
Constitutional Provisions Necessitating Change: Proposals for Reform in the Constitution of Pakistan Concerning Judiciary

_____ Usman Quddus

_____ Muhammad Arif Khan

Constitutional provisions in the Constitution of Islamic Republic of Pakistan, 1973 relating to judiciary necessitate changes in the light of equity, justice, fair-play and fundamental rights enshrined in the constitution of Pakistan so that cherished goal of freedom & justice to people of Pakistan comes in real terms. The purpose of this paper is to propose constitutional reforms pertaining to judiciary so that the constitutional provisions are inconsonance with dictates of justice, equity and fair-play and do not smack unsavory framework. The methodology employed is comparison with other provisions of the constitution particularly on fundamental rights, principles of policy and preamble to the constitution to underscore constitutional changes. Findings of the study call for constitutional amendments'. The research is only focused on the study of constitution of Pakistan and doesn't undertake a comparative analysis. The results strength mandate constitutional amendments in the basic scheme of the constitution concerning judiciary. Such an exercise has not been undertaken before and is a new addition to the scholarly literature on the subject.

Introduction

The laws in pre-partition India were promulgated to serve the interests of dominion of England. Post partition, India and Pakistan were required to do away with colonial traditions of slavery and enact

new laws that benefited people of both countries and enlarged their freedom. However, both the nations continued with the vestiges of the past which has made people at large of India and Pakistan virtually still a dependent of various institutions. An impartial judiciary is the cornerstone and one of the fundamental pillars of an independent and sovereign state in all legal systems. It is true that the judiciary keeps a check on the executive and the legislature but at the same time a check on the powers exercised by the judiciary is absolutely necessary so that judiciary is not seen as an autocratic institution that is not subject to accountability. The consequences of a reformed superior judiciary will trickle down towards inferior court's which in effect will also work properly to the satisfaction of masses. Thus the issues in the lower judiciary can be easily remedied through reforms in the superior judiciary. New traditions must replace the old in this part of the world so that world sees the light of justice also coming from this part of the world. The paper aims to propose constitutional reforms pertaining to judiciary in the interest of people of Pakistan. It calls for changes to the constitution concerning judiciary that are absolutely necessary to ensure effective administration of justice. The study is primarily focused on the study of constitution and doesn't undertake a comprehensive comparative analysis. It proposes stepwise constitutional reforms. It is being proposed and recommended as follows:

1. It is proposed that Article 199(3) & (5) of the Constitution of Pakistan should be referred to Parliament for the repeal of said Articles so that army and judiciary do not enjoy a higher status than other organs of state as it is not the mandate of judiciary to make redundant the provisions of the constitution. Article 199(3) excludes army from the purview of writ jurisdiction, while, 199(5) excludes superior judiciary. It is imperative in the light of recent developments in the case law relating to judicial immunity.ⁱ In the recent case of *Chaudhry Muhammad Akram vs Islamabad High Court*, Supreme Court of Pakistan held, that the exclusion under article 199(5) pertaining to superior judiciary only extended to judicial orders and not to the administrative orders while enforcing fundamental rights as enshrined under article 18 of the constitution of Pakistan on popular demand.ⁱⁱ

The language of 199(5) was wide enough to exclude inter alia the administrative orders, however, the Supreme Court of Pakistan choose to exclude only the judicial orders from the purview of Article 199(5). It is proposed that other provision of Constitution be also reformed which elevate army and judiciary to a higher pedestal particularly the provisions relating to freedom of speech. The wide meanings should be curtailed so that meaning of legislation is clear and not everyone can be dragged within the mischief of such provisions e.g. freedom of speech provisions may be amended to clarify as to what are the limitation to such speech and subjective wordings like interest of Islam, contempt of court, defense of Pakistan and morality/decenty etc may be clarified further so that their exact scope is clear to the people of Pakistan.

