The International Journal of Social Sciences and Humanities Invention 5(02): 4383-4386 2018
DOI: 10.18535/ijsshi/v5i2.01 **ICV 2015: 45.28**
ISSN: 2349-2031

Comparative Study

Judicial Independence and Impartiality of Judiciary: A Comparative Study

Fozia Shaheen[1], Mamoona Khalid[2]

Lecturer, University Law College, University of Sargodha, Pakistan

Abstract: Vesting judicial power in a separate branch under the doctrine of separation of power requires impartiality of the body exercising judicial powers, in order to develop public confidence on the judiciary. An independent judiciary has always been acted as a guardian of constitution and individual rights. Independence and impartiality of the judiciary is not only necessary for fair trial but also pre-requisites for the application of Rule of Law. If judiciary is biased then there will be chaos and tyranny. Right of fair trial before independent and impartial tribunal is an internationally recognized right under International Instruments. This Article is intended to explore the importance of doctrine of judicial impartiality for preserving Judicial Independence in Constitutional analysis perspective of Pakistan, UK and USA.

Key Words: Judicial, Independence, Impartiality, Dimensions, Instruments

Introduction

An independent and impartial judiciary has become an ideal and realistic goal of most of the democratic states not only in current era but also in ancient times. Its origin can be traced back to the Plato period in 399BC, Plato considers impartiality as an important attributes of judicial office. Impartiality is defined under Oxford English Dictionary as such

"[n]ot partial, not favouring one party or side more than other, unprejudiced, unbiased, fair, just or equitable" (Geyh, 2013)

So impartiality means the judicial authority should not have favouritism, tending or preconceived opinion on unjust grounds and should not prefer one party over the other on inequitable grounds or undermine a party on retaliation bases in the determination of a dispute and must uphold rule of law.

Court in Republican Party vs. White Considers impartiality as absence of bias, preconceived favour or open-mindedness (Reyes, 2003). Impartiality means lack of bias in application of law for parties or against a specific legal issue and open-mindedness of the judges to admit and consider the views against their preconceived bias or favour about litigants or ideas (Raban, 2003).

Justifications of Retaining Impartiality

The beneficiaries of the impartiality are not only litigants but also public and judges himself .Litigants are directly benefited by impartial trial, right to fair and impartial trial is recognized as fundamental rights under the Municipal laws of democratic states. Public can ascertain from the impartial trial that whether judges are performing their role in accordance with constitution and upholding law or not. It demands that "Justice should not only be done but must be seemed to be done (*Rex* vs. *Sussex, 1924)*."Impartiality and independence of the judiciary are mostly correlated and independence cannot be secured in the absence of impartiality. So if judge's acts impartially than it shall be presumed that they have attributes for holding judicial office and are performing their constitutional role honesty without any fear or favour.

Dimensions of Impartiality

Judicial impartiality can be discussed in three dimensions.

- Procedural Dimensions
- Ethical dimensions
- Political dimensions

Procedural Dimensions

In procedural perspective judicial impartiality can be understood as procedural fairness or fair hearing in the determination of legal rights and liabilities. This type of impartiality can be achieved by constitutional guarantee of fair trial, due process of law and Principle of Natural Justice.

Ethical dimensions

In Ethical perspective judicial impartiality serves as good conduct standard free from bias. Judges should not have personal or relative interest in trial that leads towards bias. This type of impartiality can be achieved by regulating the conduct of judges under Judicial Code of Conduct.

Political dimensions

In Political dimensions judicial impartiality demands that judges should not be influenced by any political interest by those who wanted to enforce Political agenda through favoured decision, if judges future interest is influenced by those who are party to suit by using different means of

pressurizing e.g. fear of Judicial accountability, reduction of judicial budget, criticism etc. than judiciary will loss public confidence and independence.

Comparative Study of Constitutional Guarantees of Judicial Impartiality PAK, UK, USA.

Regulating Judicial Impartiality in Procedural Dimensions:

Judicial impartiality in Procedural dimensions can be achieved through following factors.

