STUDY OF THE CONSTITUTIONAL INDEPENDENCE OF THE SUPERIOR JUDICIARY IN PAKISTAN.

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ABSTRACT:

The First Constituent Assembly of Pakistan passed a resolution in March 1949 called the Objectives Resolution. This Objectives Resolution established amongst other ideals "the independence of the Judiciary shall be fully secured". The Objectives Resolution remained a preamble to all Constitutions of Pakistan. It has been made an enforceable part of the Constitution in 1985 under newly inserted Article 2-A. The constitutional independence refers to the way in which the judiciary is constitutionally structured. This paper examines the constitution of Pakistan whether it provides and secures independence of judiciary in Pakistan. The irony is that the first danger to the constitutionally guaranteed independence of the judiciary is from within the Constitution itself. There are certain provisions of the Constitution of 1973 which are in clash with the Objectives Resolution of 1949 and are detrimental to judicial independence,

Introduction:

The First Constituent Assembly of Pakistan passed a resolution in March 1949 called the Objectives Resolution wherein the founding fathers of Pakistan resolved to frame a Constitution for the newly independent state of Pakistan. This Objectives Resolution established amongst other ideals "the independence of the Judiciary shall be fully secured". The Objectives Resolution remained a preamble to all Constitutions of Pakistan but was not enforceable as it was not substantive part of the Constitutions. It was made an enforceable part of the Constitution in 1985 under newly inserted Article 2-A, which provides that the principles and provisions set out in the Objectives Resolution are made substantive part of the Constitution and shall have effect accordingly.

Here the focus is to study the provisions of the Constitution related to the Judiciary whether they are consistent with the principle laid down in the Objectives Resolution that is "fully securing the independence of Judiciary". Articles 177, 179, 180, 181, 182, 193, 195, 196, 197, 200, 203C, of the

Constitution of Pakistan are discussed.

1: Appointment of Judges to the Superior Courts:

Judges including the Chief Justices of the Supreme Court, High Courts and Federal Shariat Court are appointed under Articles 177(I), 193(I) and 203C (4) of the Constitution respectively. Under Article 177 (I) of the Constitution the Chief Justice of the Supreme Court to be called Chief Justice of Pakistan is appointed by the President of Pakistan and other Judges are appointed by the President after consultation with the Chief Justice of Pakistan.

According to Article 193(1) of the Constitution, a Judge of High Court is appointed by the President after consultation with the Chief Justice of Pakistan, the Governor of concerned province and the Chief Justice of the concerned High Court except where the appointment is that of the Chief Justice of the concerned High Court.

Under Article 203-C the Judges including the Chief Justice of the Federal Shariat Court are appointed by the President for a term of three years which may be extended further. Under this Article no consultation with anyone is provided. It means that sole and tremendous powers of appointing Judges to the Federal Shariat Court are available to the executive under this article.

From the study of Articles 177, 193 and 203-C, the following questions emerge:

1. As Pakistan has adopted a parliamentary system of government under the Constitution of 1973, the question is whether it is the discretionary powers of the President to appoint judges of the Superior Courts or he is to act in accordance with the advice of the Prime Minister?
2. What is true import of the expression “after consultation” under articles

177 and 193? Whether the recommendations of the consultees are binding on the President?

3. Whether an acting Chief Justice is included in the list of consultees?
4. Who should be appointed the Chief Justice of a High court?
5. Who should be appointed the Chief Justice of Pakistan?
6. In case of difference of opinion among the consultees, whose opinion shall have primacy and shall prevail?
7. Who will initiate the process of appointment of a judge of a High Court?

The first question came before the Supreme Court in a reference sent by the President in 1996 under Article 186 of the Constitution for seeking opinion from the court whether the President is permitted to appoint judges of the Superior Courts in his sole discretion or only on the advice of the Prime Minister? Two Constitutional petitions on the same issue about the same time, were also filed in the Supreme Court under Article 184(3) by Wahab-ul Khairi on behalf of Al-Jehad Trust and by Zafar Iqbal Chaudhry, seeking a declaration that the President was the appointing authority for the judges of the Superior Judiciary and that the advice of the Prime Minister under Article 48(1) of the Constitution was not required. Article 48(I) of the Constitution envisages that in exercise of his functions, the President shall act in accordance with the advice of the cabinet or the Prime Minister. Clause (2) of Article 48 must be mentioned which says that not withstanding anything contained in clause (I) the President shall act in his discretion in respect of any matter for which he is empowered by the Constitution to do so.