2. It is recommended that Article 68 of the Constitution of Pakistan restricting discussion in Parliament with respect to the conduct of any Judge of High Court and Supreme Court may be repealed keeping in view Islamic traditions, international instruments on freedom of speech and democratic values of sovereignty of people in a functional democracy. The sovereign may dismiss any judge who appears to him to be incapable of performing his duties; or even a judge who is in every respect capable, if he can find one still more capable in Islamic dispensation of justice.³ Sovereign is also authorized to appoint and dismiss judges which inter-alia also implies that in present times the authority to appoint and dismiss judges should lie with parliament being the sovereign in parliamentary democracies.⁴ Justice Dost Muhammad Khan in the case of *District Bar Association Rawalpindi vs Federation of Pakistan*,⁵ maintained that since parliamentary committee for judicial appointments is contradictory to article 68 of constitution of Pakistan which prohibited discussion regarding the conduct of a judge therefore, article 175(A) was offensive to article 68 and liable for striking down. Though this was not the majority view in the judgment however, such provision like article 68 undermine the powers of parliament which represents the will of people therefore, article 68 constitution of Pakistan warrants repeal in this context also.
3. It is proposed & recommended that Article 204 should be reformed by the parliament in the following terms in line with Islamic values of collective accountability, international instruments on freedom of speech and democratic values of equality wherein no one is above-board, so that only serious obstruction of justice infringing rights of people is an offence. The model of The United States may be embraced where just something that shows a reasonable and current risk to justice is considered contempt.⁶

204. Contempt of Court. - A Supreme Court or High Court shall have power to punish any person who abuses, interferes with or obstructs the process of the Court in any way or disobeys any order of the Court.⁷

4. It is recommended that power of promulgation of rules of superior courts may be relegated back to the parliament so that effective checks can be ensured on the workings of superior courts. It is also in-consonance with separation of powers theory and as a result things would be put in their proper perspective and legislative tendencies in the judiciary will be curtailed. Article 202 and 208 of Constitution of Islamic republic of Pakistan relate to powers of superior courts to frame rules regarding their administration. Such powers have been extended on the pretext of independence of theory which is an offshoot of separation of powers theory, however it is manifestly contrary to justice and equity. Regarding the delegation of powers to superior courts in India to formulate rules, Justice Asok Kumar Ganguly in his separate note in case titled *University of Kerala versus Council, Principals', Colleges, Kerala & Others*, stated that,

‘The rationale of the doctrine of Separation of Powers, to my mind, is to uphold individual liberty and rule of law. Vesting of all power in one authority obviously promotes tyranny. Therefore, the principle of Separation of Powers has to be viewed through the prism of constitutionalism and for upholding the goals of justice in its full magnitude.’⁸

5. It is proposed that to bring transparency in the appointment process of superior court Judges, the powers to check the antecedents, acumen and quality of judgments may be relegated back to the parliament in terms of the real mandate of the 18th amendment to the constitution of Pakistan wherein parliamentary committee had a cardinal role. *Munir Bhatti's case*, a four member bench decision authored for the majority by Justice Mahmood Akhtar Shahidsiddiqui with additional reasons by Justice Jawad S.Khwaja has held that, the Parliamentary Committee has no authority to challenge proposals of the Judicial Commission,⁹ thus making constitutionally created Parliamentary Committee redundant.
6. It has recently been held in the case of *Justice Shaukat Aziz Siddiqui and others vs Federation of Pakistan and others*,¹⁰ that security of tenure is linked to judicial independence and a critical precondition for such independence. Elucidating further the judgment holds that reason for a cumbersome procedure for removal is to ensure judicial independence. Judicial independence should be seen through the prism

of impartial judicial decision making and not more than this as judicial independence in its true spirit connotes fair and impartial judiciary and is a tool to promote fair decisions. Regarding impeachment of superior court judges, it is proposed as follows:

A system similar to United Kingdom for impeachment of superior court judges may be introduced in Pakistan where the House of Commons holds the power of initiating an impeachment. "The member of Commons must support the charges with evidence and move for impeachment. If the Commons carries the motion, the mover receives orders to go to the bar at the House of Lords and to impeach the accused in the name of House of Commons, and all the Commons of the United Kingdom. The House of Lords hears the case with the Lord Chancellor presiding. The hearing is an ordinary trial. Both sides can call witnesses and present evidence. At the end of the hearing and after all have voted, a Lord must rise and declare upon his honor, guilty or not guilty. After voting on all of the Articles has taken place, and if the Lords find the defendant guilty, the commons may move for the judgment. The Lords cannot declare the punishment until the commons have so moved. The lords may then provide whatever punishment they find fit, within the law."¹¹ In the case of Pakistan the House of Commons may be suitably amended with National Assembly and House of Lords with the Senate. Such an envisioned process may ensure checks and balance on the superior judiciary. Furthermore, if superior judiciary really needs to satisfy its penchant for judicial independence then at-least the existing laws may be amended so that they also provide mandatory time frame regarding disposal of reference against judges. Moreover, proceedings before Supreme Judicial Council should be made open to general public to inspire confidence.¹²

