



A CRITICAL ANALYSIS OF CONSTITUTIONAL OATH IN JUDICIAL TRANSFERS, AND JUDICIAL INDEPENDENCE

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Abstract

Judicial Independence as a cornerstone of Constitutional Governance is enshrined in the Constitution of the Islamic Republic of Pakistan. In this context, articles 194 and 200 prescribe the oath and transfer of High Court judges respectively. The recent transfers of High Court judges in Pakistan, have created a lot of constitutional controversy as to whether or not a judge transferred to a transferee High Court can lawfully exercise jurisdiction without taking a fresh constitutional oath. This is not just a matter of procedure and technique but also concerns general matters of constitutional supremacy, institutional legitimacy, judicial independence and public trust in the courts.

This article explores the constitutional link between the judicial oath and judicial transfers, critically. It brings out the point that all the High Courts have independent constitutional identity and transfer to another High Court is a change in office in a constitutional entity. Therefore, exercising judicial authority in the transferee High Court requires as a constitutional precondition compliance with Article 194, which is achieved by a new oath. The article also argues that the lack of a constitutional formality harms constitutionalism sets a precedent for institutional convenience and risks judicial independence.

This study finally suggests that constitutional procedure is not subject to watering down when it comes to the question of judicial office based on the principles of constitutionality, jurisprudence, comparison of constitutional laws and international principles of judicial independence. The article suggests a step towards the legal and institutional changes that should ensure a faithful implementation of the Constitution, protect judicial independence, and restore people's confidence in the superior judiciary.

Keywords: Constitutional Oath; Judicial Transfers; Judicial Independence; Article 194; Article 200; High Courts; Constitutionalism; Rule of Law; Pakistan Judiciary.



1. Introduction

It is not enough for a constitutional court to make correct decisions; it must also faithfully observe the constitutional procedure. The nature of constitutional democracies, in which judges get their powers from the Constitution itself, means that all constitutional obligations related to the judicial functions should be addressed with exactitude and transparency.

The Constitution of the country provides a well-regulated system with regard to the appointment and transfer of judges of the superior judiciary and also regulates their functioning. The constitutional oath is one of these safeguards. Article 194 states that the oath of office of every person appointed as a Judge of a High Court shall be taken and subscribed in the form prescribed by the Constitution. At the same time, Article 200 gives the President of Pakistan the authority to transfer a Judge from one High Court to another after consulting as required by the Constitution.

The recent transfers have brought into sharp relief a constitutional issue that has been debated for a long time: Can a judge transferred to the transferee High Court constitutionally exercise the powers of that Court without having to repeat the formalities of taking a fresh oath of office as a judge of that Court? The controversy has gained more constitutional relevance as it directly involves judicial independence, institutional legitimacy, separation of powers and public trust in the constitutional governance process.

This question is also to be considered under the umbrella of constitutional history in Pakistan where institutional crisis had traditionally come in the form of constitutional laxity instead of constitutional break down. Procedural deviations, especially in the judiciary, have ramifications that go beyond the realm of administrative ease as courts are themselves guardians of constitutional supremacy.

This article proposes that transfer to another High Court is an instant assumption of office in a constitutionally separate institution that subjects one to administration of a new oath for the institution's jurisdiction to be validly exercised.

2. Significance of Research

This study is important because it:

- Uses primary sources of legal materials to analyze and interpret a legal question, and
- Exemplifies the role of the State under Article 200,
- Reinforces constitutional supremacy,
- Protects judicial independence,
- Promotes comparative constitutional studies,
- Foster a discussion on the moral obligation of the Constitution,
- Points to the degree of legitimacy in the procedure of judicial governance,
- Comprehends the problems/deficiencies in the judiciary that undermine public trust in it.



In addition the problem also strikes the legality of possibly thousands of judicial rulings made in the time frame in question.

3. Literature Review

The scholarship on judicial independence in Pakistan has been developed broadly on the following aspects:

- Judicial appointments,
- Constitutional crises,
- Provisional Orders of the Court (POs), and
- Executive interference,
- Separation of powers, and
- Judicial accountability.

Yet, little research has been focused specifically on:

- inter-High Court transfers,
- The role of judges transferred, and
- The functional role of the transfer within the framework of the constitution, and/or environment.

