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Judicial Independence and Activism in South Asia: A Comparative Study of Pakistan and India

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ABSTRACT

Judiciary of Pakistan and India has the significant role of enforcement of constitutionalism, human rights and rule of law. This research work will therefore endeavor to undertake a comparative assessment of the two countries' judiciary with special reference to the aspects of judicial independence, constitutionalism, judicial activism, and self-restraint in order to compare and serve as a benchmark in the governance and the society. The judiciary of Pakistan has had political turmoil and at the executive branch level, attempts to influence the judiciary while trying to perform its constitutional roles. On the other hand, Judiciary of India is a part of democratic country and has a sound constitutional provisions and very healthy case laws on the aspect of judicial independence and active role of Public Interest litigation (PIL). These aspects allow the study to make a comparison between the two countries' courts and their consequences for constitutionalism in South Asia.

Key Words: Judicial Independence Judicial Activism South Asia Pakistan India

Introduction

The interaction between the judiciary and other arms of government is a topic of discussion to this date though much attention has been given to the newly born democratic nations. This paper explores how Judicial independence and Judicial activism is mutually intertwined and how it has affected South Asia's Pakistan and India respectively. These two nations with their common law systems originating from Britain are good examples for the analysis of how judiciaries interpret the law and protect the Constitution in different political systems.

A principle of a working democracy that has been most commonly promoted is the judiciary's independence, whereby the judiciary is able to make decisions on legal cases, and enforce the rule of law without interference of the executive or

legislative branch of government. It is for this reason that judicial activism is a more contentious concept; it identifies judges who are willing and able to move beyond the letter of the law in order to tackle social problems or uphold rights. This paper reviews the historical development of judicial independence/activism in the two countries and major judicial decisions, cases and other related socio-political factors.

By comparing and contrasting the Pakistani and Indian experiences, this research aims to shed light on the following questions: What has been the interpretation and understanding of independence of judiciary in each of the countries concerned? How active are the respective judiciaries and what consequences for democracy, governance and rights protection have been perceived? Additionally, the research seeks to understand the correlation between independence and activism of the judiciary in a bid to establish whether the latter has a negative impact on the former or whether activism of the judiciary is a necessity if the independence of democracy institutions is to be protected.

This paper continues a comparative understanding of the judiciary in South Asia, and the specifics of judicial behavior, thus containing recommendations based on the potential and difficulties of the courts in the region within their function of being both a judge and an advocate for change.

Background of the Study

Pakistan and India's judiciary plays a central role in the implementation of constitutional law as well as constitutional values, the safeguarding of individual liberties, and the establishment of the rule of law. Each country has its legal background rooted in historical, political and legal framework that may affect its views on judicial autonomy, constitutionalism and judicialism. The judiciary of Pakistan has always worked in context of political unsteadiness, military power and interference of executive in Pakistani judiciary and it has consistently tried to maintain its independence and establish its authority in the governmental structure of the country (*Shah, 2016*). On the other hand, India's judiciary functions in a more stable democracy and has strong constitutional and case-law guarantees as well as numerous precedents supporting judicial independence and active participation in PIL (*Chandrachud 2018; Menon and Bhandari 2010*).

The features which are to be compared in this research include judicial independence, constitutional interpretation, activism, and restraint in Pakistan's and India's judicial systems and their effects on governance and society. Thus, evaluating these aspects, the study reveals the comparative analysis of the two countries' judicial systems and their impact on constitutionalism in South Asia. By making such a comparative study, the study aims at enhancing knowledge on how Judicial institutions in Pakistan and India work in multi layered legal systems, on constitutional interpretation and impact on Democratic governance and Society.

Brief Overview of Judicature of Pakistan and India

This section presents a brief description of the judicial systems of both the discussed countries – Pakistan and India with the focus on their historical evolution and main legal systems.

