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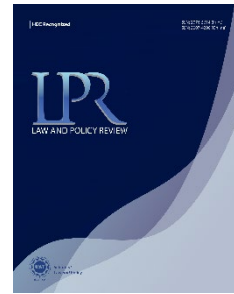
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Methods of Judicial Appointments in Different Jurisdictions: Lessons for Pakistan

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Abstract

This paper examines the contemporary mechanism of judicial appointments in Pakistan, focusing on the artificial seniority-versus-merit binary and the power of the Chief Justice of Pakistan (CJP) to appoint judges. It discusses various models of judicial appointments, including single-body mechanisms, representative appointments, professional appointments, cooperative appointments, judicial elections, commission or council appointments, and blended methods. While the commission or council mode proved successful in South Africa during its transition from white-minority rule to a constitutional democracy, it has not been yielded similar results in Pakistan. The Judicial Commission of Pakistan (JCP) has faced criticism for its lack of transparency, manipulation of meetings, preponderance of the chairman, court packing, and a borrowed bureaucrat as secretary of the commission. Drawing on lessons from South African experience, the paper recommends reforms to transform the judicial appointments process in Pakistan.

Keywords: commission, cooperative, judicial appointments, elections, single-body mechanisms

Introduction

This research paper expands the discourse surrounding judicial appointments in Pakistan, drawing upon comparative examples from other developing nations. It undertakes a critical examination of the mechanisms employed in constitutional democracies for the appointments of judges, analyzing models such as career judiciaries, appointment through an independent commission, and appointment through the collaborative engagement of the legislative and executive branches. The paper also conducts an analysis of the shortcomings in the current Judicial Commission of Pakistan (JCP), informed from the insights gained from the judicial appointment procedures in other legal systems. The JCP in Pakistan

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is subject to incessant criticism, with legitimate concerns raised by a significant number of commission members often going unaddressed. The concerns raised by various statutory and representative bodies, including the Pakistan Bar Council, provincial bar councils, the Supreme Court Bar Association, and other relevant bar associations, have been expressed through resolutions (Q. F. Isa, personal communication, May 25, 2022). However, it is unfortunate that these concerns, despite being put forth by elected, statutory, and representative entities, have not been given due attention (Q. F. Isa, personal communication, May 25, 2022). In general, civil law jurisdictions prefer to have a career judiciary, with an elected or appointed constitutional courts, that is organized on bureaucratic lines at the lower levels (Bulmer, [2017](#)). In a stark contrast, common law jurisdictions depend more and more on commissions for judicial appointments (Bulmer, [2017](#)). This paper presents an argument in favor of the commission-based mode of appointing judges, highlighting its comparative inclusivity and enhanced reliability. It has successfully evolved in the South Africa during her transition from white-minority rule to a constitutional democracy. In contrast, however, this method of judicial appointments has not been successfully evolved in Pakistan.

Methods of Judicial Appointments

Various methods are used for appointing judges in different jurisdictions, each with its own challenges and shortcomings. However, the commission or council mode is considered comparatively more inclusive and reliable.

Single-body Appointments

In general, single-body systems allocate the authority to appoint judges to the executive branch of the government (s) (Bulmer, [2017](#), p. 8). A number of older constitutions, particularly those derived from British origins, persist in adhering to this framework, granting significant authority to the executive branch in making judicial appointments (Roth, [2012](#)). However, in some states power of appointing judges lies with the parliament. The appointment of judges to the German Constitutional Court, for instance, is effectively carried out by the parliament, wherein each house of the legislature appoints an equal number of judges to serve on the Constitutional Court (Law Library of Congress, [2016](#)). The German system employs supermajority requirements, necessitating a 2/3 vote.

Consequently, a norm of reciprocity has emerged, resulting in the de facto establishment of permanent seats on the Constitutional Court that are occupied by the major political parties. Both of the two largest political parties possess an equal number of seats (European Commission for Democracy through Law, 1997, p. 5). The established convention ensures the establishment of a consistent judiciary that accurately mirrors the extensive political inclinations, while avoiding an excessive bias towards either of the two predominant factions (Ginsburg, [2009](#), p. 3). The stability of this particular legislative-centered system is contingent upon the stability of the party system. In the event that the parties exhibit less stability or if there exists a proliferation of small parties as opposed to a limited number of larger ones, the imposition of a supermajority requirement could potentially impede or render appointments more challenging, and in extreme cases, unattainable (Ginsburg, [2009](#), p. 3).

Professional Appointments

The fundamental principle underlying professional appointment mechanisms is the practice of new judges being appointed by incumbent judges (Bulmer, [2017](#), p. 9). This ensures the perpetuation of the judicial bench through a formal cooptation process; wherein prospective judges are subjected to evaluation and approval by their superiors (Bulmer, [2017](#), p. 9). A judiciary that is self-perpetuating has the potential to safeguard the independence and professionalism of the judiciary (Khan, [2023](#)). However, it may also result in the centralization of power among senior judges, thereby compromising the independence of individual judges. This can lead to a conservative, unrepresentative, unaccountable, and unresponsive judicial system that is detached from the concerns of the general public (Khan, [2023](#)).