The Supreme Court held in the instant case known as Al Jehad Trust Vs. Federation of Pakistan

1997 that there is no conflict between Article 48 and Articles 177 and 193 of the Constitution. The court concluded that the President was bound by the advice of the Prime Minister in respect of appointment of judges of the superior judiciary under Articles, 177 and 193 of the Constitution.

Question Nos2, 3 and 4 were discussed by the Supreme Court in Al Jehad Trust Vs. Federation of Pakistan 1996, commonly known as Judges' case. Chief Justice Sajjad Ali Shah concluded his opinion in the said case, in these words "Consultation is supposed to be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and Chief Justice of High Court as to the fitness and suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reason to be recorded in writing by the President/Executive". As per judgment of Justice Ajmal Mian, if the executive disagrees with the views of the Chief Justice of Pakistan and Chief Justice of the concerned High Court, it has to record strong reasons which will be justiciable. He also held that a person found to be unfit by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan for appointment as a judge of a High Court or by the Chief Justice of Pakistan for the judgeship of the Supreme Court can not be appointed as it will not be a proper exercise of power under Articles 177 and 193 of the Constitution.

In respect of the issue whether an acting Chief Justice is included in the list of consultees, the Supreme Court held in the same case that an acting Chief Justice is not a consultee for the purpose of Articles 177 and 193 of the Constitution as the appointment of acting Chief Justice is a stop

gap arrangement for a short period not more than 90 days.

Resolving the issue of the appointment of the Chief Justice of a High Court (i.e. the fourth question above) the Supreme Court observed that the most senior Judge of a High Court has a legitimate expectancy to be considered for appointment as the Chief Justice and in the absence of any concrete and valid reasons to be recorded by the President/Executive, he is entitled to be appointed as such in the Court concerned.

The fifth question in respect of the appointment of the Chief Justice of Pakistan was answered again by the Supreme Court in another important case namely Malik Asad Ali Vs. Federation of Pakistan, 1998. As per ruling of the Supreme Court, the senior most judge of the Supreme Court is to be appointed as the Chief Justice of Pakistan unless for some solid or strong reason.

The last two questions (i.e. 6th and 7th above) still call for clarification and interpretation of the relevant provisions of the Constitution. There are examples of difference of opinion among the consultees in the constitutional history of Pakistan, yet so far no proper attention has been given to such constitutional and legal complexities. When Justice Cornelius was the Chief Justice of Pakistan he often did not agree with recommendations of the Chief Justice of the West Pakistan High Court (Rizvi, 2005).

Again the rulings/verdicts/interpretations of the Supreme Court in the above referred three cases are, so far, only rulings of the court and not formally incorporated into Constitution through amendment. Keeping in view the track record of Pakistan, it is feared that these rulings can easily be disregarded, at any time, by the Executive or even quashed by the court itself. That is why one can not say with certainty that the constitutional questions relating to the Superior Judiciary have finally been solved or cleared by the Supreme Court. The judgments of the Supreme Court in the two cases (Judges

Case and Malik Asad Ali's Case) have already been violated by the Executive while making appointments to the Superior Judiciary.

The short order of the Supreme Court in the Judges' case (Al Jehad Trust V. Federation of Pakistan 1996) was announced on March 20, 1996 and it was disregarded by the Executive within 25 days. The government elevated Justice Nasir Aslam Zahid to Supreme Court and Justice Mamoon Kazi was appointed as Chief Justice of Sindh High Court on April 14, 1996, without the knowledge and approval of the Chief Justice of Pakistan (Mian, 2004).

The Court itself deviated from its former rulings in the said cases in a very short period of time. In June 1999, Justice Rashid Aziz the Chief Justice of Lahore High Court was going on leave, the Chief Justice of Pakistan recommended the name of the senior most judge of Lahore High Court Justice Falak Sher to be appointed as acting chief Justice of Lahore High Court. The federal government on the contrary appointed the next senior judge, Justice Allah Nawaz as acting Chief Justice of Lahore High Court. The appointment of justice Allah Nawaz as acting Chief Justice was challenged through a writ petition no: 11757/99 in the Lahore High Court on the ground that the principle of seniority was not followed as he was number 3 at the seniority list. It was further alleged that the impugned appointment was also against the judgments of the Supreme Court given in the Judges' case and Malik Asad Ali's case. The petition was dismissed by a single bench of the Lahore High Court, with costs of fifty thousands rupees. The bench held that it is only a convention and not a legal requirement that the senior most judge of a High Court be appointed as acting Chief Justice of the concerned High Court. The court further held that since there

was no clear provision in article 196 that only a senior most judge of High Court shall be appointed an acting Chief Justice of a High Court therefore the President can exercise his discretion.