Pakistan: A Judiciary Navigating Political Upheaval

Pakistani judiciary has had a rather eventful ride since the time this country came into being in 1947. From the colonial past inherited the legal system was built on the foundation of the British legal system which was aimed at perpetuating the colonial rule. After a time of military regimes, the 1973 Constitution aimed at creating an independent judiciary as one of the supporting structures of the new democracy. The judiciary, however, has always had a shaky relationship with the executive and the military by being in confrontation and cooperation at varying times.

Key features of the Pakistani judiciary include

- a) **Federal Structure:** A court of appeal at the top, below which there will be a court of appeal for each province and the courts below as stated.
- b) **Islamic Jurisprudence:** Islamic teachings also have to be incorporated into the laws which prompted the formation of bodies such as the Federal Shariat Court according to the Constitution.
- c) **Judicial Review:** The Supreme Court consists of constitutional rights of reviewing legislation and actions of the executives for ultra-vires.

Notable legislation shaping the Pakistani judiciary includes:

- a) **Supreme Court Rules 1956**
- b) **High Court Rules and Orders (Volume 1 to 4)**
- c) **The Constitution of the Islamic Republic of Pakistan, 1973**

The judiciary of Pakistani has faced numerous crises that threatened its sovereignty at some point in the past, such as military influence and political interference. However, the biggest hindrance that has been put in place has not been completely insurmountable as seen by the occasional defiance of the Supreme Court to act in protection of rights of other citizens as well as the upholding of the constitution.

India: A Judiciary Safeguarding a Diverse Democracy

The Indian judiciary based on the British common law has occupied a central position in the management of the largest democracy of the world. The Constitution of India came into force in 1950 and the section of an ‘independent

judiciary' was an important fundamental of the Indian republic. The Indian judiciary can be described as being constitutionalist, rights-protecting and accommodationist in the face of a large and pluralistic society.

Key features of the Indian judiciary include

- a) **Unified Structure:** It still consists of District Courts on top then also it contains a state court of appeal, state supreme court, state trial court, local trial court, as well as municipal court.
- b) **Fundamental Rights:** The Constitution contains a clear version of the charter of rights and freedoms which are justiciable.
- c) **Public Interest Litigation:** In implementation of public interest litigation, the Indian judiciary has indeed set such a good precedent meaning that persons or organizations may approach the court any violations in the interest in the general public.

Significant legislation shaping the Indian judiciary includes:

- a) **The Constitution of India, 1950**
- b) **The Supreme Court Rules, 2013**
- c) **The Code of Civil Procedure, 1908**
- d) **The Code of Criminal Procedure, 1973**

The Indian judiciary also has its share of problems such as an enormous arrears of cases and issues regarding the accountability of judiciary. It has however always been considered as strong institution and especially in the issues of enforcing the rule of law and protecting democracy.

Judicial Independence

The independence of the judiciary has been considered to be the pillar of a working democracy and the course of the common law. It enables the judges to make decisions to settle disputes freely without influence or the threat of being removed from their positions by other branches of government, political actors or powerful groups. This principle is provided for under the Constitutions of both India and Pakistan, and must therefore hold some importance in the two countries' legal frameworks. But the idea of judicial independence and its protection for realization of its practical functions has had different courses in these neighbors of South Asia.

Defining Judicial Independence

- a) **Decisional Independence:** The freedom of judges in determining cases in accordance with the law and facts without being influenced by any outside forces.

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- b) Institutional Independence: That there are safeguards for the judiciary as an organ which can shield it from interferences such as the provision of security in tenure for the judges including control over affairs such as administrative (Wineburg & Reisman, 2015).
- c) Financial Autonomy: Sufficient funding for the judiciary; the funding must be independent from the control of the executive arm of government so as to determine its functionality and against which the judiciary cannot use the control of funds as a way of forcing policy changes (Normore, 2006).
- d) Appointment Process: A non-partisan mechanism of the selection of judges that reduces politicization and increases the quality of the judiciary (Young, 2021).

