

Judicial Appointments in Pakistan: Coming Full Circle

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This comment pertains to judicial appointments in Pakistan. It explains how the traditional or pre-18th Amendment process of appointing judges gave the judiciary clear dominance over regulating the appointment of judges. Consequently, this process lacked all the necessary checks and balances. The 18th Amendment attempted to change this state of affairs by giving the Parliament a role in judicial appointments by establishing two necessary bodies: the Judicial Commission and the Parliamentary Committee. However, subsequent legislative and judicial developments have reverted the situation to the pre-18th Amendment position.

Introduction

The question posed by the Roman poet Juvenal, ‘*Quis custodiet ipsos custodes?*’ (who will guard the guards?), finds resonance in the contemporary constitutional discourse in Pakistan on judicial appointment processes. The primary objection to the traditional appointment process of judges was that it essentially entailed judges appointing judges. The objection was particularly relevant in the case of the superior judiciary (the reference here is to the High Courts and the Supreme Court of Pakistan) where the only constitutional accountability process was also within the exclusive control of the judiciary. The process visibly lacked any checks and balances. As recently as 2010, the judiciary has quite jealously guarded its definite and ultimate control over regulating the entry of judges into (and, in one rare case, exit from) the judicial system.

An attempt was made to change the traditional model of appointments through the 18th Amendment to the Constitution of

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Pakistan, 1973 (the ‘Constitution’). The intention of the 18th Amendment was to give the Parliament a role in the appointment of judges. In this comment, I examine the 18th Amendment and subsequent developments, both legislative and judicial, and argue that the situation, as it currently stands, has for all practical purposes returned to the pre-18th Amendment position.

Pre-18th Amendment Process

The process of judicial appointments in the Constitution before the passage of the 18th Amendment was that the Chief Justice of the Supreme Court recommended a panel to the President, who selected a suitable candidate from that panel. Similarly, for the appointment of judges in the High Courts, the Chief Justice of the concerned High Court forwarded a panel to the President which was channelled through the Governor of the Province and the Chief Justice of Pakistan. The pivotal role in the process was that of the Chief Justice of Pakistan as well as the provincial Chief Justices. In the famous 1996 ‘*Judges’ Case*’, the Supreme Court further curtailed the executive discretion of the President, almost to the point of making it entirely ineffectual.¹ The Court held that the recommendations of the Chief Justice were ordinarily binding on the President, except where the President departed from the recommendations, in which case the reasons for his decision were justiciable.

The 18th Amendment

In an effort to restore institutional equilibrium and dilute the unchallenged powers of the judiciary in the appointment process, Parliament passed the 18th Amendment in 2010. The 18th Amendment was a broad legislative exercise, with the judicial appointments process just one of many subjects on the reform agenda. The 18th Amendment articulated a new procedure for the appointment of superior court judges. Briefly, the cases of

¹ *Al-Jehad Trust v Federation of Pakistan* PLD 1996 SC 324.

appointment in the superior courts were to be processed through two forums. The first was the 'Judicial Commission' ('JC'), headed by the Chief Justice of Pakistan and comprising senior judges of the Supreme Court (two), Chief Justices and senior judges of the High Courts (two), the Attorney General (one), Federal and Provincial Law Ministers (one) and representatives of the Federal and Provincial Bar Councils (one). The JC was to nominate judges for each vacancy. The nominations were then forwarded to the second forum, the 'Parliamentary Committee' ('PC'), for confirmation. The PC comprised eight members, four from the National Assembly and four from the Senate, split equally between the Treasury and Opposition Benches. All names confirmed by the PC were to be forwarded to the President through the Prime Minister for appointment.