One can not find it easy to agree with this interpretation/decision of the bench of Lahore High Court as it is inconsistent with the principles laid down by the Supreme Court in the above referred two judgments (i.e. the Judges' case and Malik Asad Ali's case) wherein the Supreme Court held that the senior most judge both in a High Court and Supreme Court shall be appointed as Chief Justice, even though, there is no such clear provision in articles 193 and 177 of the Constitution. Secondly, the assertion of Justice Ehsan-ul-Haq that appointment of an acting Chief Justice is a discretionary power of the President is not in conformity with the judgment of the full bench of the Supreme Court in the second Al Jehad Trust case in 1997. The Supreme Court held in that case that the appointment of judges of the Superior Courts under Articles 177 and 193 and/or under any other Articles can not be exercised by the President in his discretion but be exercised in accordance to the advice of the Prime Minister under Article 48(I) of the Constitution.

Again on December 26, 2001, one judge from Peshawar High Court and three judges from Lahore High Court were appointed as judges of the Supreme Court. The validity of the appointment of the three judges from the Lahore High Court was challenged in the Supreme Court under Article 184(3) of the Constitution by four different petitioners. The common ground in all these petitions was that the doctrine of seniority was not followed in the appointment of the judges of the Supreme Court despite the longstanding convention in this regard and the two important judgments of the Supreme Court in Al Jehad Trust case, 1996(i.e. Judges' Case) and Malik Asad Ali's case 1997. The

names of the three judges of the Lahore High Court elevated to the Supreme Court appeared at serial No.3, 4 and 13 of the seniority list of the judges of the Lahore High Court. These petitions were jointly heard under title ‘Supreme Court Bar Association Vs. Federation of Pakistan 2002’ by a full bench of the Supreme Court consisting of five judges including the Chief Justice of Pakistan and decided on April 10, 2002.

Despite the fact that principle of seniority was applied in Malik Asad Ali’s case on the basis of the Judges’ case and for the same reason appointment of Justice Sajjad Ali Shah, the former Chief Justice of Pakistan, was declared invalid. But the principle of seniority was not applied in this case and the Supreme Court refused to accept the arguments of the petitioners on the ground that there was a difference between the appointment of the Chief Justice of the Supreme Court and appointments of Judges of the Supreme Court. Incidentally the same argument was forwarded in Malik Asad Ali’s case by the counsel of Justice Sajjad Ali Shah, that the decision in the judges’ case was not applicable in Malik Asad Ali’s case as there was difference between the appointment of the Chief Justice of a High Court and the Chief Justice of Pakistan. However that Bench of the Supreme Court refused to accept this argument or distinction between the appointment of the Chief Justice of High Court and of the Chief Justice of Pakistan. The amazing irony is that the Chief Justice of Pakistan, Justice Irshad Hassan Khan, who headed the Bench hearing the petitions wherein the appointments of three judges were challenged, was also a member of the Bench that decided Malik Asad Ali’s case. It becomes further surprising to know that he was the leader of the Bench of three judges at Quetta that issued a temporary injunction in September 1997, restraining Justice Sajjad Ali

Shah to function as Chief Justice of Pakistan on the analogy of judges' case.

Having a power-hungry executive who feels no pain in exploiting the weak points of the provisions of law, even of Constitution and such honorable judges of Superior Courts who can easily make and unmake any rule, the only possible way is to have constitutional provisions clear, unambiguous and complete in themselves.

