**Judicial independence**

Zia Ullah Ranjah

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All the rights secured to citizens under the constitution are worth nothing if they are not guaranteed by an independent judiciary. An independent judiciary forms the core of any justice system, so our constitution also provides that the independence of the judiciary shall be fully secured.

While nominating judge Justice Ayesha A Malik as the first female judge of the SC, the chief justice of Pakistan sought to promote judicial independence. However, a section of the bar and some members of the Judicial Commission of Pakistan resisted the elevation of Justice Ayesha Malik, claiming adherence to the principle of seniority to secure the independence of the judiciary.

I appreciate that the seniority principle is another mechanism to ensure independence against the sort of political interference that Pakistan has experienced in the past. But, despite its merits, this mechanism is not perfect. It has its own pitfalls – like not concentrating on ‘competence’. Moreover, if seniority is to be the only criterion then what is the need for a Judicial Commission? There must be discretion with the JC (albeit structured) in making appointments to the SC.

Those who opposed the nomination precisely argued that only the most senior judge of a high court could be elevated to the SC. They maintained that the elevation of Justice Ayesha Malik in disregard of the seniority principle would have been against the constitution. I examine this argument based on the constitution, the history of judicial appointments in Pakistan, and the constitutional principle of discrimination.

Article 177 of the constitution deals with the eligibility of judges to be appointed at the SC and states that a person to be appointed as SC judge must be a citizen of Pakistan. H/she should have been a judge of the high court for not less than five years or enrolled as an advocate of the high courts for not less than 15 years. Justice Ayesha Malik meets the constitutional threshold for appointment to the SC. Above all, the seniority principle lacks a constitutional basis. Thus, the argument fails on the touchstone of the constitution itself.

So far, 41 junior judges have been appointed to the SC bypassing more senior judges. So, the nomination of Justice Ayesha Malik was nothing unusual. It was as per the precedent and convention of judicial appointments. Some of those 41 prompted questions about judicial independence. However, if 41 male judges have been appointed to the SC despite being junior to other judges, why could a woman judge not have been appointed? If the bar councils protested the appointment of a female judge in front of the SC, why did they conveniently accept the appointments of 41 male judges in the past?

As to discrimination against women judges, suffice it to say that Pakistan is the only country in South Asia where a female judge has never been appointed to the SC. With the nomination of Justice Ayesha Malik, it was hoped that we would provide representation and space to an honorable woman judge in the apex court, who qualifies even otherwise based on her experience, judicial performance, independence and integrity.

Women judges have performed well in other jurisdictions (Brenda Hale (UK), Sandra Day O'Connor and Ruth Bader Ginsburg (US)). India has recently appointed three women judges to the SC. In denying the elevation of Judge Ayesha Malik, despite her competence and integrity, Pakistan has missed an historic opportunity. It is also a violation of Article 25 of the constitution, which guarantees the equality of all citizens without any discrimination on the basis of gender. It obliges the state to take affirmative action for the protection of women.

It is worth recalling the words of Muhammad Ali Jinnah: "No nation can ever be worthy of its existence that cannot take its women along with the men. No struggle can ever succeed without women participating side by side with men. There are two powers in the world; one is the sword and the other is the pen. There is great competition and rivalry between the two. There is a third power stronger than both, that of the women". But we seem not to recognise and appreciate this third power. According to World Bank development indicators 2020, women comprise 48.54 percent of the total population in Pakistan. How can a country make progress, as per Jinnah's vision, that denies merit and rightful place to so many women?

Alongside the principle of seniority, the competence and integrity of a judge cannot be ignored altogether. To improve the performance of our justice system, we need to adopt a balanced approach that both encourages independence and appreciates the ability of judges. A blind following of the seniority principle and opaque process of judicial appointments has already made Pakistan's justice system weak and insensitive to the expectations of the people.

CJP Gulzar Ahmed said that "no one had discussed the merits of the nominee". Justice Umar Ata Bandial said that Justice Ayesha A Malik was known to be "a fiercely independent judge and probably that was the reason why the bar was opposing her appointment as SC judge". Justice Maqbool Baqar stressed the need for democracy, independence, and women's liberation. Justice Sardar Tariq Masood stated that he was a strong supporter of women empowerment, stressing that his only intention was to preserve the prestige of the judiciary.

Democracy, women's liberation, women empowerment and the prestige of the judiciary cannot be achieved with low representation of women on the bench and the bar. How can the judiciary be made independent while preventing the elevation of independent judges? How can we promote democracy, equality, and social justice while denying women due representation in the judiciary?

Members of the judiciary, bar and civil society should support the elevation of independent women judges to make the judiciary independent and inclusive. Unless the merit of women is appreciated and they are allowed to fully participate in national life, Pakistan will not be able to progress.

The writer is an advocate of the Supreme Court.

Email: zranjahlaw@gmail.com