In the Indian context, it is observed that the appointment of the higher judiciary is carried out by the President, who engages in consultations with the Supreme Court. Consequently, this process has resulted in a situation where the judiciary exercises a significant degree of autonomy in its own appointments (Sengupta & Sharma, [2017](#)). The Supreme Court of India emerged as the prevailing entity in the pursuit of supremacy. The restoration of a collegium system was enacted following the Supreme Court on Record Association case of 2015 (Sengupta & Sharma, [2017](#)). The inclusion of judicial councils comprised solely of judges is another form of systems involving judicial self-appointment. The Iraqi Higher Judicial Council can

be characterized as an institutional entity. Japan also provides an illustration of a judiciary that is predominantly self-appointed (Ginsburg, [2009](#), p. 4).

It can be asserted that the prevalence of systems involving judicial self-appointment is diminishing. It is evident that they afford the judiciary as a collective entity with utmost independence (Ginsburg, [2009](#)). However, it is possible that individual judges may exhibit a lower degree of independence. Moreover, the system is perceived as offering minimal levels of accountability. Numerous judiciaries have increasingly engaged in political matters, thereby potentially compromising their own legitimacy (Ginsburg, [2009](#), p. 4).

Cooperative Appointments

The implementation of cooperative appointment methods necessitates the collaboration between two entities. Typically, a single institution assumes the responsibility of nominating candidates, while the other institution either grants consent to the nomination or proceeds to select judges from a limited list of nominees (Bulmer, [2017](#), p. 10). In the context of Brazil, the President is responsible for the nomination of candidates for the Supreme Federal Court. Subsequently, these nominees are required to secure the approval of an absolute majority within the Senate (Bulmer, [2017](#), p. 10). In both the United States and Russia, the appointment process for Supreme or Constitutional Court judges involves the nomination by the President and subsequent approval by a legislative body through a majority vote (Ginsburg, [2009](#), p. 3). The cooperative mechanism pertaining to judicial appointments, nonetheless, presents the potential for impasse, as the appointment process necessitates consensus among various institutions. Under certain circumstances of political conflict, it is conceivable that appointments may not be made, resulting in the persistence of vacancies (Ginsburg, [2009](#), p. 3).

Representative Appointments

The utilization of representative appointment mechanisms facilitates the allocation of a specific number of members to a court by two or more entities (Bulmer, [2017](#), p. 10). In the context of Mongolia, it is noteworthy that the composition of the Constitutional Court consists of three equal segments, wherein each segment is responsible for appointing one-third of the courts members (Bulmer, [2017](#), p. 10). Specifically, the President, Parliament, and Judiciary are individually entrusted with the task of

appointing one-third of the Constitutional Court members. In countries such as Italy and South Korea, the composition of the constitutional court is characterized by a tripartite appointment process (Ginsburg, [2009](#), p. 2). Specifically, one-third of the members are designated by the President, another one-third by the legislature, and the remaining one-third by the Supreme Court. Mongolia serves as an additional illustration, wherein the composition of the constitutional court consists of judges appointed by three distinct entities: one-third by the Mongolian president, another one-third by the judiciary, and the remaining one-third by parliament.

Representative systems are purposefully structured to guarantee a diverse composition of individuals with various professional and political backgrounds within the court, with the aim of preventing any single institution from exerting excessive influence or control (Ginsburg, [2009](#), p. 3). Given that only one-third of the membership is appointed by any single entity, it can be inferred that no individual body possesses the authority to dictate outcomes. This assumption is contingent upon the assumption that each judge functions as an impartial agent. Nevertheless, it is conceivable that judges may be perceived as representatives of the individuals who have selected them. An instance of potential bias may arise when justices appointed by the parliament exhibit a tendency to favor the parliament over the executive branch in cases of dispute (Ginsburg, [2009](#)). The primary emphasis of this system lies in the collective aspect of the court, which serves to guarantee both independence and accountability. Cooperative system differs from representative judicial appointments. A cooperative system involves joint decision-making for judicial appointments, while a representative system allows individual appointments without consent, allowing co-appointing bodies to make their own appointments (Bulmer, [2017](#), p. 11).

Mixed Mechanisms

The aforementioned appointment mechanisms have the potential to be integrated in innovative manners (Khan, [2023](#)). An illustrative instance involves the utilization of a representative appointment mechanism, wherein certain members of a court are designated by the executive, while others are selected through a collaborative mechanism that necessitates the collective endorsement of two or more actors (Khan, [2023](#)). The entities involved in a collaborative appointment procedure may also be formed based on a representative framework. The appointment of the Chief Justice

of Jamaica's Supreme Court and the President of the Court of Appeal follows a formal process. Specifically, the Governor General appoints these positions based on the advice provided by the Prime Minister, following consultations with the leader of the opposition (Bulmer, [2017](#), p. 11). The appointment of the remaining judges of the Supreme Court and Appeal Court is carried out by the Governor General, who acts upon the recommendations put forth by the Judicial Service Commission. Therefore, a blended mechanism of judicial appointments may be ensured by taking features from different models of appointing judges.