Furthermore, clause (2) (b) of Article 193 of the Constitution provides that a member of civil service having served as a district judge for a period not less that three years, may be appointed as a judge of a High Court. In the past civil servants on the executive side often came to have judicial experience. Criminal justice was often administered at lower courts jointly by the executive and the judiciary. A civil servant could be appointed a district judge for three years and then elevated to the status of High Court judge. This provision was inherited from the Government of India Act 1935 and was incorporated in all Constitutions of Pakistan. Many civil servants had been inducted in the Superior Judiciary since independence. Some outstanding judges of the superior judiciary belonged to the group of civil service, such as Justice Cornelius, Justice Rustam Kayani, Justice Saad Saud Jan, Justice Shafi Ur Rehman, Justice K.M.A Samdani and Justice Zafarullah Chaudhry. Somehow, no appointment has been made from the civil service under this provision of the Constitution in the recent past. The reason for the non-compliance or non-observation of this provision is not known. Anyhow this provision goes against the basic concept of separation of powers and is also detrimental to the independence of judiciary. Furthermore clause (2) (b) of Article 193 should not be practiced after separation of

judiciary from the executive at the lower level since 1996.

2: Appointment of Acting Chief Justices:

Article 180 provides for the appointment of Acting Chief Justice of Pakistan. Whenever the office of the Chief Justice of Pakistan becomes vacant, the President is to appoint "the most senior of the Judges of the Supreme Court to act as Chief Justice of Pakistan". Ironically weightage has been given to seniority for appointment of Acting Chief Justice of Pakistan but not for permanent Chief Justice of Pakistan under Article 177. It is again interesting that no seniority condition is laid down for appointment of acting Chief Justice of a High Court under Article 196 of the Constitution.

3: Appointment of Acting, Ad hoc and Additional judges:

Articles 181 and 182 of the Constitution provide for the appointment of acting judges and ad hoc judges in the Supreme Court respectively, whereas additional judges in the High Courts are appointed under Article 197. At any time when the office of a judge is absent or is unable to perform the function of his office due to any other cause, the President may under Article 181 of the Constitution appoint a judge of a High Court as acting judge of the Supreme Court if he is qualified for appointment as a judge of the Supreme Court as per Article 177 of the Constitution. If at any time it is not possible to hold or continue a sitting of the Supreme Court for want of quorum or for any other reason and it is necessary to increase temporarily the number of judges of the Supreme Court, ad hoc judges/judge may be appointed under Article 182 of the Constitution.

The language of Article 182 provides different grounds than the grounds under Article 181 of the Constitution. The grounds under Article 181 are vacancy in office and inability to perform the functions whereas the ground under Article 182 is want of

quorum and necessity to increase temporarily the number of the judges of the Supreme Court. The language of the both Articles indicates that they provide for the appointment of judges to meet the temporary situation. Unfortunately the letter and sprite of these constitutional provisions were not correctly followed or the same were for the past many years, consciously misused or misapplied and permanent vacancies were usually filled by acting/ad hoc appointments who continued for years as temporary judges. The Supreme Court of Pakistan consists of 17 permanent judges including the Chief Justice. In 1995 there were as many as seven acting/ad hoc judges in the Supreme Court against 10 permanent judges including the Chief Justice (Khan, 1998).

Article 197 of the Constitution is more detrimental to the independence of the judiciary and more misapplied and misused than Articles 181 and 182. Under Article 197 an additional judge of a High Court may be appointed by the President under the following circumstances:

i. When the office of a judge of a High Court is vacant; or
ii. When a judge of a High Court is absent from or is unable to perform the functions of his office due to any other cause; or
iii. When for any other reason, it is necessary to increase the number of judges of a High Court.

The qualifications for appointment as an additional judge under Article 197 are similar to those for appointment of a permanent judge under Article 193. An additional judge is appointed for such period as the President may determine. After the lapse of such period, the President may extend the period. In case the period is not extended or the appointment is not made under Article 193, the additional

judge shall relinquish the charge of his office.

It may be noted that an additional judge appointed under Article 197 and permanent judge of a High Court appointed under Article 193, as for as, powers jurisdictions, functions, pay, privileges, duties and obligations are concerned, are at par; the only different is of the service tenure.

The unfortunate and unconstitutional practice that has been keenly followed by all the governments is to treat Article 197 as the gateway through which every judge of a High Court has to pass before being made permanent. Almost all judges of the High Court before they were made permanent had to get a number of extensions for short terms. The additional judges continued entering the superior judiciary with a legitimate expectation that they would not have to go back on the expiration of their term but they would be confirmed ultimately. What happened in practice is that the true purpose of Article 197 has never been carried into effect.

The practice of appointment of acting or ad hoc judges in the Supreme Court and additional judges in the High Courts is detrimental to independence of judiciary. It can be said without a fear of dispute that successive governments of Pakistan have, in the words of Justice E.S Venkataramiah, been “virtually playing with the courts” (Huq, 1997).

