

Nadeem Ahmed v. Federation of Pakistan

PLD 2010 SC 1165

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This case note comments on the ruling of the Supreme Court ('Court') on the consolidated petitions challenging the Constitution (Eighteenth Amendment) Act, 2010 ('18th Constitutional Amendment') in *Nadeem Ahmad v. Federation of Pakistan*. The petitions challenged the 18th Constitutional Amendment on the grounds that the new procedure for appointment of judges to superior courts outlined in the newly inserted Article 175A of the Constitution of the Islamic Republic of Pakistan, 1973 ('Constitution') infringed upon the independence of the judiciary. The 18th Constitutional Amendment devised a new method for appointing judges, which would be processed through two fora. The first was the Judicial Commission ('Commission')¹—an independent body nominating judges for each vacancy. For confirmation, the nominations were then to be sent to the second forum, i.e., the Parliamentary Committee ('Committee').² After confirming the nominations, the Committee would forward the names to the President through the Prime Minister.

Although the Court entertained the petitions challenging the aforementioned procedure, it exercised restraint, did not pass a definitive order, and referred the matter back to the Parliament to reconsider the impugned provisions of the 18th Constitutional Amendment. The Court refrained from ruling on whether it had the power to judicially review and strike down constitutional amendments, but it echoed two broad recommendations in the context of judicial appointments to superior courts. First, the number of Court's judges in the Commission should be increased from two to four. Second, the Committee should give cogent reasons for not accepting the Commission's recommendation of the candidate while referring the matter for reconsideration. If the Commission reiterates its initial recommendation after considering the Committee's reasoning, the latter should become final, with the President then required to make

¹ The Judicial Commission was headed by the Chief Justice of Pakistan and comprising two senior judges of the Supreme Court, Chief Justices and two senior judges of the High Courts, the Attorney General, Federal and Provincial Law Ministers, and representatives of the Federal and Provincial Bar Councils.

² The Parliamentary Committee comprised of eight members, four from the National Assembly and four from the Senate, with an equal split between the Treasury and Opposition benches.

the appointment accordingly. Were these recommendations to be accepted, the Court's judges would have gained an overwhelming majority in the Commission and would have been empowered enough to overrule the Committee's directions.

Although the Court referred the matter back to the Parliament for reconsideration, it hinted—by placing 'judicial independence' at the same pedestal as 'sovereignty of the Parliament' and by obligating the Parliament to act in accordance with its 'constitutional mandate'—that Parliament did not have absolute discretion to reject the recommendations made by the Court.³ Moreover, the Court stated that till such time the issue is finally resolved, the newly inserted Article 175A of the Constitution had to be enforced in 'consonance' with judicial independence and that the Court could judicially review the Committee's decision of rejecting the Commission's recommendations.⁴ Thus, the Court gave the impression that it could nullify the impugned Amendment if the suggested changes were not made.

Under the original scheme of the Constitution, the Chief Justice of Pakistan would recommend a panel of candidates to the President for nomination; the President would then select a suitable candidate from amongst them. However, in the *Al-Jehad Trust* case,⁵ the Court curtailed the power of the President and made recommendations of the Chief Justice binding on the former. If the President deviated from such recommendations, the reasons for the President's decision would be justiciable. Thus, post-*Al-Jehad*, the procedure for judicial appointments to superior courts lacked the necessary checks and balances from other state organs. The 18th Constitutional Amendment addressed this issue by establishing the Committee and giving the Parliament a role in judicial appointments to superior courts.

However, the Court, through its order in *Nadeem Ahmed*, reverted the situation to the pre-18th Constitutional Amendment era. The Constitution (Nineteenth Amendment) Act, 2010 ('19th Constitutional Amendment')—which rendered the Committee ineffective by reducing it to a mere rubberstamp—was a direct result of this ruling: the 18th Constitutional Amendment came into force on April 15, 2010; the Court passed its order in *Nadeem Ahmed* on September 30, 2010 and adjourned the matter to a 'date in the last week of January, 2011'⁶; meanwhile,

³ *Nadeem Ahmed v. Federation of Pakistan* PLD 2010 Supreme Court 1165 [14].

⁴ *Ibid* [15].

⁵ *Al-Jehad Trust v. Federation of Pakistan* PLD 1996 SC 324.

⁶ *Nadeem Ahmed* (n 3) [17].

on January 4, 2011, the Parliament promulgated the 19th Constitutional Amendment. This timeline—the recommendations echoed by the Court and the promulgation of the 19th Constitutional Amendment just a month after the *Nadeem Ahmed* ruling—indicates that the 19th Constitutional Amendment was a direct result of this ruling. The 19th Constitutional Amendment was a regressive step in that it eliminated the role of parliamentarians by rendering the Committee toothless, thereby ceding all the ground that had been won as a result of the 18th Constitutional Amendment.

The major challenge to the new procedure—outlined in the 18th Constitutional Amendment—for judicial appointments to superior courts was premised on the idea of independence of judiciary. However, it must be noted that the notion of independence of the judiciary does not operate in isolation and is subject to different checks and balances from other state organs, reinforcing the principle of separation of powers. In *Muhammad Aslam Awan v. Federation of Pakistan*,⁷ the Court held that judicial independence is based on the concept of trichotomy of powers. Thus, the notion of separation or trichotomy of powers precedes the concept of judicial independence, with the latter emanating from the former and the former defining the contours of the latter. As such, the Parliament having a role in appointing judges to superior courts does not infringe upon judicial independence. Rather, the role of parliamentarians, as the repositories of the will of the people, is indispensable to the process as it is an effective means to hold the superior judiciary accountable—a judiciary that has often come under criticism for going beyond its constitutional mandate. There are various countries around the world where the legislature and the executive partake in judicial appointments, and there are even instances where the judiciary has no say in the matter. Robert Stevens asserts that ‘judges choosing judges is the antithesis of democracy’ and that ‘in all major common law countries—the US, Canada, Australia, and South Africa—the executive chooses the judiciary...’⁸

If there were any positive takeaway from the ruling in *Nadeem Ahmed*, it was the display of some level of restraint by the Court in the form of not striking down the 18th Constitutional Amendment. Unlike *District Bar Association*,⁹ wherein the majority Court held that it had the power to judicially review and strike down constitutional amendments on the

⁷ *Muhammad Aslam Awan v. Federation of Pakistan* 2014 SCMR 1289.

⁸ Robert Stevens, *The English Judges: Their Role in the Changing Constitution* (Hart Publishing 2002) 144.

⁹ *District Bar Association and others v. Federation of Pakistan and others* PLD 2015 SC 401.

touchstone of basic structure of the Constitution, the Court in *Nadeem Ahmed* did show some deference to the Parliament by exercising judicial restraint and referring the matter back to the legislature for reconsideration.