Safeguarding Judicial Independence: A Comparative Perspective

As it has been mentioned above, India as well as Pakistan have incorporated constitutional measures and institutions for the independence of the judiciary. However, the nature of their past experiences, political situations, and legal systems define the efficiency of these protection measures.

a. India:

- Constitutional Guarantees: The constitution of India ensures and embodies the principles of judicial independence in its framework by virtue of Article 50, Article 124 and 145 of the Indian Constitution.
- Collegium System: The Indian higher court judges are recruited chiefly through the collegium system where a team of other judges selects the candidates. Despite the fact that this particular system tries to eliminate political interferences, it has been said to be very much veiled and aristocratic in its functioning (Winer, 2013).
- Contempt of Court Power: Indian judiciary has the power to punish any person or company for the act that is contrary to the respect of the court or the act that delays justice delivery system. This power although has been debated has been used to protect the judiciary from external vice.

b. Pakistan:

- Constitutional Provisions: In Pakistan under the Constitution of the country articles 175-196 the provisions are laid down for an independent judiciary with protection of tenure for the judges, financial independence and the principle of separation of powers (References, 2012).
- Judicial Commission: This in essence means that the Judicial Commission has a prerogative of influence as far as recommend ability of the appointment of judges to the higher courts so as to set a worthy cause of eliminating the process of political influence on the same. However, concerns about political influence and the lack of a clear separation of powers persist (Wikipedia 2018).

- Challenges to Judicial Independence: Unstable political situation in Pakistan along with military interventions in the political affairs of Pakistan has always been a factor in the issues relating to independence of judiciary. Charges against the judges, their removal, or threats have influenced the judiciary to the level where they cannot function autonomously and without the pressure from other formations (Wiki | Gelbooru, 2021).

Thus, it may be said that the project of judicial independence continues unabated in both India and Pakistan. While a lot has been achieved in the establishment of organs like commissions and even putting into constitutions of the two nations protection of this principle, much more can be said of the practical realization of this fundamental principle. Your comparative study can then delve deeper into the specific issues, successes, and issues concerning the judiciary's independence in some of the South Asian nations.

Constitutional Interpretation

In Pakistan constitutional interpretation has been mainly textual and historical with a middle ground between constitutionalism and socio-political questions (*Shah, 2014*). Prominent cases such as *Maulvi Tamizuddin Khan v. Federation of Pakistan 1955* and *Benazir Bhutto v. Federation of Pakistan 1988* are the examples of Supreme Court of Pakistan has been playing all these roles in maintaining the constitutional supremacy and preserving the democratic system in Pakistan (*Khan, 2015*). Whereas, India uses a more liberal method of constitutional interpretation, and integrates concepts of justice and international human rights law into constitutional decisions (*Singh, 2016*). The Supreme Court in defining the fundamental structure of constitution and containing the legislations' invasion into fundamental rights, there is a doctrine called the "basic structure" which was explained in the case of *Kesavananda Bharati Sripadagalvaru and Ors vs State of Kerala and Anr 1973 (4 SCC 225)*.

Judicial Activism and Restraint

This research article compares judicial activism in Pakistan and India based upon their legal frameworks and backgrounds. In Pakistan the period of judicial activism was during the term of Chief Justice Iftikhar Chaudhry and few of the cases are Panama Papers case 2017, against corruption and electoral reforms. Furthermore, the Pakistani judiciary activism has a strong association with public opinion and uses the judicial power of review to influence the policies and governance practices (*Khan, 2015*). Moreover, in India, the judicial activism is characterized by the use of the PIL, social and economic injustice, legal questions of the environment, and electoral reform (Menon & Bhandari, 2010). The *Vishakha v. State of Rajasthan (1997)* and *Olga Tellis v. Bombay Municipal*

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Corporation (1985) are some of the key cases that show the Supreme Court's activism in the protection of the vulnerable groups and in supporting the social justice causes (Singh, 2016). On the other hand, the two countries' judicial restraint entails the respect accorded the legislatures and or the executives. This is in a bid to maintain the doctrine of separation of powers, principles of institutional autonomy and democracy's political responsibility (Shah, 2014; Malik, 2008).