The need for a new oath, some distinguished Pakistani and international jurists on constitutionalism and judicial independence include:

- Hamid Khan,
- A.K. Brohi,
- Justice Dorab Patel,
- Justice (R) Farhat Hussain,
- Paula Newberg,
- Martin Lau,
- Osama Siddique,
- Allen McGrath,
- A.V. Dicey,
- Ronald Dworkin,
- Joseph Raz, and
- Lon Fuller.

This article attempts to add an analysis to a constitutionally underexplored issue that has a contemporary significance.

3.1 Constitutional question: Can a judge validly exercise jurisdiction in a High Court without taking oath after his transfer as a judge of that specific High Court?



4. Constitutional Framework Governing Judicial Transfers

The constitutional framework related to High Courts is mainly derived from the Articles 192 to 208 of the Constitution. This attempt outlines the constitutional identity of the High Courts which are mentioned as:

A High Court for each Province and other appropriate areas as determined by law is provided for in Article 192. Each High Court has:

- Separate territorial jurisdiction,
- Independent constitutional identity,
- Separate administrative authority,
- A body that can oversee, review, and enforce the rules,
- Distinct institutional structure.
- Monitor lower courts subordinate to it.

Administrative relocation does not make one judge of the one High Court, a judge of another constitutional court. Each High Court is a constitutionally separate court, rather than a part of one national court.

4.2 Constitutional Oath

Article 194 provides:

Before he enters upon office a person to be appointed a Judge of a High Court shall take the oath in the form specified in the Third Schedule before the Governor/Chief Justice concerned.

The constitution is in the language and it will be mandatory. The words “before entering upon office” mean that the oath is a condition precedent to the exercise of judicial power by law. The oath is not a ritual, but rather the mechanism of the constitution which gives judges their authority.

The third schedule also reveals the differences between various constitutional courts as it contains different oaths for the Judges of the Supreme Court, High Courts, Federal Shariat Court and other constitutional positions.

4.3 Transfer of Judges under Article 200

Under Article 200 the President has the power to transfer a Judge from one High Court to another subject to consultation with:

- The Chief Justice Pakistan
- The Chief Justices of the High Courts concerned,



- The concerned judge(s).

But it does not clearly provide for the exemption of transferred judge from the compulsory oath of office under Article 194. As such, the interpretation of constitutional provisions should be a harmonious one. It is not a matter of silence of Article 200 that the oath should be ignored when it has to be obeyed by the constitutional command of Article 194.

5. Importance of Constitutional Oath

The constitutional oath has several groundbreaking roles in a constitutional democracy. First, it's a symbolic commitment to the Constitution and the rule of law. Second, it puts into place institutional accountability, which limits the judges' power by setting them against the constitutional constraints. Thirdly, it ensures public legitimacy of judicial power.

The oath is then a conferring of authority. The source of judicial authority is not only by way of notification of the appointment or transfer but also by the completion of office of a judge according to its constitution.

People's trust in courts in constitutional democracies relies to a large extent on the courts' visibly faithful adherence to constitutional procedure. The more the constitutional actors are able to abrogate constitutional procedures for the sake of convenience or expediency, the more the legitimacy of the institution is undermined. In the constitutional history of Pakistan, a gradual slip down the path of constitutional governance has happened numerous times when the irregularities in the procedure were normalized.

The primacy of the Constitution demands unwavering adherence to constitutional procedures by all constitutional functionaries. Constitutional offices cannot be acquired or exercised by implication, custom, convention, or institutional expediency; their existence, authority, and functions must be rooted in explicit constitutional mandate.

6. Whether Transfer Constitutes Assumption of New Constitutional Office

The constitutional issue is whether the transfer under Article 200 is only a change of venue or it is an assumption of office by the judge in a constitutionally different court.

There is a strong constitutional case for a transfer to be an assumption of a new constitutional position because of the following:

- a. Each High Court has its own constitution, identity;
- b. Judges have different jurisdiction in each court;
- c. Differences in administrative and supervisory powers between the various High Courts;



- d. Oath under Article 194 is to be taken in a specific Constitutional Court.
- e. Each of the High Courts (Lahore HC, Sindh HC, Islamabad HC, Peshawar HC and Balochistan HC) is empowered by different laws/establishment.