Judicial Elections

In certain jurisdictions, primarily within the United States, a minority of regions employ popular elections as a method for selecting judges (Bulmer, [2017](#), p. 14). The utilization of popular elections in the selection of judges presents limited assurances regarding their professional competence, while also rendering them susceptible to political partisanship and corruption, particularly when they are compelled to solicit campaign funds (Bulmer, [2017](#)). As per the provisions outlined in the 2010 Constitution of Bolivia, the process of appointing members to the Supreme Court of Justice involves the use of popular elections (Pásara, [2015](#)). However, in an effort to mitigate the influence of partisan affiliations, prospective candidates are prohibited from engaging in active campaigning or maintaining membership in political parties (Bulmer, [2017](#), p. 14).

Every state in the United States possesses its own distinct state judiciary, which operates under a unique system of appointment (Ginsburg, [2009](#), p. 6). The nature of these systems has exhibited diversity throughout different periods, with a significant proportion incorporating judicial elections, albeit not universally. The utilization of electoral systems experienced a surge in popularity during the 19th century, primarily driven by the objective of augmenting the accountability of the judiciary. This inclination was further fueled by concerns surrounding the perceived elitism of judges (Ginsburg, [2009](#)). These systems can be distinguished based on two fundamental dimensions: the presence of partisanship in elections and the purpose of elections, whether they serve as a means for initial appointment or solely for retention.

Partisan elections, as their name implies, enable judges to participate in electoral campaigns affiliated with a specific political party, thereby

presenting themselves as candidates aligned with either the Republican or Democratic party (Bulmer, [2017](#)). Non-partisan elections are characterized by the absence of party affiliation. At present, there are eight states that employ partisan elections, whereas thirteen states utilize non-partisan elections (Ginsburg, [2009](#), p. 6).

Retention election systems consist of an initial appointment process based on the merit plan, followed by a subsequent election approximately one year later, wherein the judge runs uncontested (Ginsburg, [2009](#), p. 6). The determination of whether to retain a judge is made by the public, taking into consideration the judges judicial record. Subsequently, the judge will be susceptible to periodic re-election. The present system employs electoral processes as a means to foster public accountability; however, it does not incorporate public participation in the initial appointment of judges. In the United States, judges have been subject to recall by the public as a punitive measure. In a well-known occurrence, three individuals serving on the California Supreme Court were subject to recall in 1986 due to their outspoken resistance towards the implementation of capital punishment (Ginsburg, [2009](#), p. 6). One member of the judiciary, namely Chief Justice Rose Bird, consistently cast votes in favor of overturning all instances of capital punishment that had been imposed by lower courts. As a consequence of this occurrence, a triumphant endeavor was undertaken to initiate her recall, thereby exemplifying the principle of judicial accountability. Nevertheless, it also demonstrates that the participation of the general public can potentially impede the judges capacity to render an impartial decision based on her own interpretation of the legal principles.

Judicial elections have been the target of significant scrutiny and scholarly critique (Ginsburg, [2009](#), p. 7). The practice of electing judges serves as a mechanism for fostering accountability within the judicial system, and was initially implemented in the United States with the intention of preventing judges from being solely appointed by influential politicians. However, as time has passed, it has been increasingly recognized that this practice carries the potential for the politicization of the judiciary. There exists a lack of empirical evidence supporting the notion that it results in a judiciary characterized by greater diversity. Furthermore, the near-automatic re-election process also does not result in increased turnover of judges. Nevertheless, recall elections have proven to be an

effective mechanism in upholding judicial accountability, particularly in cases of significant public interest.

Judicial Council or Commission

A judicial council or commission is an autonomous governmental body that typically consists of a blend of individuals from both judicial and nonjudicial backgrounds. Its primary function is to oversee the process of making judicial appointments or providing guidance and recommendations in this regard (Bulmer, [2017](#), p. 15). In the context of South Africa, the appointment process for the Constitutional Court involves the participation of various stakeholders, including members of the judiciary, representatives from the legal profession, academics, and politicians, who collectively form the Judicial Service Commission. This commission is responsible for making nominations to the President for potential appointments to the Constitutional Court (Bulmer, [2017](#), p. 17). The inclusion of a diverse membership within a judicial council is intended to establish a harmonious equilibrium between the principles of professionalism and independence, on one hand, and the values of accountability and representation within the judiciary, on the other. The council or commission model, in its various iterations, is currently prevalent in the majority of constitutions worldwide.

Nominating Powers of the Judicial Councils

The functions and powers of judicial councils exhibit significant variation, encompassing advisory roles that offer non-binding recommendations, as well as decision-making bodies vested with authority over the appointment process (Bulmer, [2017](#), p. 15). The Judicial Appointments Advisory Board (JAAB) in Ireland is considered to have limited role as an advisory institution. The JAAB is limited to presenting a list of seven suitably qualified candidates for every vacancy. The government is under no obligation to choose a candidate from the provided list, as it maintains the discretion to make appointments based on its own initiative. In contrast, the Judicial Appointments Advisory Committee (JAAC) in Ontario, Canada, presents a mere three candidates for consideration in response to each judicial vacancy. The list of nominees is arranged in a hierarchical order based on preference (Bulmer, [2017](#)). The Attorney General of the province possesses the authority to make decisions regarding the appointment of judges. However, the law mandates that the Attorney General must select a candidate exclusively from a predetermined

list of three nominees. It is important to note that the Attorney General does have the discretion to reject the entire list and request that the Judicial Appointments Advisory Committee (JAAC) provide new nominations.

