**Judicial appointments**

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While celebrating the appointment of the first woman judge in the Supreme Court of Pakistan, we need to address the valid concerns regarding transparency and merit in judicial appointments to superior courts. The appointment of Justice Ayesha A Malik in the SC has highlighted the immediate need to reform the process of appointments in the judiciary, and has ignited an objective debate (seniority versus merit) in the legal fraternity.

Proponents of the seniority principle essentially argue that, considering the political and constitutional context of Pakistan (the influence of the executive and its manipulation of judicial appointments), ignoring seniority would weaken the judiciary. They see the seniority principle as a shield against the interference of the executive. To them, the principle of seniority promotes merit (in the sense of appointments without external influence) and judicial independence.

On the other side, it is argued that the seniority principle lacks constitutional basis and fails to concentrate on merit – judicial performance. Appointments based on seniority alone, it is argued, undermine merit and promote mediocrity. Both arguments are valid to an extent and have flip sides as well. In our judicial history, some judges were appointed to the SC ignoring seniority while others were elevated on the basis of seniority. For judicial appointments at all levels, it is high time Pakistan’s constitution and the Judicial Commission of Pakistan Rules 2010 (Rules) are amended to strengthen our justice system. Otherwise, it will fail to deliver justice to the people and lose public confidence, which is a must for any justice system and, thus, any nation to survive.

The following proposals may take the debate forward in helping make new criteria of judicial appointments:

First, appropriate amendments in the constitutional provisions regarding the appointment of judges to the Supreme Court, high courts and the Federal Shariat Court (Articles 175-A and 177) should be made to provide representation to women, minorities, legal academics, and civil society leaders in the Judicial Commission. This will allow a diversity of perspectives and enhance public trust in the judiciary. A specific quota for women and minorities may also be discussed for appointments to the Supreme Court and High Courts-based on merit. This will move away from any ‘seniority principle’, even if this means more space for ‘politicising’ quota-based appointments. Further, eminent legal academicians and lawyers should be appointed to the superior courts to enrich jurisprudence. In this regard, Article 177 may be amended appropriately; even the experience requirements for high court judges and lawyers may be revised to elevate senior members of the legal fraternity to the SC.

Second, the method of nomination may be changed to the process of application. It will allow an equal opportunity to compete for judicial positions. Shortlisted candidates may be called for a public or recorded interview and a brief presentation before the Judicial Commission. Alternatively, federal and provincial Judicial Service Commissions comprising judges, lawyers, legal academicians and civil society members may be established to conduct shortlisting, examination and interview of candidates for provincial and federal judicial services.

Third, moving away from seniority towards category-based quotas, the assessment of ‘merit’ for judicial appointments needs to be made more objective and transparent. The method of assessment may be quantified allowing each member of the Judicial Commission to assign scores to each candidate against specified factors such as professional qualifications and experience, intellectual capacity, integrity, independence, diversity, analysis skills, efficiency, and professional conduct. These parameters may be further specified by amending the Rules. Again, for any element of subjective scoring, the integrity of the actors must be widely respected and present “to dispel misgivings that arbitrariness in the selection process holds sway”.

Four, there should be a specified quota for provincial high court judges as well as senior lawyers and legal academicians from each province for the appointment to the SC to make it a truly federal institution.

Five, clearly aspects which cannot be measured quantitatively such as integrity and independence and jurisprudential quality of a judgment may be determined through the collective wisdom of the members of the Judicial Commission. The quantitative method may include statistics such as the number of decided cases, the number of decisions set aside or upheld by the apex court, and the time consumed for writing a judgment after the hearing.

To develop robust criteria for judicial appointments and the performance evaluation of superior courts’ judges, guidance may be sought from the best practices in other jurisdictions. In this regard, the Basic Principles on the Independence of the Judiciary, adopted by the UN General Assembly in 1985, Black Letter Guidelines for the Evaluation of Judicial Performance developed by the American Bar Association, Minimal Judicial Standards developed by the EU, the Council of Europe’s Commission for Democracy through Law (The Venice Commission), and the Model Act for Judicial Appointments framed by the Commonwealth nations may be examined.

Instead of sticking to absolute discretion in the nomination of judges or the principle of seniority, the bench and bar need to move forward and conduct a national-level consultation to bring greater objectivity, transparency, and merit in judicial appointments.

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