Transfer of a HC judge, therefore, is not a simple administrative transfer which is granted to civil servants. Superior Judges exercise their sovereign judicial power through a constitutional office, and are institutionally independent of the executive. Judicial transfer should not be seen as a simple administrative transfer; otherwise it would weaken judicial independence and the separation of powers.

7. Judicial Independence and Constitutional Risks

7.1 Violation of Constitutional Scheme

The country's Constitution has provided each High Court with its own constitutional identity, administrative powers and jurisdiction. Article 194 provides for the taking of an oath by all Judges of the High Courts and the Third Schedule gives the different constitutional oaths to be performed in different superior courts. This is an example of how one constitutional court cannot be "automatically extended" to another constitutional court without the fulfillment of the prescribed constitutional requirements. This is because the omission of a fresh oath upon transfer of judges between High Courts would undermine the constitutional structure and the difference between High Courts established by the Constitution.

7.2 Violation of Article 194 and Due Process

According to Article 194, a Judge of a High Court shall be subject to an oath before he enters upon his office. The constitutional language is mandatory and does not allow for any implied exemption. The oath is not a mere formality of ceremony but rather that it is a condition precedent of the constitutionality of judicial exercise of powers.

This issue also raises due process implications on the basis of the guarantees under Article 4, 9 and 10A of the Constitution. Litigants have a constitutional right to adjudication by judges whose authority is completely based on their compliance with the constitution. In situations where the judicial functions are undertaken without the constitutional mandates, issues can be raised about constitutional competence, the legitimacy of judicial proceedings, and public confidence in the judicial system.

7.3 Threat to Judicial Independence

Judicial independence depends on judges being able to exercise their constitutional duties without undue pressure, manipulation or influence of any executive branch. Unless conducted with



constitutional controls, inter-High Court transfers could raise questions about the independence of judges in regard to the principle of placement based on constitutional need and merit.

In this context, the need of a fresh constitutional oath assumes special significance as it reiterates the autonomous constitutional identity of the transferee High Court and guarantees that judicial authority emanates from the Constitution and not for convenience. A sense of external intervention undermines institutional credibility, which is essential for the legitimacy of constitutional courts based upon public trust in their impartiality, neutrality and adherence to law.

The deterioration of constitutional governance is often initiated by the slowdown and normalization of deviations in the process. Thus, the withdrawal of constitutional protections of the judicial function may have the effect of reducing judicial independence and institutional autonomy in the long term.

7.4 Erosion of Public Confidence and Constitutional Morality

There is a requirement for public confidence in the judiciary to see constitutional procedure followed. Public confidence in the neutrality, consistency and commitment of constitutional courts is their moral authority, not their physical strength. When constitutional processes are selectively implemented or diluted in institutions, it is always a matter of public concern when it comes to judicial independence and institutional integrity.

Such aberrations also raise the issue of constitutional morality, the adherence of constitutional functionaries to the letter and the spirit of the Constitution with particular regard to the judiciary. Implementing constitutional governance requires mandatory safeguards to be followed, which cannot be compromised for expedience or administrative ease. Any derogation from the constitutionality of the position of the judge, in the name of any kind of "flexibility," lowers the level of constitutionalism, institutional legitimacy and the rule of law.

8. Constitutional Concerns Arising from Judicial Transfers

8.1 Judges as Constitutional Officeholders

The members of the superior judiciary are not civil servants of the usual kind, who are subject to prevailing administrative dispositions and to executive control. In contrast to the government officials who have their power derived from statutory service rules and executive hierarchy, superior court judges are constitutional officeholders enjoying constitutional authority to perform the function of judge.

Their main constitutional roles are to interpret, protect, defend the Constitution, and ensure fundamental rights are respected and to settle disputes between the State and itself. It is therefore



not possible mechanistically to apply, for example, the concept of deputation, administrative relocation, or executive placement to judicial office. The transferability of judges as administrative entities can have a negative impact on judicial independence, separation of powers and the supremacy of the constitution.

Constitutional formality, especially the oath that is required to be taken by judges, therefore, must be given strict constitutional interpretation and not administrative convenience.