4: Retirement Age of the Judges of the Superior Courts:

Another constitutional provision needing serious attention in respect of the independence of the judiciary is the disparity between the retirement ages of the judges of the Supreme Court and judges of the High Courts. According to Article 179(1) of the Constitution, the retirement age for a judge of the Supreme Court is sixty five years whereas for a judge of a High Court it is sixty two years under Article 195

(1) of the Constitution. It goes without saying that a judge of a High Court nearing his retirement age naturally may wish to be appointed as a judge of the Supreme Court because apart from obvious honor and dignity of such appointment , he can then get the period of his service and official facilities extended for another three years. Availability of such an opportunity can possibly make such a judge prey to this temptation and to the allurements of the political executive. One cannot understand the logic and rationale behind this disparity between the retirement ages of the judges of the Supreme Court and High Courts. However this disparity between the retirement ages is not good for and is, indeed, detrimental to the independence of the judiciary.

5: Transfer of High Court Judges:

Under Article 200(1) of the Constitution a judge of a High Court may be transferred to another High Court by the President of Pakistan without the consent of the concerned judge and without consultation with the Chief Justice of Pakistan and the Chief Justice of the concerned High Court, provided that the transfer is for a period not exceeding two years. The consent of the concerned judge and the consultation with the Chief Justices are required if the transfer is for a period of more than two years. Clause 4, of the same Article provides that a judge of a High Court who does not accept transfer to another High Court under clause (I) shall be deemed to have retired from his office. Under the original Article 200 of the Constitution, the President might transfer a judge of a High Court to another High Court only with consent of the concerned judge and after consultation by the President with the Chief Justice of Pakistan and the Chief Justices of both High Courts. By Fifth Constitutional Amendment in 1976 during Zulfiqar Ali Bhutto’s government, the condition of

consent and consultation was dispensed with if the transfer was for a period not exceeding one year at a time. The period of one year was extended to two years subsequently by President's Order No.14 of 1985. Clause (4) of the Article 200 was incorporated again by the President's Order No.24 of 1985. The last two President's orders were issued by the military regime of General Zia.

The above amendments in Article 200 were challenged before the Sindh High Court by the Sindh High Court Bar Association through its President Sharaf Faridi in 1989. It was contended that these amendments were violation of the independence of judiciary. The court observed that the above mentioned amendments militate against the concept of independence of judiciary as originally envisaged by the Constitution itself. The court held as under: -

"The above amendments/additions in the Constitution were made from time to time to keep the judiciary docile and subservient. The introduction of the provision for transfer of a High Court judge to another High Court without his consent under the Fifth Amendment for one year, then under President's order No.14 of 1985 for 2 years and so also appointment of a High Court judge to the Federal Shariat Court without his consent for the above period at the peril of his being stand retired, in case of his refusal to accept transfer or appointment.... .... are the amendments/additions which militate against the concept of the independence of judiciary/separation of judiciary as envisaged by the Constitution" (PLD, 1989).

However the court refused to declare the said provisions of the Constitution as ultra vires. The court held in the following words: "The present cases do not involve the question of change in the basic structure and framework of the Constitution as the

amendments in the aforesaid articles relating to judiciary can not be said to have altered the basic structure of the Constitution pertaining to the working of the judiciary. It is therefore, not necessary to dilate upon the above question any further. The upshot of the above discussion is that we cannot declare any of the Constitution provision as ultra vires in the instant petitions" (PLD, 1989).

One can very respectfully disagree with the learned justice's opinion that these amendments can not be declared ultra vires because they do not alter the structure of the Constitution pertaining to the working of the judiciary. It has been observed by the court that these amendments militate against the concept of the independence of judiciary. Isn't this a contradiction between the findings and rulings of the court? Secondly clause (4) of Article 200 is in direct conflict with Article 209 (7) which provides constitutional protection to the services of the judges of the Supreme Court and High Courts.

Thirdly in the presence of Article 200, as it is, the independence of the judiciary cannot be "fully secured" as envisaged by the Objectives Resolution. These provisions are against the founding principles of the Constitution and consequently, should have been declared ultra vires by the court.

