**Judging the process**

Muhammad Waqar Rana

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The writer is an advocate of the Supreme Court and former additional attorney general for Pakistan.

The constitution entrusts the judiciary with the onerous and sacred duty of enforcing the constitution, which includes the fundamental rights enshrined therein. These rights are a citizen’s security against highhandedness and injustice by the state.

The appointment of judges to the high courts and the Supreme Court is therefore mandated to be based on merit and a consensus-oriented process, leaving no room for criticism and complaint. The process of judicial appointments has usually been kept secret and beyond the public eye. With the advent of this era of information, however, the state is obliged to run its affairs in the open.

One of the blessings of democracy is that state functionaries are appointed and removed through a transparent process. Since every power can be abused, the power of appointment of judges is usually subjected to checks and balances. For example, the American president nominates and with the advice and consent of the Senate appoints Supreme Court judges and other high officers. The chief justice of the US Supreme Court has no role in the process. In the UK, even after the Constitutional Reforms Act, 2005, the lord chancellor requests the Judicial Commission after consultation with the lord chief justice for appointment of judges to the higher courts. In India, the amendment for judicial commission was declared unconstitutional. Pakistan is the only country where judges appoint judges and a judicial council comprising judges is empowered to remove judges.

In this context, a controversy has cropped up about the Judicial Commission of Pakistan’s last meeting. In the process, it has exposed the sorry state of affairs in the working of the superior judiciary and the JCP. Letters have been written by the Commission’s members. Even the audio of the JCP’s proceedings was made public. Such open disagreements amongst judges reflect that there exists distrust amongst the members of the superior judiciary in the matter of appointments to the Supreme Court.

The judiciary is the ultimate arbiter of all legal and political controversies, which it willingly but unnecessarily shouldered. The fallout of this unfortunate situation is that now political leaders openly criticize and dispute decisions and formation of benches of the Supreme Court. Courts neither hold the sword nor the purse. Their authority and respect depends on the superior wisdom reflected in their decisions, integrity and dispensation of justice according to law and constitution. The ills of democracy are not to be treated in the courts. The cure lies somewhere else.

Over the years, we have seen the judiciary remaining subservient to dictatorial governments and fractured democracies. After the Lawyers’ Movement (2007) it ventured to reform both society and democracy. Decorated with a new power, popularity and authority, judicial activism was introduced.

And we now stand at a place where the process of appointments to the Supreme Court and high courts is being seriously doubted, controverted and disputed – by the judiciary itself as well as the bars.

The procedure for appointments of judges to the superior courts was changed to remove flaws in the old system. The executive at the time would abuse its powers which impinged upon the independence of the judiciary. This new system introduced under Article 175 A through the 18th Amendment (2010) was meant to eradicate manipulation and it provided a two-tier check on the process of appointments. A commission comprising several stakeholders with the majority from the judiciary would nominate judges and a parliamentary committee would confirm them. The executive would only do the ministerial work and issue notifications of appointments. The transition from an absolute power of appointments vested in the chief justice(s) to the commission became a victim of a narrow interpretation, with there being an unwillingness to compromise on their primacy and powers. The spirit of the amendment got mutilated by a judicial fiat.

This new system of appointments where the power of nomination was arrogated by the chief justice(s) gave birth to new controversies. Earlier, an informal collegium used to advise chief justices for consultation on nominations made by the executive. Under the new system, nominations were being made on a pattern that ended up in grievances from members of the bars and the public. Now only office bearers of the bars, law officers and former chamber fellows were allegedly considered for nominations. The bar has been expressing serious misgivings about the nominations.

An independent assessment of the data of appointments and factors involved in nominations under the new system may lead to shocking results. A judicial office is now the most prestigious and powerful office in the land and high stakes are involved due to its emerging role in political controversies. This has evidently led to differences amongst judges in the matter of appointments and other issues.

After the Lawyers’ Movement, a number of controversial cases were taken up by the Supreme Court (between 2009 and 2013) under the suo-motu jurisdiction, exposing it to harsh criticism from political circles. The court however maintained its unity. But the 18th Amendment case (2012) led to a rift. Then there was the matter of en-bloc appointments made to the high courts and the Supreme Court in the aftermath of the Sindh High Court Bar Association (2009). Some of these appointments were made taking into account additional factors which led to creating differences on policy and approach between old and new judges.

When the names of high court judges are now proposed for the Supreme Court the seniority principle intrigues many in the Commission for being the sole basis for nomination and by necessity other factors are looked at to find a suitable appointee, including integrity, competence and conduct. The debate on both sides – following seniority principle alone or seniority and merit – is now giving us two emerging and diverging approaches. The point of view of both sides needs consideration and intentions must not be doubted.

The seniority principle, it is urged, will exclude the possibility of an abuse of discretion by chief justices. Whenever the seniority principle is violated, it promotes distrust and jumping the cue encourages favouritism and breeds bitterness, they argue. Those who insist on merit, performance and integrity, in addition to the seniority principle, argue that appointment to the Supreme Court is a fresh appointment and mere seniority would result in packing the court with judges whose performance and integrity are under a cloud. Judging is a duty not a privilege.

The appointment and removal procedure of judges requires serious review and reconsideration. Not only the judiciary but other branches of the government should also be taken on board as the real stakeholders here are the people of Pakistan.

Numerical strength in the Commission may have momentary winners but it will terminally affect the institution of the judiciary that must be protected and saved as it is the last guarantee for rule of law, rights and constitution.

Email: mwaqarrana@yahoo.com