Under the Constitution of the Republic of South Africa ([1996](#)), the Judicial Service Commission (JSC) is responsible for the appointment process. When there is a need to fill vacancies, the JSC fulfils this duty by issuing a notice that provides comprehensive information about the available positions and invites individuals to submit nominations. The process involves the identification of qualified candidates and extending invitations for interviews (The Judicial Service Commission, [n.d.](#)). The interviews are disseminated to the public through the official social media channels managed by the judiciary of the Republic of South Africa (Judiciary RSA, [2023](#)). Prior to the interviews, professional organisations and members of the general public are afforded the opportunity to provide comments or make representations to the commission regarding the candidates. The interviews are conducted in a public setting, following which the JSC engages in private deliberations and subsequently renders its decisions. The recommendations are conveyed to the President, who subsequently proceeds with the appointment process (Office of the Chief Justice of Republic of South Africa, [n.d.](#)).

In sharp contrast to South Africa, the Pakistani system exhibits a disproportionate reliance on the Chief Justice (Omer, [2022](#)). The CJP possesses exclusive authority to initiate nominations in the Commissions for appointment, thereby granting him significant power in this regard, while other members of the commission are excluded from this process (Judicial Commission of Pakistan, [n.d.](#)).

Judicial Appointments in Pakistan: Theory and Practice

There is no denying the fact that practically judicial appointments in Pakistan reflects departure from theory. The JCP is facing unending criticism from the members of the same constitutional body, legal fraternity, and public at large. The CJP holds a hegemonic position in the process of appointing judges in contrary to the Constitution and longstanding practices duly endorsed by the apex court. An artificial seniority-cum-merit binary (unknown to the constitution) is hampering the decisions of the Commission. The situation warrants reconsideration of the entire process in

light of the lessons learned from the hereinbefore mentioned models of judicial appointments.

The Longstanding Practice of Judicial Appointments in Pakistan

The traditional convention has been to elevate Chief Justices of the High Courts to the Supreme Court. This is primarily due to their extensive tenure in the judiciary, which equips them with a wealth of judicial expertise across various legal domains. Additionally, they possess a comprehensive understanding of the diverse challenges and complexities associated with judicial administration (Q. F. Isa, personal communication, May 25, 2022). In addition, the Chief Justice of a High Court engages in interactions with the provincial executive in relation to budgetary and administrative issues that impact the functioning of the courts. Through these interactions, the Chief Justice gains a comprehensive understanding of the challenges and limitations involved, while also developing the ability to maintain a professional distance from the executive branch (Q. F. Isa, personal communication, May 25, 2022).

In instances where a Chief Justice of a High Court is not appointed to the Supreme Court, such decisions are consistently made following careful consideration and for valid justifications. The senior most judge of the High Court is, consequently, appointed (Q. F. Isa, personal communication, May 25, 2022). An additional instance occurred when a proficient, albeit less experienced judge, who was nearing retirement at the age of 62, was elevated to the Supreme Court. This elevation proved advantageous as it allowed the public to continue benefiting from the judges expertise and skill for an additional three years, while also resulting in cost savings for the government. The aforementioned practice persisted despite the establishment of the JCP as mandated by the constitution (Q. F. Isa, personal communication, May 25, 2022).

Abandonment of Longstanding Practice

The longstanding practice in appointing judges to the SCP was abolished by CJP Saqib Nisar and Gulzar Ahmad. The establishment of an artificial seniority-versus-merit dichotomy was undertaken, despite the absence of any explicit provision in the constitution regarding this matter (Q. F. Isa, personal communication, May 25, 2022). The Chief Justices in question operated under the assumption that seniority and merit were incompatible, and proceeded to unilaterally nominate candidates based on

their own self-justified and fallacious reasoning, while asserting the candidates merit. Consequently, Chief Justices and senior judges of the High Court(s) were deprived from elevation to the apex court (Vakeel Online, [2021](#)). The CJP, Mr. Saqib Nisar, attempted to provide a rationale for the selection of a junior judge from the Sindh High Court for appointment to the SCP. However, he made this assertion without substantiating it with evidence, claiming that neither the Chief Justice nor any of the senior judges expressed a desire to be appointed to the SCP. However, the Chief Justice and senior judges express a contrasting narrative (Q. F. Isa, personal communication, May 25, 2022). CJP Gulzar Ahmad bypassed the Chief Justice of the Sindh High Court and senior judges, asserting that they did not meet the merit test. However, he did so without first establishing the criteria and methodology to assess merit (Q. F. Isa, personal communication, May 25, 2022). Subsequently, Chief Justice Gulzar put forth the recommendation to appoint the aforementioned Chief Justice as an ad-hoc judge to the Supreme Court after a few weeks. Has he now successfully passed the elusive merit test? Coincidentally, the criteria for being appointed as a judge, as stipulated in Article 177 of the Constitution, and as an ad-hoc judge, as outlined in Article 182 of the Constitution, are indistinguishable. Furthermore, judges falling under both categories possess equivalent powers and perform identical duties.