- Constitutional Guarantee of Fair Trial.
- Constitutional Guarantee of due process.(Geyh, 2013)
- Observance of Natural Justice Principles.
- Disqualifying Mechanism

Constitutional Guarantee of Fair Trial and due process under the Constitution of UK, USA and Pakistan

Right to fair trial and due process is recognized as fundamental right under the Constitution of most of the democratic states. Fair trial demands that

- Hearing should be fair.
- Judge should be impartial.
- In accordance with law.
- Within reasonable time.

Fairness can be secured by setting procedural standards of fair hearing under statutory laws."Nemo Judex in re sua" recognized as fundamental essential of fair hearing demands impartiality of the authority associated with the task of deciding disputes and it should apply reason objectively in accordance with law and facts of the case (Jain'SN& Jain MP. "n.d.").

Right to Fair trial has always been central to the British Justice System. It is recognized as one of the essentials of Rule of Law upon which British Justice System is based. Historically it was recognized under the Magna Carta in1215 under the provisions 'to no one will we sell, to no one will we refuse or delay, right or justice". Later on, right to fair trial and public hearing by an independent and impartial tribunal in determination of civil rights and criminal charge is granted Under Article 6 of the "European Convention on Human Rights" and Human Rights Act (Vitkauskav& Dikov, 2012). This principle was further protected under the Constitutional Reform Act 2005 by securing independence of Judiciary. Right to fair trial puts two fold obligations on state;

i. No one should be punished without adopting fair trial procedure.
ii. Everyone shall be tried by impartial Courts established by law ("Article 6: Right to a Fair Trial, 2012").

As far as fair hearing in USA is concern it is guaranteed under the Due Process Clause enumerated in 5th and 14th amendment to the Constitution of United States of America. Under Due Process Clause government is prohibited to deprive individuals of their life, liberty and Property without observing due process of law. Due process has been interpreted by Supreme Court of USA and includes "a fair trial in a fair tribunal is a basic requirement of due process". It was held in Tumey vs. Ohio that right to an impartial judge is granted under the due process clause (Geyh, 2013). So impartiality in procedural dimensions is achieved by due Process Clause in USA.

Under the Constitution of Pakistan 1973 procedural impartiality is secured through following provisions;

i. Right to fair trial and due process of law is granted as fundamental right under Article 10-A of the Constitution of Pakistan 1973.
ii. Article 4 grants inalienable right to be treated in accordance with law and no person shall be deprived of life, liberty, property and reputation except in accordance with law. Article 4 is designed to entitle an individual to be treated in accordance with principles of Natural Justice.
iii. Equality before Law is granted under Article 25 of the Constitution of Pakistan 1973 as fundamental right. Article 25 is a safeguard against discrimination on all bases.

Disqualifying Mechanism and Principles of Natural Justice:-

Disqualifying mechanism is a mode to secure procedural impartiality; under this mechanism a judge shall be disqualified to hear a case in which his personal, pecuniary, friends or family interest is involved. It is based on the principle of Natural justice that "no one shall be judge of his own cause". In UK, Principles of Natural Justice such as "audi alterm partem" and "nemo judex in re sua" are fully observed and decision can be set aside in case of violation of these principles (Jackson &Philips, 2001). Held in Mrs. Anisa Rehman vs. PIA (1994) that "audi alterm partem" was applicable in both judicial and quasi judicial proceedings.Article 6(1) of ECHR automatically disqualifies a judge from hearing a case in which his personal, pecuniary, friends or family interest is involved. It was held in R vs. Bow Street Magistrates, ex P. Pinochet that;

Judge failure to disclose his personal interest in case violated the Principles of Natural Justice that "no one shall be judge of his own cause" and disqualification rule demands exclusion of judge in a case involving his own interest (Tesekkur, 2012).

Requisites for Application of Disqualification Rule:

i. Judge must have personal, relative or pecuniary interest in case.
ii. Judge must disclose his interest in case.
iii. Due to alleged interest there is apprehension of danger to impartiality. It was held in R. vs. Gough that for application of disqualification rule existence of real danger of bias is pre requisite.