The 19th Amendment

The 18th Amendment was challenged before the Supreme Court on the ground, amongst others, that the new appointment process infringed upon the independence of the judiciary. The Supreme Court, in an unprecedented move, admitted the petition for hearing before the full court.² To hold the petition maintainable was a very strong statement in itself. Historically, the view of the Court seems to be of not sitting in judgment over constitutional amendments. Yet, the Court ultimately displayed some minimum level of restraint in not passing a definitive order. Instead, the Court offered advice on how to modify the 18th Amendment to make it conform to the Constitution, and referred the matter back to the Parliament. However, the tone and tenor of the Court proceedings and order indicated that it was not entirely within the Parliament's discretion to reject the Court's advice. The Court opined:

We had two options; either to decide all these petitions forthwith or to solicit, in the first instance, the collective wisdom of the chosen representatives of the people by referring the matter for re-consideration. In

² *Nadeem Ahmad v Federation of Pakistan* PLD 2010 SC 1165.

adopting the latter course, we are persuaded primarily by the fact that institutions may have different roles to play, but they have common goals to pursue in accord with their constitutional mandate.³

The abovementioned passage is relevant, since the Court seemed to suggest that it had the power to adjudicate (and perhaps even strike down) a constitutional amendment, hence communicating to the Parliament that if the suggested changes were not made, the Court had the option (perhaps even the inclination) of nullifying the offending portion of the 18th Amendment.

The Court made two substantive suggestions. Firstly, that the provisions may be amended to increase the number of the ‘most senior judges’ of the Supreme Court in the JC’s membership from two to four. Secondly, that if the JC’s recommendation in favour of a candidate for judgeship was not accepted by the PC, the latter was required to give sound reasons for its decision and refer the matter to the JC for reconsideration. If, upon considering the PC’s reasons, the JC reiterated its original recommendation, the latter became final and the President was bound to make the appointment accordingly. The obvious implication of these suggestions was that the judges (both serving and retired) would now have an overwhelming majority of eight out of the total eleven members in the JC. Additionally, the JC would have the power to overrule the PC; a very clear step backwards in the direction of the pre-18th Amendment situation. The Parliament nevertheless complied, and the suggested amendments were made and incorporated in the 19th Amendment.

Confirmation of the *Judges’ Case*

The first major opportunity for the Supreme Court to interpret the provisions of the 19th Amendment and set the contours of the new appointment process arose in 2011 in the case of *Munir Hussain Bhatti*.⁴ The issue under contention was whether

³ *ibid* para 14.

⁴ *Munir Hussain Bhatti v Federation of Pakistan* PLD 2011 SC 407.

the PC could disagree with the JC on the extension/confirmation of judges of the High Court. The PC, based on the remarks of the Chief Justice of the Lahore High Court, refused to extend the probation period of four judges of the Lahore High Court. The decision of the PC was challenged before the Supreme Court. Overruling the decision of the PC, the Court held that ‘the technical evaluation of a person’s calibre as a Judge has to be made by the [Judicial] Commission, and once evaluated the recommendations of the Commission are to be looked (*sic*) as one.’⁵ The Court further asserted that the PC ‘can reject the nomination on the grounds falling within its domain for very strong reasons which shall be justiciable.’⁶ Here again, the observation that the PC’s reasons for departing from the JC’s recommendations would be justiciable meant that the superior judiciary retained ultimate control over judicial appointments to the superior judiciary.

Presidential Reference

Subsequent to the 18th and 19th Amendments, the JC formulated the Judicial Commission of Pakistan Rules 2010 (the ‘JCPR’) to clarify and regulate the specifics of the appointments procedure within the JC under the 19th Amendment. Importantly, the JCPR vested the power to initiate nominations in the Chief Justice of Pakistan alone. The most recent episode where the controversy surrounding judicial appointments again took centre stage and in which the Chief Justice’s powers, both within and without the JC, became apparent, was regarding the appointment of the Chief Justice of Islamabad High Court in 2013.⁷ Briefly, the Chief Justice, exercising his nomination power under the JCPR, purported to supersede the senior-most judge of the Islamabad High Court, Justice Riaz A. Khan, in favour of his junior, Justice Anwar Khan Kasi, as the new Chief Justice of the Islamabad High Court. Further, in the meeting of the JC, Justice Kasi was treated as the senior-most judge of the Islamabad High Court for the

⁵ *ibid* para 25.

⁶ *ibid* para 26.