Seniority versus Merit Binary

The artificial seniority-versus-merit binary, created by the commission, is under umpteen criticism. A drop-deep analysis of arguments for and against seniority is indispensable to reach a conclusion. The vast majority of legal fraternity, including Pakistan Bar Council, demands upholding seniority principle (Vakeel Online, [2021](#)). Those advocating seniority principle rely on the history of judiciary in Pakistan. In their point of view, seniority is an obstacle to arbitrary appointment on the pretext of merit. As a lesson of history, whenever seniority has been compromised, disaster is the only outcome (Vakeel Online, [2021](#)). In 1954, Abu Saleh Muhammad Akram, a Bengali judge, being the senior most judge of the Federal Court was ignored to be appointment as CJP and Muhammad Munir was appointed instead. As a result, Pakistan faced disastrous consequences in shape of Maulvi Tamizuddin and Dosso cases (Vakeel Online, [2021](#)). The seniority principle, says Hamid Khan, makes the system self-operative and

closes the window for nepotism, political appointees, and intervention from the undemocratic forces.

In stark contrast, those advocating merit or competence rely on constitution as seniority is not envisioned in the constitution. In their point of view, appointments of judges should be made by judging the credibility, spirit and vision of the nominees (Raja, [2021a](#)). The purpose of 18th amendment was to make this process inclusive, democratic, and transparent. However, that was watered down by the SCP as discussed in chapter two. The job of the commission, says Salman Akram Raja, is not limited to check the dates of birth of judges for judicial appointments in the apex court (Vakeel Online, [2021](#)). The appointment of chief justices on the principle of seniority is not the concern of those advocating for meritorious appointments. However, they are concerned with the pursuit of seniority principle in fresh appointments made to the SCP from a high court.

The appointment of Ayesha A. Malik, a junior judge of Lahore High Court, as a judge of the SCP resulted in endless debates over seniority-versus-merit binary (Vakeel Online, [2021](#)). Her appointment was welcomed by many based upon her gender. However, the women card, says Hamid Khan, was smartly used to dispel genuine concerns of the legal fraternity (Vakeel Online, [2021](#)). Had the seniority principle been adhered in the past, the Lahore High Court would have had a women chief justice and the supreme court a women judge back in 2002-2003, if Justice Fakharun Nisa Khokar was not bypassed (Vakeel Online, [2021](#)). The adherence to the principle of seniority in the selection of judges has the potential to introduce mediocrity into the judicial domain (Raja, [2021b](#)). The aforementioned principle fails to provide a juristic vision. Both the most senior Sessions Judges and the most senior high court judges should not perceive their promotion to the high courts or the SCP as a guaranteed privilege (Raja, [2021a](#)). The selection of lawyers for elevation should encompass an evaluation process that considers not only narrow definitions of competence and integrity, but also takes into account their spirit and vision (Raja, [2021a](#)). Implementing this task is more challenging than merely expressing it verbally. The significance of spirit and vision in relation to the execution of the judicial function warrants examination. This inquiry necessitates an analysis of the actions undertaken by judges presiding over superior courts in the process of rendering decisions in legal cases (Raja, [2021a](#)). It is widely believed that judges engage in the application of legal principles to

the specific factual circumstances presented in a given case. The actuality is considerably more intricate. The interpretation of legal texts and assessment of factual evidence involve the consideration of spirit and vision.

Disregard for the Constitution

The Chairman of the JCP took it upon himself to unilaterally select judges for appointment to the Supreme Court and his chosen nominees were presented to the members as *fait accompli* to either approve or reject them (Q. F. Isa, personal communication, May 25, 2022). This does not accord with Article 175A of the Constitution (Q. F. Isa, personal communication, May 25, 2022). On December 27, 2021, the senior puisne judge, Mr. Justice Qazi Faez Isa, penned a letter to the CJP (also serving as the Chairman of the Commission). The letter underlines the notion that while undoubtedly possessing wisdom, the leaders of well-operated and respected organizations globally function with an emphasis on openness and transparency. They engage in sharing proposals with colleagues, considering their input, and embracing valuable suggestions. Such an approach is instrumental in reinforcing and uniting institutions, ultimately fostering public confidence (Q. F. Isa, personal communication, May 25, 2022). Mr. Justice Qazi Faez Isa notes that the brilliance of an individual alone might not suffice as a replacement for the benefits derived from a process that is participatory and consultative in nature

In another communication dated January 3, 2022, the senior puisne judge, Mr. Justice Qazi Faez Isa, wrote a letter to the then CJP, Mr. Gulzar Ahmad, wherein he articulated that Article 175A (2) of the Constitution explicitly designates the CJP as the Chairman of the Commission and no more. It refrains from conferring sole nominative authority upon the CJP. Moreover, it doesn't establish that the Commission can exclusively consider the nominee proposed by the CJP (Q. F. Isa, personal communication, May 25, 2022). Furthermore, Mr. Justice Qazi Faez Isa highlighted that the capacity to formulate rules, as stipulated under Article 175A (4) of the Constitution to regulate the Commissions proceedings, neither endows nor empowers the Commission to operate beyond the parameters mandated by the Constitution.