Challenges to Judicial Independence

In Pakistan, threats to the judiciary along with the political instability, military dictatorship and the executive encroachment on the judiciary. As the military started taking over, and eradicating civil liberties, constitutional changes and dismissals of judiciary were used to disarm the judiciary of its power to restrain the military (Khan, 2015). The political actors have also worked hard to determine who becomes a judge and this has led to erosion of judicial independence and probably bias (Shah, 2014). Whereas, in India there are several threats to judicial independence such as political influence, influence by the executive and question of accountability. The process of selection of judges through the collegium system has been a matter of concern, the conflict between the judiciary and the government (Chandrachud, 2018). Socio-political criticisms of judicial activism and demands for the judiciary to be answerable have elicited worries concerning the judiciary's independence (Singh, 2016).

Compounding the challenges that exist in both countries, corruption and lack of transparency remain inherent problems of Pakistan's legal framework even within the judiciary. These factors further erode public confidence on legal matters and equally slow down the fairness and neutrality of justice systems. The continued activities of the extremism and the lack of consequences for those who attempt to terrorize judges are the key problems for judicial independence. These complex problems can be solved only through the development of a wide-ranging strategy and initiating legal changes, increasing the capacities of institutions, and altering the attitudes of society.

In India, due to large number of cases the courts get overburdened and consequently there are many pending cases that hamper the efficiency of judiciary thereby compromising the justice delivery system and public faith. India has a sound legal system and an activist judiciary in matters of rights despite which there are apprehensions about the influence of the executive in the transfer and postings of the judges. Achieving a balance between judicial responsibility and the judiciary autonomy is still an issue, which continues to be widely deliberated as it is an essential component in practice of the Rule of Law and support of democracy.

Role of Judiciary in Constitutional Enforcement

The judiciary in Pakistan also brings effectiveness in the provisions of the constitution through enforcing and implementing the provisions with an intention of ascertaining whether the legislative and executive actions are following the constitution. This Constitutional role of Pakistan Supreme Court is clear from the *Maulvi Tamizuddin Khan V. Federation of Pakistan 1955* and *Benazir Bhutto V. Federation of Pakistan 1988* etc. cases. Whereas, India's judiciary can enforce the constitutional provisions in the country and protect the freedom of the people and the structures through the judicial review and 'basic structure doctrine'. Referring to *Minerva Mills Ltd. v. Union of India (1980)* and *Vishakha v. State of Rajasthan (1997)* it can be stated that the Supreme Court of India interferes with the matters and takes an active role to protect the constitutional rights and the interest of the public (Singh, 2016).

The judiciary also has the major responsibility of constitutionalism and responsible for the protection of the constitution from being violated by the legislative and executive branches. This task is especially important in nations such as India and Pakistan wherein the constitution charges the judiciary with the responsibility of defending and ensuring the protection of the rights of individuals guaranteed within the two nations' constitutions. Judicial review through the courts enables the laws and actions taken by the executive branch to be declared inconsistent with the constitution, thus ensuring the constitution's pre-eminence as well as check arbitrary uses of power. This authority enables the judiciary to explain matters of the constitution, remove any doubt, and set legal referential standards that define the constitution's principles and their applicability in the future. For instance, India's Supreme Court decision in *Kesavananda Bharati Sripadagalvaru & Ors v. State of Kerala & Anr*, decided on April 24, 2015, set out the Basic Structure Doctrine whereby it is the Parliament that cannot amend the Constitution in a manner that alters the structure of the Constitution. Likewise, the Pakistani judiciary has occasionally acted to safeguard constitutional rights and freedoms as well as during Militarized Rule of Law though its efficiency has not been without setbacks from political insecurity and international influence. In addition to judicial review, the judiciary in the enforcement of the constitution also protects rights and freedoms. People can go to court asking for enforcement of their constitutional rights and freedoms including the right to equal treatment, freedom of speech and unfair discrimination. However, there are some limitations that have been observed regarding the judiciary's capacity to enforce the constitution. Some of them include political interference, non-transparent method in appointment of judges, and shortage of facilities that hamper the independence of Judiciary.