6: Federal Shariat Court:

Article 203C was inserted by the military regime of General Zia in 1980 through the Constitution (Amendment) Order 1980. This Article provides for the Federal Shariat Court consisting of the Chief Justice and seven other judges to be appointed by the President. The term of the Chief Justice and other judges shall be for a period not exceeding three years, but may be extended to such further term or terms as the President may determine. The President may appoint any judge

of a High Court, including an acting Chief Justice of a High Court, as a judge of the Federal Shariat Court without his consent and without consultation by the President with the Chief Justice of the concerned High Court if such appointment is for a period not exceeding two years. According to clause (5) of the same Article a judge of a High Court who does not accept appointment as a judge of the Federal Shariat Court shall be deemed to have retired from judgeship of the High Court.

Under clause (4B) of Article 203-C the President may at any time, modify the term of appointment of a judge of the Federal Shariat Court or assign any other office or may require a judge of the Federal Shariat Court to perform such other functions as the President may deem fit. In the present context i.e. clause (4B) of this Article, the term judge includes the Chief Justice of the Federal Shariat Court. A Chief Justice of the Federal Shariat Court, Justice Aftab Ahmad was transferred from his office and appointed as an Advisor to the ministry for religious affairs by General Zia through a Presidential Order in 1986. The Honorable Justice did not accept the new appointment and resigned. Justice Aftab Ahmad himself stated: “the President is empowered to assign any duty to the Chief Justice or a judge of the Federal Shariat Court without his consent” he added “the President may upgrade the post of a peon and appoint a former Chief Justice to that post”. He further said “in the presence of this law i.e. (4B) of Article 203C every judge of the Federal Shariat Court remains under pressure of the Government. The job of the Federal Shariat Court is to examine whether the existing laws of the country are against Islamic injunctions and if they are, to declare them void. Therefore in the presence of provision of (4B) it appears the government wants interpretation

of Islamic injunctions as it desires" (Rizvi, 2005).

Article 203C provides sole and tremendous powers to the President. Provisions under Clause 4B of the said Article are the most outrageous and most detrimental to the independence of judiciary. Such sweeping powers under Article 203C, introduced by a military dictator, make a mockery of the independence of the Judiciary. Unfortunately our judicial history has witnessed that several Chief Justices and Judges of High Courts were sent to the Federal Shariat Court because they annoyed the Government.

The Supreme Court of Pakistan has imposed some checks upon the tremendous powers of the President through rulings in two important cases (i.e. Al Jehad Trust V Federation of Pakistan 1996 and Al Jehad Trust V Federation of Pakistan 1997). But constitutional provisions still exist and the Constitution has not yet been amended in the light of the judgments of the Supreme Court. In the second case of Al-Jehad Trust, the Supreme Court held that, the appointments of the Chief Justice and the Judges of the Federal Shariat Court will be made by the President on the advice of the Prime Minister. In the first case of Al-Jehad Trust (Judges' case) the Supreme Court observed that once a sitting Chief Justice or a judge of a High Court is appointed in the Federal Shariat Court, he becomes susceptible under clause 4B of Article 203C to actions detrimental to his security of tenure which is guaranteed by Article 209 of the Constitution. Finding Article 203C of the Constitution to be irreconcilable with Article 209, thereof the Supreme Court held that a Chief Justice or a Judge of a High Court could not be transferred to the Federal Shariat Court without his consent.

The judges of High Courts giving a decision which will annoy the

sitting Government, will certainly bear in their minds the fear of victimization, at least transfer to another High Court under Article 200 of the Constitution or to the Federal Shariat Court under Article 203C of the Constitution. “It needs to be instilled in every mind that where fear is, Justice cannot be” in the words of Justice Khanna. When judiciary is ceased by fear in the decision of cases, it becomes demoralized.

There is a conflict between Article 203C (5) and Article 209(7) of the Constitution. Clause (5) of Article 203C provides that if a judge of a high court is appointed as a judge of the Federal Shariat Court and he refuses to accept such appointment, he shall be deemed to have retired from the High Court. Whereas clause (7) of Article 209, giving protection to the services of a judge of the Superior Courts, declares that a judge of the Supreme Court or of a High Court shall not be removed from office except as provided by Article 209, i.e. through the Supreme Judicial Council.

7: Suggestions for Structural Independence of the Judiciary:

The independence of the judiciary has two aspects, that is, de jure independence which can be deduced from legal documents; and de facto independence which means the degree of independence that the courts factually enjoy. To get de jure independence for judiciary in Pakistan amendments in the Constitution of Pakistan are suggested.