The rules of the JCP explicitly states that the initiation of nominations within the Commissions for appointments shall be executed by the CJP

(Judicial Commission of Pakistan, [n.d.](#)). However, this rule should not be interpreted as bestowing singular and absolute authority upon the CJP to exclusively nominate judges. Such an interpretation, if adopted, would affect in an infringement of the Constitution (Q. F. Isa, personal communication, May 25, 2022). A fundamental principle of interpretation underscores that when the authority to establish rules is delegated, it cannot be utilized to replace or surpass the very legal framework that grants it, let alone transgressing the boundaries set by the Constitution (Q. F. Isa, personal communication, May 25, 2022).

Manipulation of Meetings

The Secretary of the Commission manipulates matters through different methods. He has done this, for example, by needlessly forwarding to the members of the Commission a letter alleging that a member was not qualified to be a member of the commission because he was working for the State Bank of Pakistan (Q. F. Isa, personal communication, May 25, 2022). In doing this, writes Qazi Faez Isa, the Secretary misused his office and the facilities of the Supreme Court. The complainant, if he chose to, could have himself written to the members. It was not becoming of the Secretary to facilitate him, and to forward an unverified and defamatory complaint. Another of his tactics is to convene meetings when particular Member(s) may not be able to attend, and to do so because their views on a particular matter did not accord with those of the Chairman. Mr. Justice Qazi Faez Isa claimed that he was seriously ill with Covid-19 and his precarious condition was known to the Secretary, yet a meeting of the Commission was held, and during vacations, on 10 August 2021; he attended the meeting strapped with a mask connected to an oxygen tank. And, another time, when he had to accompany his wife abroad who required medical attention, the meeting was held on 9 September 2021 (Q. F. Isa, personal communication, May 25, 2022). These tactics, indeed, undermines the credibility of the JCP and the highest court of the country.

Secrecy and the Constitution

Article 175A (15) of the Constitution stipulates that the meetings of the Parliamentary Committee are to be conducted in camera (The Constitution of Islamic Republic of Pakistan, 1973, n.d., art. 175A (15)). However, the Constitution does not explicitly extend this requirement to the meetings of the Commission. Rule 5(4) contravenes the Constitution by stating that the

proceedings of the Commission must be conducted in camera (Judicial Commission of Pakistan, [n.d.](#)). Articles 175A (15) makes it clear that whenever the Constitution requires secrecy (camera proceedings) it states this expressly. When it does not do this, to then introduce secrecy, amounts to writing words into the Constitution, a power which the JCP does not possess (Q. F. Isa, personal communication, May 25, 2022). In a separate letter dated May 5, 2021, Mr. Justice Qazi Faez Isa expressed his apprehensions, noting that in several countries, the procedure for appointing judges is transparent and open to both the public and the media (Q. F. Isa, personal communication, May 25, 2022). It leaves one to wonder whether the canard of secrecy serves some other purpose.

Concerns of the Statutory and Representative Bodies

In an attempt to record protest and raise concerns, Pakistan Bar Council (PBC), a number of provincial bar councils, Supreme Court Bar Association (SCBA), and a number of other associations have always expressed their concerns over judicial appointments through resolutions, but the concerns of these elected, statutory, and representative bodies are not heard (Q. F. Isa, personal communication, May 25, 2022). On 7th June, 2023 the Pakistan Bar Council, in a joint meeting of the Vice Chairmen, Chairmen, Executive Committee, and members of the Judicial Commission of Pakistan from the PBC and all Provincial Bar Councils, the Pakistan Bar Council demanded that the elevation of judges in superior courts be based on seniority-cum-fitness, and that the rules of the commission be immediately revised after consultation with the relevant stakeholders. It was also urged that nominations from Khyber Pakhtunkhwa and other relevant provinces be made to fill the vacant seats in the apex court (Sigamony, [2023](#)). However, the concerns of statutory and representative bodies of the legal fraternity have not been addressed.

South African Model of Judicial Appointments: Lessons for Pakistan

The transition of South Africa from white-majority rule to a constitutional democracy required judicial reforms, inter alia, other public institutions (Gee & Rackley, [2017](#)). As a result, Section 178 of the Constitution established the South African Judicial Service Commission (JSC) (Republic of South Africa, [1996](#)). Every year, in April and October, the JSC has a week-long meeting (Office of the Chief Justice of Republic of South Africa, [n.d.](#)). One of its responsibilities is to interview candidates

for judicial appointments and also to hold accountable judges for their conduct (Office of the Chief Justice of Republic of South Africa, [n.d.](#)). It consists of twenty-three commissioners and a maximum of twenty-five when candidates are interviewed for a High Court. It is made of judges, politicians, legal practitioners, cabinet minister, and academia. The commission advertises vacant seats through its official website and accept applications in a defined format. A questionnaire which requires personal and educational details, experience, publications, reported judgments, and work cited in judgments is to be submitted by the aspirants. Once candidates are shortlisted, comprehensive public interviews are held to gauge the legal acumen and competence of the candidates.

