be established to tackle an issue if arise in the future.

In conclusion, the question of whether the Chief Justice of Pakistan can be tried in the Supreme Judicial Council (SJC) represents a complex and multifaceted issue that intertwines principles of judicial accountability, constitutional safeguards, and the preservation of judicial independence. As the custodian of justice in the country, the Chief Justice holds a position of immense responsibility, and the accountability mechanisms in place serve as a critical check to ensure ethical conduct and adherence to the law.

The Supreme Judicial Council, which was instituted by the Pakistani Constitution, is crucial in maintaining the credibility of the judiciary since it hears cases involving accusations of wrongdoing against judges, including the Chief Justice. Accountability procedures are necessary to preserve public confidence and the rule of law, but they must be weighed against the need to protect the judiciary's independence from improper influence so that judges can make decisions without fear of retaliation.

The discourse surrounding the trial of the Chief Justice in the SJC reflects broader debates on the separation of powers, the autonomy of the judiciary, and the supremacy of the Constitution. Striking the right balance between judicial accountability and independence remains a formidable challenge. Ensuring that accountability procedures are transparent, fair, and free from political considerations is essential to foster public confidence in the judiciary.

In navigating this complex terrain, it is imperative for legal scholars, practitioners, policymakers, and society at large to engage in thoughtful discussions that transcend individual cases. A transparent and accountable judiciary contributes not only to the establishment of the rule of law but also to the protection of citizens' fundamental rights. As discussions continue, it is hoped that the accountability mechanisms evolve in a manner that upholds the principles of justice, integrity, and the highest standards of conduct while preserving the sanctity of the judiciary and the pivotal role of the Chief Justice within it. Ultimately, the resolution of this question lies at the intersection of legal principles, ethical considerations, and the overarching goal of ensuring a just and equitable society.

References

- Ahmed, I. (2020). Review Essay: Designing Democracy: Judges, Judicial Review and Constitutionalism in Pakistan South Asia. *Journal of South Asian Studies*, 43:2,369-374
- Ahsan, J.P. (2023). Accountability or a dictatorial remnant? <https://www.dawn.com/authors/10456/ahsan-j-pirzada> retrieved on 10.05.2024
- Ali, R., N. Jabeen, T. Jan, M. (2021). Judicial Appointments in the Historical Context: From 1947-2005. *PAKISTAN SOCIAL SCIENCES REVIEW*, 5(1),482-490, doi:10.35484/pssr.2021(5-I)37
- Al-jihad Trust v. Federation of Pakistan, PLD 1996 SC 324
- Chaudhry, G., M. (2020), the constitution of Pakistan. 1973, Lahore: Federal Law House, 234-236
- Chaudhry, G., W. (2020). Constitutional Development in Pakistan. London, Longman Group Limited, 91
- Constitution of United States of America, Article 3 retrieved from <https://www.senate.gov/about/origins-foundations/senate-and-constitution/constitution.htm>
- Constitution of India, Article 124(4) and (5) <https://legislative.gov.in/constitution-of-india/>
- Constitution of Pakistan, Article 209(1) https://na.gov.pk/uploads/documents/1333523681_951.pdf
- Iftikhar Muhammad Chaudhry v. President of Pakistan, Short Order (PLD 2007 SC 578), Detail Judgment (PLD 2010 SC 161)
- Kalanauri. (2020). Has the Supreme Judicial Council been able to Judge the Judges? <https://zafarkalanauri.com/wp-content/uploads/2020/05/Supreme-Judicial-Council-of-Pakistan.pdf>
- Khan, H. (2020), Constitutional and Political History of Pakistan of Pakistan. Lahore: Oxford

University press, 560-570

Khan Asfandiyar Wali v. Federation of Pakistan PLD 2001 SC 607

Malik Asad Ali and other v. Federation of Pakistan PLD 1998 SC 161

Mr. President (Referring Authority) v. Mr. Justice Shoukat Ali PLD 1971 SC 585

Mehmood, S. (2020). Judicial Independence and Development: Evidence from Pakistan. 77-90

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

Shahida,J. Independence of Judiciary, retrieved from www.supremecourt.gov.pk/ijc/Articles/2/4.pdf

Sultan, S. & Jabeen, T. (2020). Changing Facets of Judicial Activism in Pakistan. Review of Education, Administration & Law 3(3), 523-534.

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

The Government of India Act 1935, Section 205https://www.legislation.gov.uk/ukpga/1935/2/pdfs/ukpga_19350002_en.pdf

The State v. Mr. Justice Akhlaque Hussain

The constitution (First Amendment) Act 1974,the legal framework order 2002,the (Eighteenth Amendment) Act 2010
