**Judicial reforms: now or never: Part - I**

Zafarullah Khan

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The constitution is the body of doctrines and practices that form the fundamental organizing principles of a political state. The general idea of a constitution originated with the Greeks and especially in the normative writings of Aristotle. However, modern constitutions are based on the theory of social contract developed by Thomas Hobbes, John Locke and Rousseau, who after the Reformation were trying to search for a new basis of order, stability, loyalty and obedience to the state.

Rousseau argued that all individuals are all-powerful sovereign whose main purpose is the expression of the ‘general will’ that can never be wrong. The social contract necessitates: that certain fundamental procedures must not be subject to frequent or arbitrary change and citizens must know the basic rules according to which politics are conducted.

It also necessitates that those who govern are regularly accountable to at least a portion of the governed. Accountability can be enforced through a great variety of regular procedures, including elections, systems of promotion and discipline, fiscal accounting, recall, and referendum. Those in office must conduct themselves as the representatives of their electorate.

It also states that there shall be a division of power among several organs of the state – between local and central government and between the legislature, executive and judiciary – to ensure the presence of restraints and ‘checks and balances’ in the polity. This is called separation of powers among separate and independent bodies to limit the possibility of arbitrary excesses by the government, since the sanction of all three branches is required for making, executing, and administering laws. The first modern formulation of the doctrine was by the French political philosopher Montesquieu.

The preamble of the constitution of Pakistan declares that it is the will of the people of Pakistan to establish an order: wherein the state shall exercise its powers and authority through the chosen representatives of the people. The preamble also states that the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed while fundamental rights, subject to law and public morality, shall be guaranteed. The independence of the judiciary shall be fully secured, according to the preamble.

The constitution is squarely based on the doctrine of separation of power. In this, the main task of the judicial branch is the final authoritative adjudication of controversies over the application of laws in specific situations facing individuals, groups, legal entities, or governments and their agencies. Article 175 of the constitution says that there shall be a Supreme Court of Pakistan, a high court for each Province and a high court for the Islamabad Capital Territory and such other courts as may be established by law; no court shall have any jurisdiction save as is or may be conferred on it by the constitution or by or under any law; and judiciary shall be separated progressively from the executive.

The judiciary of Pakistan has a hierarchical system with two classes of courts: the superior (or higher) judiciary and the subordinate (or lower) judiciary. The superior judiciary is composed of the Supreme Court of Pakistan, the Federal Shariat Court (FSC) and five high courts. The regions of Azad and Jammu Kashmir and Gilgit-Baltistan have separate court systems.

The subordinate judiciary consists of civil and criminal district courts, and numerous specialized courts/tribunals covering banking, insurance, customs and excise, smuggling, drugs, terrorism, taxation, the environment, consumer protection, and corruption.

Prior to the 18th Amendment, the president of Pakistan, on the recommendation of the chief justice of Pakistan, made appointments to the Supreme Court of Pakistan, FSC and high courts. This system bred many allegations of favouritism. However, following the Supreme Court's judgment in the Al-Jehad Trust case, the government's role in judicial appointments was curtailed. Under the terms of this judgment, the government and the president's office were bound to act on the recommendations of the chief justice of Pakistan.

After the 18th and 19th amendments, a new Judicial Commission and Parliamentary Committee were established for appointments. The commission for appointment in the Supreme Court consists of a total of nine members: the chief justice of Pakistan, four senior judges of the Supreme Court, a former chief justice or judge of the Supreme Court nominated by the CJP, the attorney general of Pakistan, the federal minister for law and justice and, one senior advocate nominated by the Pakistan Bar Council. This means six judges, two representatives of the executive and one representative of the Bar.

The committee may or not confirm the nominee of the commission. The commission curtailed all powers of the executive and even the president has no discretionary power but only to approve the nominee. The prime minister has only ministerial power regarding the appointment procedure. Similarly after 19th Amendment, the powers of the committee have also been curtailed.

For appointments to the high courts, the same procedure is adopted. However, instead of four Supreme Court judges, four senior-most high court judges, the provincial law minister and a member of the provincial bar council will sit on the commission.

This system, though initially envisaged under the Charter of Democracy and formalized by the 18th and 19th amendments, has failed and has bred serious allegations, including that there is no merit system for selection of judges to the higher judiciary. And that judges of the provincial judicial service are generally ignored. That courts are packed with favourites.

It is also alleged that the system allows influential lawyers who have support from the bars to make it to the higher judiciary. That relatives and chamber fellows of judges of the superior courts are elevated. That the principle of seniority is ignored, and that the role of only one stakeholder is dominant – judges are in clear majority, and they start the process of nominations.

It is, therefore, proposed that the Judicial Commission for appointments in the Supreme Court and FSC consisting of ten members may be constituted with equitable representation of various stakeholders: the CJP and two senior-most judges of the Supreme Court, the law minister and law secretary, the attorney general, two members nominated by Pakistan Bar Council, and two members (citizens are the real stakeholders) from amongst eminent citizens, to be nominated/appointed by the above eight members.

There shall be a clearly defined and structured eligibility criterion as laid down by the superior courts for appointments to be made in the executive; the criteria shall include seniority, reported cases, education, research papers, tax payments, conduct etc.

Parliament may make this criterion through an act of parliament. Names may be invited by the commission through open procedures. Any member of the commission may recommend a name. Nominations shall be made from women and minorities also. Hearings of the commission shall be open to the public. There shall be an equitable representation of the federating units including Islamabad Capital territory.

The commission by two-thirds majority of its total membership shall nominate to the committee two candidates, for each vacancy of a judge in the Supreme Court, the Federal Shariat Court, as the case may be.

For appointment in the high courts, a similar commission and procedure, mutatis mutandis, as discussed above for appointments in the Supreme Court (including equitable geographic representation of different zones etc.), shall be made.

At least 25 per cent appointments shall be made from the subordinate judiciary (in Punjab, the subordinate judiciary is totally ignored. For example, so far, no civil judge has risen to the rank of the chief justice of a high court or judge of the Supreme Court whereas it has so happened in the cases of other provinces and from KP some have made to the post of the CJP.

Elevation shall also be made from the civil service. While it is allowed under the constitution, the last time it was done was in the 1970s (Justice Zafarullah Khan). It is to be mentioned that some great judges in the history of Pakistan were from civil service: Justices Cornelius, Kiani, S A Rehman, Anwarulhaq, Shafiurrehman, and Samdani.

Currently, the nomination (one for one post of judges) made by the commission is considered by a committee. However, the 19th Amendment has diluted the powers of parliament.

To be continued…

The writer is a barrister. He may be reached at: mail@zafarullahkhan.com