In South African model of judicial appointments, unlike Pakistan, every eligible and ambitious aspirant can apply and compete against the vacant seats. One individual member of the commission cannot nominate candidates for judgeship. In stark contrast to the South African model, the Chairman of the JCP is all-powerful to trigger nomination of candidates in light of the rules and judicial interpretations. The CJP's influential role in appointments of judges must be reconsidered (Omer, [2022](#)). and a more transparent, inclusive, and meritorious process be adopted. South African model provides a balanced alternative mechanism to end the hegemonic position of the CJP as Chairman JCP. Furthermore, a constitutional protection may be given to the regular meetings of the JCP. The JSC in South Africa meets twice a year as stipulated. The meetings of the JCP must be regulated to end the discretion of the chairman to postponed a constitutional responsibility of the commission.

Recommendations

Judicial appointments in Pakistan needs to be reconsidered in the following manner to ensure maximum procedural-transparency, judicial accountability, public participation, and inclusiveness.

Reconstitution of the Judicial Commission of Pakistan

The JCP needs to be reconstituted by the inclusion of adequate members from the Parliament and academia. Beyond a shadow of doubt, role of the existing Parliamentary Committee has been reduced via judicial interpretations. The committee is devoid of any concrete role to play and inclusion of the legislators in the commission will provides them a decisive voting power. It will give a say to the public through their representatives

in the commission. It will ensure, consequently, judicial accountability and can enhance the overall credibility of the commission. As a lesson, Pakistan may take into account the South African Judicial Service Commissions all-inclusive approach. This research study recommends the inclusion of two members from academia and an equal representation of both judges and parliamentarians in the commission, in addition to the member(s) of executive arm of the government and statutory bodies of the legal fraternity.

Regulating the Powers of the Chairman

Rules of the JCP have empowered the CJP (Chairman) to exercise unregulated discretion in nomination and the proceedings of the commission. The chairman is all-powerful to commence and regulate meetings of the commission to the exclusion of other members. It must be regulated through appropriate legislation to make it inclusive and self-operative. As a lesson, Pakistan may consider public advertisement of vacant vacancies like South African model. Aspirants may be required to submit a questionnaire-based application with credentials to be considered for screening and interviews. It will make the process self-operative and competitive. The chairman of the commission will no longer possess the power to nominate candidates to be considered for final appointments. Furthermore, commission may maintain a separate website and social media handles for advertisements, lists of applicants, schedule of interviews, and call for public complaints regarding any candidate before final recommendation to the President. The same procedure has successfully evolved in South Africa.

Ensuring Bi-annual Meetings and Defined Minimum Criterion

The meetings of the Commission must be constitutionally protected. A defined schedule of bi-annual meetings, through legislation, may make the process self-operative. The contemporary commission meets as per the whims of the chairman, which ultimately questions the formation of the commission. Additionally, a minimum criterion may be devised in accordance with the constitutional requirements and the best global practices for judicial nominations. It must ensure adequate representation of all provinces and both genders in the apex court. As a lesson, Pakistan may consider the African model for bi-annual meetings, criteria and guidance concerning candidates for judicial appointments.

Revisiting the Rules of the Commission

The existing rules of the Judicial Commission of Pakistan violates the constitution in multiple ways. Rule 2(e), for instance, stipulates that the Registrar of the apex court could potentially hold the role of the Secretary of the Commission (Judicial Commission of Pakistan, [n.d.](#)). The incumbent Registrar, a borrowed bureaucrat, serves as Secretary of the commission. However, judiciary and executive branches must be kept apart, according to Article 175(3) of the constitution. Therefore, it is incomprehensible why a gentleman, who is an integral part of the executive, is occupying these two most important and sensitive positions. Furthermore, Constitution mandates Parliamentary Committee meetings be held in camera., but the constitution does not state this with regard to the meetings of the commission (The Constitution of Islamic Republic of Pakistan, 1973, n.d., art. 175A (15)). However, Rule 5(4) infringes upon the constitution by mandating that the proceedings of the Commission be conducted in camera (Judicial Commission of Pakistan, [n.d.](#)). Articles 175A (15) and 226 make it clear that whenever the Constitution requires secrecy (camera proceedings) it states this expressly. Similarly, Rule 3(1) articulates that the initiation of nominations within the Commissions for appointments shall be carried out by the CJP (Judicial Commission of Pakistan, [n.d.](#)). However, nomination is the collective responsibility of the Commission and the said rule violates the Constitution as discussed hereinbefore. Therefore, the Rules of the Commission deserve drop-deep examination and may be amended to bring it within the permissible limits of the Constitution.

Ensuring Procedural Transparency

Procedural transparency underpins the credibility of any constitutional duty. The contemporary Commission lacks credibility in the eyes of legal fraternity and members of the Commission. Therefore, ensuring procedurally-transparent proceedings of the Commission will enhance the credibility of the system. It can be achieved through use of technology for public participation, advertisements, and decisions of the Commission. The South African model provides a standout alternative mechanism. The interviews of the candidates, for instance, are available on the official YouTube channel of the judiciary for public feedback. Application form, advertisement of vacant seats, and minimum criteria and guidance are available on the official website. Pakistan can ensure a more procedurally-transparent proceedings of the Commission.