Exception to Rule:

If judge discloses his interest but parties have no objection and no danger to impartiality exist than judge is not disqualified to hear (Jackson &Philips, 2001).

As far as impartiality rule in USA and Pakistan is concern, disqualifying rules are contained in Judicial Code of Conduct. In USA the Model Code of Judicial Conduct objectively states that a judge shall not entertain a case involving his personal, economic interest or having relations with lawyers or parties to suit or such entity is party to suit in which judge has already served before holding judicial office or receiver of campaign contribution from party. In Pakistan disqualification rules are contained in the. Rule IV of the Code contains disqualification rule that disqualifies judge to entertain a suit involving his personal, friends or relative interest (*Code of Conduct*, 2009).

Disqualification and Disciplinary Actions under Judicial Code in Pakistan:

Under National Judicial Policy Judges are required to follow the judicial Code of Conduct in discharge of judicial functions .The violation of rules of judicial Conduct is considered as misconduct subject to disciplinary proceedings by Supreme Judicial Council .The alleged misconduct shall be reported to Chairmen of SJC for action through Chief Justice of the Concerned High Court ("*National Judicial Policy*, 2012").

Regulating Judicial Impartiality in Ethical Dimensions:

Impartiality in ethical dimension can be regulated by Judicial Code of Conduct, Oath laws and disciplinary mechanisms. Judicial Code of Conduct regulates the impartiality by two ways.

i. Regulate the judicial Conduct.
ii. Base for disciplinary action in case of violation of Code.

Judicial Conference of the U.S., Rules for Judicial Conduct and Judicial Disability Proceeding recognizes code violation as bases for disciplinary action. In USA and Pakistan Judicial Code of Conduct are in written form to regulate the impartiality in ethical dimension as contrast to UK, where there is no code in written form. However there are certain documents such as "Equal Treatment Bench Book" and The Guide to judicial conduct to regulate judge's conduct.

As far as USA is concern judicial impartiality is required under "American Bar Association Model Code of Judicial Conduct" (Herein after called Code of Judicial Conduct).The Code put restriction on judges and directed them not to indulge in Partiality .Under Code of Judicial Conduct Canon 2.

"A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment."

A judge shall not be influenced by Partisan interest or criticism fear etc during discharge of judicial functions.Canon3,S5 B of Code of Judicial Conduct directed the judges behavior should express the impartiality and non indulgence in case e.g. expressions, language etc.

According to Canon 2 S A, Judges should to avoid impropriety and its appearance (Kang, 2004).

Code of Conduct for judges of the Supreme Court and High Court regulate the impartiality in Pakistan, Article III directs that Judicial Conduct should be free from impropriety. Article IV directs that judges should not entertain cases involving his personal, friends or family interest and refuse to hear cases in which he has any connection with parties or advocates. Justice should not only be done but it must be seen to be done. Article VIII directs judges not to accept gifts from parties or public that will interfere in performance of judicial functions ("*Code of Conduct"*, 2009).

As far as disciplinary action in UK is concern, under Human Rights Act proceedings against judicial conduct can be initiated by exercising remedy of appeal, review and in any other manner mentioned in rules. The Office for judicial complaints were constituted under Constitutional Reform Act 2005 impose obligation on Lord Chancellor and Lord Chief Justice for governing judicial complaint system. Under this system judge may be removed or suspended from office after hearing of conduct complained.

In Pakistan Supreme Judicial Council can inquire into the Complained Conduct and judge may be removed from office.