⁷ *Reference No. 01 of 2012 PLD 2013 SC 279.*

purposes of the appointment as Chief Justice. This confusion emanated from the fact that both judges were appointed to the High Court on the same day. In principle, however, Justice Kasi was junior to Justice Khan for the reason that when judges are appointed on the same day, the judge older in age is deemed to be senior. The PC upheld the JC's 'recommendation' and Justice Kasi's name was sent to the President for notification. Interestingly, although the President does not have a role in the judicial appointments process post the 18th Amendment, the President in this case sent a reference to the Supreme Court regarding the constitutionality of the recommendation.

The *Presidential Reference* raised three major legal issues.⁸ Firstly, do proceedings of the JC stand vitiated if a person participates in them who is not so authorized? Secondly, what remedy does the President have if asked to make judicial appointments that, in his opinion, are against the Constitution? And finally, as the senior-most judge of the Islamabad High Court, did Justice Riaz A. Khan have a legitimate expectancy to be considered for the office of its Chief Justice?

The second question is an easy one, since in the present constitutional scheme, the President has no substantive role in the appointment. As far as treating the second senior-most judge as the senior-most for the purposes of the JC's meeting and recommendation, there is no express permission for that. The third question is even more complex. In the past, the Court has definitively established the principle that the senior-most judge has a legitimate expectancy to be appointed as the Chief Justice (most notably in the '*Judges' Case*'). Yet, in the advisory judgment rendered in the *Presidential Reference*, the Court side-stepped the question and declined to pass a conclusive ruling. Instead of adjudicating on the question of seniority and providing detailed, compelling reasons for overruling the long-standing convention of seniority, the Court stated that it would not decide the matter in the

⁸ *ibid.*

advisory jurisdiction. And if Justice Riaz A. Khan felt aggrieved, the Court suggested that he petition the Court himself.

The New Model

If the two cases of *Munir Hussain Bhatti, 2011* and the *Presidential Reference, 2013* are studied in juxtaposition, a pattern emerges. The first case rendered the PC almost redundant, or at the very least, quite weak. The second judgment, while reaffirming the supremacy of the JC in general, also established, in particular, the powerful, steering role of the Chief Justice of Pakistan. It may seem that the progress made in the Parliament has now been undone by the Supreme Court. The debate in the *Presidential Reference* on the intent of the Parliament in promulgating the 19th Amendment is also peculiar, considering that the Parliament was not given much choice by the Court in passing it. It might be said that the Chief Justice is just one member of the eleven-member JC, and accordingly has one vote. That is unquestionably true in theory. However, after the introduction of the JCPR, it is only the Chief Justice who can initiate or propose a name for appointment, and the rest can either accept or reject it. Yet, even that does not convey the real significance of the role of the Chief Justice.

Rethinking Judicial Independence

The traditional pre-18th and 19th Amendments' process gave inordinate power to the Chief Justice to appoint judges. However, the surrounding political context meant that the power was rarely exercised freely. The period after the lawyers' movement and the restoration of the judiciary engenders an unprecedented phenomenon in Pakistan's political and constitutional history. Never has there been a judiciary which has been this powerful. The role of the Chief Justice has transformed from the theoretically powerful head of the judiciary to the practically unanimous leader (as far as the internal judicial consensus is concerned). It is perhaps instructive to look at another case to fully appreciate this point. In the 2009 case of *Justice Hasnat Ahmad Khan*, the Supreme Court faced the question of the legality of the appointments of judges who were appointed or took oaths during the lawyers' movement (also known as the 'PCO

Judges Case').⁹ Under Article 209 of the Constitution, there is only one constitutional mechanism for the removal of judges of the superior courts, namely, through a reference to the Supreme Judicial Council (the 'SJC'), which is comprised of the senior-most judges.¹⁰ However, instead of referring the cases of the 'PCO' judges to the SJC, the Supreme Court removed over one hundred judges of the superior courts through a single judgment. The jurisprudential ramification of this is that the SJC might now be a defunct institution in terms of its exclusive power to hold judges accountable.