8.2 Constitutional Supremacy and Harmonious Interpretation

It could be argued that Article 200 does not expressly mandate re-swearing after transfer. Whereas, so called “constitutional silence” cannot prevail over the constitutional mandate that is embedded in Article 194.

The provisions of the Constitution must be read together and not separately. However, since Article 194 requires all Judges of the High Courts to take the oath before taking office, it is not correct to say that the transfer of Judges to a constitutionally separate High Court is an exception to the constitutional requirements because Article 200 does not repeat them in all their forms.

The Constitution cannot be circumvented by practical or institutional shrewdness. Judicial practices will be expected to reflect constitutional fidelity and observance of constitutional procedure as well.

8.3 Judicial Precedents and Constitutional Fidelity

Public office and judicial authority is always held in accordance with the strictures of the constitution. Constitutional experts have repeatedly found that oath and constitutional legitimacy are essential elements of legal judicial authority in various instances of constitutional crisis, such as jurisprudence around Provisional Constitutional Orders (PCOs).

The general rule that has come to the fore in Pakistani jurisprudence is that constitutional deviations, even if it is institutionally feasible, are not allowed to supersede the rule of law and constitutional supremacy.

8.4 Institutional Risks and Precedential Consequences

This could have serious institutional implications beyond the scope of one case if judges are allowed to exercise jurisdiction in violation of the constitutional prerequisites. These activities run the risk of becoming procedural commonplace and eventually undermining constitutional protections of judicial office.

When constitutional forms and procedures are interpreted flexibly, future judicial transfers can be



subjected more and more to institutional pressure, to the influence of the executive, or to administration convenience. This, over time, can undermine judicial independence and public trust, and even the constitutional independence of the judiciary.

The constitutional history shows that institutional erosion can take place over a span of several years by accepting exceptions over a period of time that gradually weaken the spirit of the constitution. Therefore, the importance of keeping consistency and transparency in constitutional protection of the judiciary cannot be over-emphasized.

9. Constitutional Responsibilities in Judicial Transfers

It is a duty of the President of Pakistan, the Chief Justice of Pakistan, the concerned Chief Justices of High Courts and the transferred judge(s) of High Court(s) under the Constitution of Pakistan's Article 200. Transfer process itself is only constitutional in the context of constitutional and non-partisan behaviour of all constitutional actors.

Institutions of the President have the transfer authority as a constitutional trust and it cannot be given to them without restriction. Similarly, the consultations with the Chief Justice of Pakistan and the relevant Chief Justices must be of substance, objective and for the sake of preservation of integrity of the institution and constitutional governance.

The task of completion of the transfer in accordance with the Constitution is also the responsibility of the concerned High Courts before handing over the judicial work to the transferee judge/court.

Finally, the transferred judge(s) is not only a passive element, but also has a constitutional and obligatory role to ensure that the constitutional conditions are respected, such as the oath of office before taking on judicial power in the transferee High Court.

10. Legal Consequences of Absence of Fresh Oath

Failure to administer a fresh Constitutional oath after inter-High Court transfer may raise serious constitutional and institutional concerns relating to:

- Constitutional defiance
- Validity of judicial proceedings,
- Legitimacy of judgments,
- Constitutional competence,
- Jurisdictional authority, and
- Enforceability of judicial acts.

Although courts may invoke the de facto doctrine to preserve past judgments in the interest of legal



stability and institutional continuity, such doctrine does not validate unconstitutional practice itself. It merely protects the public from institutional chaos arising from constitutional irregularity.

Hence, with all other constitutional and judicial acts preserved for practical purposes, constitutional correction and procedural clarity is necessary to restore and sustain the confidence of the public in the judiciary, preserve its institutional legitimacy and reaffirm the supremacy of the Constitution.

11. The Way Forward

The constitutional continuity and independence of judiciary, along with the credibility of judicial institutions, should be protected by clear constitutional protection and transparent procedures for judicial transfers as per Article 200 of the Constitution. The first condition is that each and every transferee Judge shall be sworn in afresh as a Judge of the transferee High Court before exercising any judicial or administrative powers. The High Courts are constitutionally different and the assumption of office in the transferee court has to be in "form and substance" in accordance with the Constitution.