Firstly, to achieve the independence of the judiciary and to have efficient judges of integrity, the whole system of the judicial appointment needs overhauling. The system of appointment of judges is of paramount importance to ensure independence of judiciary because it is primarily the human being that makes or mars the institution. The judicial appointment must be made more

competitive and more transparent. The executive's power to appoint judges to the superior courts must be limited. The present system of judicial appointment does not provide any role to the bar. The effectiveness and importance of the bar in preserving and defending the independence of the judiciary must be recognized and it must be given an appropriate role. The prevailing system and procedure of judicial appointments need drastic changes. A Judicial Appointment Commission is recommended to replace the existing system of judicial appointments.

The Commission should consist of the Chief Justice of Pakistan, two next senior judges of the Supreme Court, the Chief Justices of the four High Courts, three/four retired judges of the Supreme Court to be appointed by the Parliament and two nominees of the bar to be elected by the advocates. The Commission must have exclusive and final authority to recommend appointment of judges including the Chief Justices of the superior courts. It should make criteria for the selection of judges of the superior courts. It should invite applications from the interested candidates to be appointed as judges of the superior courts. The Chief Justice of Pakistan and the Chief Justices of the High Courts must be appointed in accordance with recommendation of the Commission. The Commission should recommend the Chief Justices out of the three most senior judges of their respective courts. The recommendation of the Commission for appointments of the judges including the Chief Justices must be binding on the executive. The executive's function should be limited only to issuing the appointment order. The parliament's role should be only to appoint the retired judges of the Supreme Court as members of the Commission. Judges of the High Courts be selected from the bar as well as from the lower judiciary. The strength of both groups in the superior judiciary

should be specified giving more seats to bar.

The process of the selection of the judges of the High Courts must be open. The names of the persons to be appointed as judges of the High Courts must be advertised for public scrutiny. Public censure is good and helpful in selecting judges of integrity.

Secondly, Articles 180 and 196 dealing with the appointment of acting Chief Justice of Pakistan and acting Chief Justice of a High Court respectively must be amended as per the judgment of the Supreme Court in the Judges' case. Appointment of acting Chief Justices must be a stop-gape arrangement for a short period not more than one month. Furthermore Article 196 must be brought at par with Article 180. Article 180 provides that the senior most judge of the Supreme Court shall be appointed as an acting Chief Justice of Pakistan. So it is recommended that only the senior most judge of a High Court must be appointed as an acting Chief Justice of that High Court

Thirdly, Articles 181 and 182 of the Constitution provide for the appointment of acting judges and ad hoc judges in the Supreme Court respectively, whereas additional judges in the High Courts are appointed under Article 197. These Articles must be amended and permanent vacancies of the judges in the superior courts must be filled with permanent appointment within a specified period. Temporary appointment of judges against permanent vacancies must not be allowed.

Fourthly, disparity between the retirement ages of the Supreme Court Judges and the High Court Judges must be removed. Article 195(1) of the Constitution must be amended and the retirement age of a judge of a High Court must be increased up to 65 years to bring it at par with the

retirement age of a judge of the Supreme Court.

Fifthly, Article 200 must be amended not to allow transfer of a judge of a High Court to another High Court without consent of the concerned judge and the Chief Justices of the concerned High Courts.

Sixthly, the very rationale behind the establishment of the Federal Shariat Court and its utility are questionable. This Court merely duplicates the functions of the existing superior courts and also operates as a check on the sovereignty of Parliament. The composition of the Court, particularly the mode of appointment of its judges and the insecurity of their tenure are detrimental to judicial independence. This Court does not fully meet the criterion prescribed for the independence of the judiciary, hence, is not immune to pressure and influence from the executive. Its sole function i.e. to examine a law whether it is in conformity with the injunctions of Islam may be performed by the High Court. So the Federal Shariat Court must be abolished.

CONCLUSION:

The foregoing study of the constitutional provisions leads to the conclusion that the first danger to the constitutionally guaranteed independence of the judiciary is from within the constitution itself. The constitution, alongside the provisions ensuring independence of the judiciary, also carries provisions which can be misused or misapplied by the executive for interfering with the independence of the judiciary. There are also certain provisions of the constitution relating to the judiciary which are in clash with each other. The constitution of Pakistan has been correctly termed “an internally contradictory constitutional instrument” (Newberg 1995).

In short the judiciary in Pakistan is not based on sound foundation of structural independence. One cannot expect behavioral independence from the judges without structural independence of the judiciary. To achieve structural independence the constitution needs amendment.

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