Justice MianSaqibNisar in the case of *District Bar Association Rawalpindi vs Federation of Pakistan*,¹³ remarked that, other countries like India, England and USA had a system where superior judiciary was responsible to parliament and removal mandated to parliament but in Pakistan superior judiciary was answerable to itself, therefore, such power should be exercised with restraint and wisdom. Enforcement of fundamental rights of people rest with the judiciary therefore, restraint is not the proper prerogative which should be exercised by the supreme judicial council and it is proposed that any deviation of the law should be dealt with accordingly as heavy costs are involved in superior court litigation s which may amount to the whole life saving of an average household. Appointments and removal of superior court judges are not challengeable before any of the courts in

Pakistan including Supreme Court of Pakistan; therefore, a thorough revision in this regard as proposed is required.

7. It is recommended that doctrine of independence of judiciary should be reviewed by the higher judiciary of both India and Pakistan so that checks and balances can also be ensured on the superior judiciary. Independence of judiciary should also be adjusted with checks and balances so that accountability is also guaranteed. Currently the doctrine has been interpreted by the superior judiciary as independence from everything on this planet. This has resulted in decisions like *Maulvi Tamizuddin Case*, *Dosso Case*, *Nusrat Bhutto case* and *Zafar Ali Shah case* wherein justice was seen under the clout of executive and judges escaped accountability.
8. It is proposed that 'fasiq' (one who violates injunctions of Islam) may be incorporated constitutionally as a ground for impeachment of a judge in Islamic Republic of Pakistan.¹⁴ If 'sadiq' and 'ameen' can be the criteria for eligibility of members of parliament then fasiq may be incorporated as the grounds for impeachment of a superior court judge who are charged with the most onerous duty of enforcing fundamental rights of people of the country. Al-Marghinini, the author of one of the Hanafi code suggests that appointing authority should refrain from appointing fasiq (one who violates commandments of Allah) as a judge.¹⁵
9. It is also recommended that judicial immunity may be reformed in light of the doctrine of maqasid sharia. An unaccountable judiciary cannot ensure the objectives of sharia i.e. religion, life, progeny, wealth and intellect. This can be witnessed from the blatant violations of law that are witnessed every-day in courts.
10. It is proposed that while elevating judges of superior courts they be trained to obey the mandatory commands of Allah and tested with the basic knowledge of sharia. This way purpose of constitution as enshrined in the objective resolution will also see some light of the day.
11. It is proposed that Judicial Officers Protection Act, 1850 may be repealed and at-least one damages suit may be provided against judges of superior judiciary. This will encourage litigants to go to higher forums for redressal of their grievance in-case of a wrong decision. It will also be in accordance with due process clause of Constitution of Pakistan which guarantees adjudication by an impartial tribunal. Numerous other professionals such as physicians, attorneys and police officers' carryout their responsibility effectively with the threat of

lawsuits ever present. In case such a damages suit fails then law should mandate that it be accompanied with heavy costs or fine if there were reasonable grounds to believe that suit was frivolous or tainted with malafide.¹⁶

12. It is proposed and recommended that independent constitutional court be formed in the center with benches in respective provinces so that superior courts are available to redress the grievances of litigants and do not remain busy deciding constitutional cases neglecting litigants fundamental rights as is the order of today.
13. It is proposed and recommended that an independent supervisory body which may be designated as judicial ombudsman should be formed at federal and provincial level to oversee actions of superior court judges. It should inter-alia ensure that judges don't trespass law and remain proactive in redressing the grievance of litigants. This can be done by mandating the function of writing annual confidential reports of the judges to such judicial ombudsman and delegating power of issuing necessary reminders to superior court judges.
14. It is proposed that in light of such reports of the judicial ombudsman, Chief Justice of Pakistan should be appointed and principle of seniority may be reviewed for appointing the Chief Justice of Pakistan to ensure merit.
15. It is proposed that review of Supreme Court's judgments should be heard by a bench of Supreme Court judges other than the one which pronounced the judgment. This will ensure removal of bias if any in the verdict and chances of a more fair decision.
16. It is proposed that suo motto powers should be exercised by a bench of Supreme Court consisting of not less than three judges and right of appeal should be provided against the exercise of suo motto jurisdiction. This way indiscriminate exercise of suo-motto jurisdiction will stop.
17. Recently the Supreme Court of Pakistan has more than often invoked article 184(3) to usurp the powers of executive in Pakistan which is against the scheme of constitution of Pakistan. The Chief Justice of Pakistan MianSaqibNisar visits to hospitals and other institutions are outside the powers vested by constitution and there is no provision in constitution and law to stop judiciary from this practice. No aggrieved person has approached executive initially and then approached the Supreme Court under article 184(3) for redress of grievances. It is proposed that Article 184(3) of the constitution of Islamic Republic of