A legitimate Parliament should make it clear once and for all whether a transfer under Article 200 is a continuity of the appointment to constitutional office with afresh oath taking, a constitutional procedure, and the assumption of the office remains the same as the existing constitutional office holders. This is necessary so that the meaning of the Constitution can be interpreted in a consistent manner and to avoid future institutional debate.

Also, there is an urgent need for comprehensive uniform and transparent judicial transfer rules applicable to all High Courts. Such rules should make clear the constitutional and administrative aspects of the transfer such as the date and form of oath taking, the starting point of judicial jurisdiction, the transfer of administrative functions, rules on seniority, service rights, and safeguards to prevent the judicial function from becoming arbitrary or from being pressured by institutional influences.

A clear constitutional process in all transfers is also important. Any notification to the President regarding the transfer shall clearly detail the date of transfer, the date of fresh oath, when judicial power shall be deemed to be lawfully exercised in the transferee High Court and all administrative implications that may arise. This sort of transparency in proceedings would enhance institutional unity and public trust in the judiciary.

The importance of the constitutional question makes it imperative to adjudicate it with finality and certainty by an independent body, in order to ensure the non-ambiguity of legal and constitutional validity of the transferred judicial authority. In this sense, judicial review is not just about procedure, it is an essential aspect of upholding the rule of law and the integrity of judicial institutions.



The judicial transfer mechanism needs to be aligned with internationally accepted judicial independence and constitutional governance principles such as the United Nations Basic Principles on the Independence of the Judiciary, the Bangalore Principles on Judicial Conduct, the principles of judicial separation of powers adopted by the Commonwealth Secretariat and the wide range of comparative constitutional principles of good practice used in democratic judiciaries. Compliance with these ideals would strengthen the rule of law, transparency, and the constitutionality of the judicial system.

12. Recommendations

- Impartiality should be ensured, judicial administration shall be free from political and executive influences.
- Constitution commands to take oath before entering upon High Court as judge, so it must be complied with in all circumstances.
- Before taking the oath in the transferee High Court, the judge(s) should not assign/act in the role of a judge.
- Controversial transfers be recalled immediately and effected cases re-heard meritoriously.
- The Parliament should make changes to the Article 200 regulating the transfer procedure.
- Parliament should enact an independent judicial regulatory & observatory body (dissolving the Supreme Judicial Council, Judicial Commission, National Judicial Policy Making Committee etc. due to conflict of interests) as they have collectively failed in maintaining the Rule of Law.
- The uniform judicial transfer policy should be established within the framework of the constitution.
- Bar councils and bar associations should actively advocate constitutional compliance.
- The independence and monitoring of the judiciary needs to be further reinforced; Subordinate judiciary has lost its credibility more than the higher judiciary.
- Judicial transfers should remain exceptional rather than routine subjected to transparent constitutional scrutiny.
- Constitutional conventions relating to judicial office must be institutionalized.
- Support the strengthening of constitutional literacy in legal institutions which concerns judicial independence.
- Any uncertainty relating to judicial legitimacy should be clarified in favour of the supremacy of the Constitution.

13. Conclusion

The Constitution of Pakistan does not allow constitutional shortcuts for matters relating to judicial offices. The High Court Judge has constitutional legitimacy not simply because of a transfer notification issued under Article 200 but because all the constitutional conditions precedent to his assumption of office in a constitutionally distinct High Court have been fulfilled, including taking a



fresh oath under the constitutional provisions. An incomplete constitutional process undermines institutional legitimacy and poses a significant risk to ending up with a slippery slope to the gradual normalization of constitutional aberrations under the pretense of constitutional expediency.

Judges do not fall into the category of ordinary administrative deputation; they are constitutional guardians whose duty it is to preserve the supremacy of the Constitution and rule of law. When constitutional custodians circumvent constitutional rules, the credibility, efficacy, and integrity of the judiciary is inevitably undermined, resulting in loss of public trust and gradual undermining of constitutional governance in the future. Open lawlessness is not the only way to erode constitutional democracies; important is also to resort to constitutional procedures in ways that can be interpreted as flexible in the face of the stress and need of institutions.