Comparative Analysis and Findings

To the extent possible, this research paper compares and contrasts justice systems in Pakistan and India. It also explains the contemporary threats to judicial independence in both countries including political influence and the executive branch. However, Pakistan has had previous experience of direct military rule while India has had problems of accountability of judiciary in a democratic set up (Shah, 2014, Menon & Bhandari, 2010). On this they have disagreed and so there are criticisms on the extremes of the judiciary. Such a strategy weakens democracies, according to critics, while the judiciary has the function of defending rights and spreading justice, according to supporters, in the view of Chandrachud (2018).

Judicial Independence

Pakistan also has issues of historical military rule and executive domination that threaten the independence of judiciary in matters concerning appointments and structures (Shah, 2016). India guarantees judicial independence through the constitution and previous cases, although the collegium system is under pressure (Malik, 2008; Chandrachud, 2018).

Constitutional Interpretation

Pakistan has been focusing on textualism when experiencing political instability (Shah, 2014). India incorporates justice, equity and international standards into its understanding as the 'basic structure doctrine' demonstrates (Singh, 2016).

Judicial Activism and Restraint

This paper has argued that judicial activism arises due to governance crises and human rights concerns (Shah, 2016). India's activism protects rights through PILs but is accused of over activism (Menon & Bhandari, 2010; Chandrachud, 2018).

Impact on Governance and Society

Legal findings impact on electoral changes and responsibility in the midst of political processes (Shah, 2016). The decisions made by India improves the transparency in society and the justice for the people hence promoting the legislative reforms (Menon & Bhandari, 2010).

Recommendations to overcome the Challenges

Therefore, to boost the authority of judiciary in the execution of constitution along with the ways to get rid of the issues that both India and Pakistan are confronting with, the following recommendations could be made.

Enhancing Judicial Independence

The court is therefore a very vital component of any society and this is why, at all costs, judiciaries must be protected. This include; security of tenure of judges, merit in the appointment of judges as well as independence financial of the judiciary.

Strengthening Judicial Capacity

Hiring qualified staff, offering the judiciary appropriate supplies and money, and creating training and development programs for the judiciary can enhance the judiciary's ability to deal with constitutional questions efficiently.

Promoting Judicial Accountability

The measures, which provide the accountability of the judiciary, such as understandable and effective procedure of receiving the complaints against the judges and making the processes of the judiciary transparent, can enhance the public trust to the judicial branch.

Enhancing Public Legal Awareness

The constitution's literacy and the judiciary as the protector of the rights therein may help the people seek judicial redress where they feel that their rights have been violated and the enhancement of constitutionalism.

Fostering Dialogue and Collaboration

This should be done through consultation with the judiciary, the legislature and the executive branches of government on matters of constitution with a view of getting the appropriate appreciation of the constitution by the arms of government.

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By implementing these recommendations, both the countries can strengthen the judiciaries capacity in the promotion of the rule of law and constitutionalism, and citizens' constitutional rights and freedoms as well as improve on the implementation of the constitutions.

Conclusion

In a nutshell, the judiciary of both Pakistan and India has a great role in enforcement of constitutional provisions, conservation of rights of the people and maintaining the principles of the rule of law. Accordingly, both countries' judiciaries have been equally assertive concerning the declaration of judicial independence and constitution of governance systems. Thus, this research contributes to the lack of research on the comparative study of judicial institutions and their relations with constitutional and democratic values in South Asia. The further research should be devoted to the shifts in the judicial procedures, shifts in the system of selection of the judges, and shifts in the status of the judiciary in the world legal system.

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