Regulating Judicial Impartiality in Political Dimensions:

In political dimensions impartiality can be achieved by designing judicial appointment and removal process in such a way to shield political influence and promote public confidence on judiciary (Geyh, 2013). Impartiality in political dimensions means there should not be political judging, which means that judges instead of applying law in determination of rights and liabilities applies official ideology (Satin ,2008). In Pakistan and UK appointment process under the current arrangement is so designed to shield the political influence, whereas in USA there is Senate confirmation that is balanced by ABA, Pressure group and public. Judicial removal process in UK and USA involves legislature whereas in Pakistan there is independent Supreme judicial Council to provide judges fear free atmosphere and to apply law instead of applying political agenda due to fear of removal. Judges shall not hold any profitable office under Article 207 of the Constitution of Pakistan is designed to achieve impartiality by eliminating any fear of loss and seniors will.

Conclusions and Recommendations

Study of the concept of judicial independence is incomplete by excluding judicial impartiality in the sense that concept of judicial independence and impartiality are interrelated. Whenever, we talk about judicial independence we impliedly assume impartiality of judiciary. Trial objectives are to achieve impartiality by means of independence. In current Article, judicial impartiality is discussed in three dimensions, namely procedural, ethical and political dimensions and means to secure impartiality in these dimensions. Judicial impartiality in ethical dimensions is achieved by regulating judicial conduct through Judicial Code of Conduct and disciplinary action mechanism. Judicial impartiality in procedural dimensions is achieved by constitutionally securing principles of fair trial, due Process and Natural justice Principles. As far

as UK is concern, there is judicial complaint system in addition to impeachment under the "Constitutional Reform Act 2005" that will remove a judge on the grounds of misconduct. Whereas in Pakistan there is no such forum except Supreme Judicial Council that will inquire into judicial conduct, such complaint mechanism should also be adopted in Pakistan to reinforce judicial impartiality in procedural dimensions. In political dimensions impartiality can be secured by exclusion of legislative and executive interference in judicial appointment, removal, tenure and salary.

References

[1] Code of conduct for judges of the Supreme Court and the High Court.(2009). Retrieved May20, 2014from file:///G:/CODE%20OF%20CONDUCT%20FOR%20JUDGES%20OF%20THE%20SUPREME%20COURT%20AND%20THE%20HIGH%20COURTS.htm

[2] Geyh,G,C (2013).Dimensions of judicial impartiality .*FLORIDA LAW REVIEW, 65 (2013)*. Retrieved March18, 2014from http:// heinonline. Org.

[3] Jain'SN & Jain MP. (n.d.).*Principles of Administrative Law* .Marshal Printing Press, Federal Law House.

[4] Jackson &Philips H, O, (2001). *Constitutional and Administrative Law*. Sweet and Maxwell .

[5] Kang,M,J, John lockes. (2004), Political plan, or, there's no such thing as judicial impartiality (and it's a good thing, too). *Vermont Law Review Vol. 29(007*). Retrieved May20, 2014from http://heinonline.org.

[6] Satin ,K, Impartiality of the judiciary. *Ankara bar Review ,2008,1,16-18*. Retrieved March20, 2014from at http:// heinonline.Org.

[7] National judicial policy .(2012). Secretariat Law and Justice Commission of Pakistan, Supreme court building, Islamabad . Retrieved May20, 2014from http://www. supremecourt.gov.pk/web/user_files/File/NJP2009.pdf.

[8] Reyes, I,d, G. (2003).Case comment appearance of impartiality in the republican party vs. white courts opinion, *Boston University Law Review*, 83,465(2003). Retrieved March15, 2014 from http:// heinonline. Org.

[9] Raban, O. (2003).Judicial impartiality and regulation of judicial election campaigns. *University of Florida Journal of Law and Public Policy.15 (2003).* Available at http:// heinonline. Org.

[10] Tesekkur,Symposium Judicial Ethics. (2012). Abridge presentation practice in the Uk .Ankara. Retrieved March 20, 2014from http://www.yargitay.gov.tr/abproje/eng/ belge/semp1/GARLICK_EN.pdf.

[11] Vitkauskav,D & Dikov, G. (n.d.). Protecting the right to fair trial under the European Convention on human rights. Strasbourg. Council of Europe. Retrieved March30, 2014from http://www.coe.int/t/dghl/cooperation/ capacity building/Source/documentation/hb12_fairtrial_en.pdf.