Conclusion

To encapsulate, judges do interpret laws which directly or indirectly affect public life. In Pakistan, the contemporary mechanism of judicial appointments is a subject of unending criticism and controversies. An artificial seniority-versus-merit binary has been created that is unknown to the Constitution itself. The CJP in general and the judicial branch in particular is all-powerful to appoint judges. Reforms is the only solution to tackle longstanding concerns and to ensure a balance between judicial accountability and independence. Therefore, a drop-deep examination of judicial appointments in different jurisdictions is made in this paper to bring reforms to the mechanism of judicial appointments in Pakistan. The available literature reveals different modes of judicial appointments which includes, single-body mechanism, representative appointments, professional appointments, cooperative appointments, judicial elections, appointments via commission or council, and a blended method of judicial appointments. Every method of appointing judges has its own challenges and shortcomings. However, the commission or council mode of appointing judges is comparatively inclusive and more reliable. It has successfully evolved in the South Africa during her transition from white-minority rule to a constitutional democracy. In stark contrast to South Africa, the commission mode of appointing judges has not been successfully evolved in Pakistan. The JCP has been the target of umpteen criticism for lack of transparency, manipulation of meetings, pre-pondering role of the chairman, court packing and for a borrowed bureaucrat as secretary of the commission. Through an exhaustive process of candidate selection, public interviews, and comprehensive assessments, the South African model promotes openness, inclusiveness, and competence in judicial appointments. Drawing lessons from the South African experience, this paper recommends a series of reforms to transform the judicial appointments process in Pakistan.

Conflict of Interest

The authors of the manuscript have no financial or non-financial conflict of interest in the subject matter or materials discussed in this manuscript.

Data Availability Statement

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References

- Bulmer, E. (2017). *Judicial appointments*. International IDEA Publications.
- European Commission for Democracy through Law (Venice Commission). (1997). *The composition of constitutional courts* (Science and Technique of Democracy No. 20) [Report]. Council of Europe. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1997\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e)
- Gee, G., & Rackley, E. (Eds.). (2017). *Debating judicial appointments in an age of diversity*. Routledge.
- Ginsburg, T. (2009). *Judicial appointments and judicial independence*. Comparative Constitutions Project. http://comparativeconstitutionsproject.org/files/judicial_appointments.pdf
- Judicial Commission of Pakistan. (n.d.). *Judicial commission of Pakistan rules, 2010*. https://www.supremecourt.gov.pk/downloads_judgements/all_downloads/judicial_commission/Rules,2010.pdf
- Judiciary RSA. (2023, April 20). *Judicial service commission interviews: 20 April 2023* [Video]. YouTube. <https://www.youtube.com/watch?v=7UwC6RajhRw>
- Khan, F. S. (2023, June 2). How to appoint a judge. *Dawn*. <https://www.thenews.com.pk/print/1076242-how-to-appoint-a-judge>
- Law Library of Congress. (2016, May 2). *How judges are selected in Germany*. In Custodia Legis. [https://blogs.loc.gov/law/2016/05/how-judges-are-selected-in-germany/The Library of Congress](https://blogs.loc.gov/law/2016/05/how-judges-are-selected-in-germany/The_Library_of_Congress)
- Office of the Chief Justice of Republic of South Africa. (n.d.). *About the JSC*. Retrieved on July 14, 2023, from <https://www.judiciary.org.za/index.php/judicial-service-commission/about-the-jsc>
- Omer, R. (2022, August 6). Paterfamilias? *Dawn*. <https://www.dawn.com/news/1703522>

- Pásara, L. (2015, March 5). *Judicial elections in Bolivia: An unprecedented event*. Due Process of Law Foundation. <https://back.dplf.org/en/resources/judicial-elections-bolivia-unprecedented-event>
- Raja, S. A. (2021a, August 8). Credibility and judicial appointments. *Dawn*. <https://www.thenews.com.pk/print/874783-credibility-and-judicial-appointments>
- Raja, S. A. (2021b, July 19). Seniority and judicial appointments. *Dawn*. <https://www.thenews.com.pk/print/865957-seniority-and-judicial-appointments>
- Republic of South Africa. (1996). *The constitution of the republic of South Africa*. <https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1>
- Roth, L. (2012). *Judicial appointments*. National Library of Australia. <https://catalogue.nla.gov.au/Record/6101253>
- Sengupta, A., & Sharma, R. (Ed.). (2017). *Appointment of judges to the Supreme Court of India: Transparency, accountability, and independence*. Oxford University Press.
- Sigamony, T. J. (2024, June 8). SC Acts: Bar councils' plea to apex court. *Business Recorder*. <https://www.brecorder.com/news/40246541>
- The Judicial Service Commission. (n.d.). *Justice/Resources/FAQs*. Accessed on June 17, 2023, <https://www.justice.gov.za/faq/faq-jsc.html>
- Vakeel Online. (2021, September 27). 'Does seniority matter for judicial appointments?' [Video]. Facebook. <https://www.facebook.com/watch/?v=984037555778784>