There is another political dimension to this. With the sweeping judgment in the '*PCO Judges Case*', all the judges of the 'opposing camp' were sent home, with the result that the judiciary (particularly the Supreme Court) became a homogenous group, and somewhat of a monolith. Given this background, the Supreme Court's suggestion in the *Presidential Reference* that it was open to Justice Riaz A. Khan to petition the Court himself against the decision of the JC (perhaps, more significantly, against the nomination by the Chief Justice as the *ex officio* member of the JC), might be asking too much. While 'politics' and 'factions' may seem like particularly harsh terms to use in relation to the Supreme Court, the lawyers' movement created clear divides between the legal community; people were either with the movement or against it. The intensity of the movement and the recklessness of the regime of that time meant that the provision of nuance gradually decreased to the point of being abandoned completely. Even now, it is quite common to hear the opposing groups in the bar politics to be sometimes referred to as pro- and anti-judiciary camps. These labels make slightly more sense if understood as pro and anti the Chief Justice of Pakistan. There has been very little dissent on any

⁹ *Justice Hasnat Ahmed Khan v Federation of Pakistan* 2011 PLD 680 SC. Also known as the *PCO (Provisional Constitutional Order) Judges Case*. A Provisional Constitutional Order, or PCO, is an extra-constitutional order that suspends either wholly or partially the Constitution of Pakistan.

¹⁰ The Supreme Judicial Council of Pakistan is a body of judges empowered under Article 209 of the Constitution of Pakistan to hear cases of misconduct against judges.

major constitutional case since 2009 (the *Presidential Reference* being one notable recent exception). There seems to be a tacit consensus on putting up a unified front in public regardless of personal views; a bit like the Cabinet. The reasons for the solidarity are not necessarily personal, although there is bound to be some of that as well; they are largely rooted in recent institutional experience. The impetus for this unity is the past experience of the November, 2007 ‘emergency’ imposed by General Pervez Musharraf. The Supreme Court has not abandoned the ‘War Time’ posture of the emergency. Hence, while considering the judicial appointment process and the fact that the Chief Justice in theory has just one vote out of eleven, it is perhaps significant that the Supreme Court has displayed a tendency to vote *en bloc* which gives it a clear majority of eight out of eleven.

Ironically, the 18th Amendment was challenged and accepted for hearing on the grounds of infringement of the ‘Independence of Judiciary’. The reference to the independence of the judiciary and the potential threats that it faces have seen an extraordinary rise in the past few years. Historically, the threat came from an interventionist executive. That is, by and large, no longer the case. Now, with the newly realized power post the lawyers’ movement, there is the feeling that the judiciary sometimes overcompensates for its past lack of autonomy and takes the independence argument too far. A recent example is when the Public Accounts Committee asked the Registrar of the Supreme Court to render accounts of the administrative expense of the Court.¹¹ The Registrar refused on the grounds that this would adversely affect the judicial independence. The particular reason put forth by the Registrar is that according to Article 68 of the Constitution, no discussion can take place in the Parliament regarding the conduct of any judge of the superior courts ‘in discharge of his duties’. The argument is a fairly weak one, as the

¹¹ Public Accounts Committee has the responsibility of oversight of the executive. The Committee examines the accounts showing the appropriation of sums granted by the Assembly for the expenditure of the Government, the annual finance accounts of the Government, the report of the Auditor-General of Pakistan and such other matters as the Minister for Finance may refer to it.

administrative expense of the Court cannot be equated with the conduct of individual judges in the discharge of their duties. There is evidence of a new and aggressive model of 'judicial independence' which has come to signify the primary narrative in the discourse on institutional dominance.

Conclusion

The entire debate on judicial appointments has to be viewed in the context of this recent conception of judicial independence. The attempt to maintain absolute or at least substantial control over judicial appointments to the superior courts is part of a broader institutional struggle. All of this has meant the coming of a full circle, with, for now, the Chief Justice of Pakistan firmly in the driver's seat in regards to judicial appointments. This should be a cause for some concern. Firstly, negating the basic idea of constitutional amendments is dangerous, particularly for a nascent parliamentary democracy such as ours. Secondly, the principle of devolving decision-making from individuals to institutions, and hence the entire idea of 'checks and balances', seems to have been compromised.