This article espouses that the answer to the research question be negative. Judicial authority is also legitimate if it complies with constitutionally required formalities; this reflects the article's other claim. Any violation of the constitutional procedures in respect of superior courts not only reduces the credibility of the institutions but can also undermine public confidence in the constitutional governance itself.

The current debate thus needs to be examined in the backdrop of recurring constitutional issues that have time and again affected the independence of judiciary, the trust of people in state institutions and led to the failure of rule of law and supremacy of the Constitution.

References

- Constitution of the Islamic Republic of Pakistan, 1973.
- Hamid Khan, *Constitutional and Political History of Pakistan*.
- A.K. Brohi, *Fundamental Law of Pakistan*.
- Paula R. Newberg, *Judging the State*.
- Martin Lau, *The Role of Islam in the Legal System of Pakistan*.
- Osama Siddique, *Pakistan's Experience with Formal Law*.
- Allen McGrath, *The Destruction of Pakistan's Democracy*.
- Al-Jehad Trust Case, PLD 1996 SC 324.
- Sindh High Court Bar Association Case, PLD 2009 SC 879.
- Munir Hussain Bhatti Case, PLD 2011 SC 407.
- Malik Asad Ali Case, PLD 1998 SC 161.
- Sharaf Faridi Case, PLD 1989 Karachi 404.
- Justice Qazi Faez Isa Case, PLD 2021 SC 1.
- Asma Jilani Case, PLD 1972 SC 139.
- Federation v. Aitzaz Ahsan, PLD 1989 SC 61.



- Reference No.1 of 1996, PLD 1997 SC 84.
- PLD 2025 SC 516.
- United Nations Basic Principles on the Independence of Judiciary, 1985.
- Bangalore Principles of Judicial Conduct, 2002.
- International Bar Association Minimum Standards of Judicial Independence.
- Commonwealth Principles on the Accountability of and Relationship between the Three Branches of Government, 2003.
- A.V. Dicey, *Introduction to the Study of the Law of the Constitution*.
- Wade & Forsyth, *Administrative Law*.
- De Smith, *Constitutional and Administrative Law*.
- H.W.R. Wade, *Rule of Law Essays*.
- Joseph Raz, *Authority of Law*.
- Lon Fuller, *Morality of Law*.
- Ronald Dworkin, *Law's Empire*.
- Montesquieu, *Spirit of Laws*.
- Blackstone's Commentaries.
- Federalist Papers.
- Supreme Court Rules of Pakistan.
- Lahore High Court Rules and Orders.
- Sindh High Court Establishment Rules.
- Islamabad High Court Rules.
- Balochistan High Court Rules.
- Peshawar High Court Rules.
- Law and Justice Commission reports.
- International Commission of Jurists reports.
- Venice Commission reports on judicial independence.
- Comparative Constitutional Law texts.
- Indian Constitution, Articles 222–224.
- S.P. Gupta Case (India).
- Second Judges Case (India).
- Third Judges Case (India).
- UK Constitutional Reform Act 2005.
- US Federal Judicial Oath statutes.
- Marbury v. Madison.
- Cooper v. Aaron.
- Kesavananda Bharati Case.



-
- Minerva Mills Case.
 - Pakistan Bar Council resolutions.
 - Supreme Court Bar Association reports.
 - Judicial independence literature.
 - Constitutionalism scholarship.
 - Separation of powers literature.
 - Comparative judicial administration texts.
 - Rule of law indexes.
 - International judicial ethics literature.
 - Judicial accountability reports.
 - Constitutional interpretation theories.
 - Originalism and living constitutionalism debates.
 - Constitutional conventions scholarship.
 - Jurisdictional legitimacy theories.
 - Public trust in judiciary studies.
 - Legal positivism literature.
 - Natural law scholarship.
 - Pakistan Law Digest commentaries.
 - SCMR annual digests.
 - PLD constitutional case index.
 - Dawn, “SC sees nothing unconstitutional in judges’ transfer”, 12 May 2025.
 - The Express Tribune, “Lahore Bar Association challenges transfer of IHC judges”, 2025.
 - UN Human Rights Council reports relating to judicial independence.
 - Commonwealth Latimer House Guidelines.
 - International standards on independence of judges and lawyers.