Pakistan be suitably amended so that Supreme Court of Pakistan can take notice only on an 'application' by any aggrieved party in cases of public importance involving breach of fundamental rights where remedy was exhausted by the aggrieved party and could not get amelioration from executive, and not independent of application for self-publicity and self-indulgence for either party be entertained where executive was not approached initially for redress of grievance.

18. It is proposed that Article 184(3) of the constitution of Islamic Republic of Pakistan be suitably amended so that Supreme Court of Pakistan can take notice only on an 'application' by any aggrieved party in cases of public importance involving breach of fundamental rights, and not independent of application for self-publicity and self-indulgence.
19. It is proposed that misconduct of a superior court judge should inter-alia imply trespassing the settled law under Article 209 and in this regard Article 209 of Constitution of Pakistan may be suitably amended.
20. It is proposed that superior court should be monitored by an independent supervisory body as suggested above which inter-alia should check whether superior courts are active in redressing the grievance of litigants or merely dismissing the cases based on technicalities. Such supervisory body may also be mandated to monitor the indiscriminate exercise of suo-motto powers as was seen in the case of famous actress case where she was found in possession of a bottle of wine and suo-motto powers were exercised.
21. It is proposed and recommended that appointment procedure of district judiciary may be delineated in the constitution with entrustment to any independent tribunal other than judiciary itself so that chances of any foul play are excluded. Persons from every walk of life should be considered for such judicial appointment in lower judiciary so that distinguished scholars are also able to make it to the benches.

Conclusion

Constitutional reforms are the need of time as Pakistan has witnessed numerous constitutional breakages endorsed by judiciary which casts a negative shadow and indicates a weakness in the institution. Judiciary will only inspire confidence of masses in Pakistan if it can bring transparency, merit and fair-play within its systems. This way it will be

respected by the people and its verdicts will enjoy sanctity as the foundations of judiciary will be laid on sound basis. Judicial reforms have been trumpeted a lot but no solid outcome has been forthcoming. It is imperative that judicial reforms should be in the interest of masses and seen to be as such rather than serving the powerful ruling elite.

Notes and References

ⁱUsman Quddus, “Judicial immunity or Judicial impunity: Judicial immunity with special reference to Islamic Law”, *HazaraIslamicus*7: 1(2018), 19-49.

ⁱⁱ*Ch. Muhammad Akram vs Registrar Islamabad High Court & others*, Cont.P no.3 of 2014.

³Mahiudin Abu Zakaria Yahya Ibn Sharif En Nawawi, *Minhaj-Et-Talibin* (Lahore: Law Publishing Company), 502.

⁴Usman Quddus, “Judicial immunity or Judicial impunity: Judicial immunity with special reference to Islamic Law”, *HazaraIslamicus*7: 1(2018), 19-49.

⁵*District Bar Association Rawalpindi vs Federation of Pakistan*, PLD 2015 SC 863.

⁶<http://www.lawteacher.net/free-law-essays/administrative-law/object-of-law-of-contempt-administrative-law-essay.php>, (last assessed 12/11/2016).

⁷Usman Quddus, “Judicial immunity or Judicial impunity: Judicial immunity with special reference to Islamic Law”, *HazaraIslamicus*7: 1(2018), 19-49.

⁸*University of Kerala versus Council, Principals', Colleges, Kerala & Others*, WRIT PETITION(C) NO.429 OF 2009. <https://indiankanoon.org/doc/1460097/> (accessed 22nd April, 2017).

⁹*Munir Bhatti Case*, PLD 2011 SC 407.

¹⁰*Justice Shaukat Aziz Siddiqui and others vs Federation of Pakistan and others*, PLD 2018 SC 538.

¹¹Misbah Saboohi, “Article 209 of the Pakistani Constitution; A Dilemma, or a Possible Explanation?”, *Islamabad Law Review*, 2 (2004): 47.

¹²Usman Quddus, “Judicial immunity or Judicial impunity: Judicial immunity with special reference to Islamic Law”, *HazaraIslamicus*7: 1(2018), 19-49.

¹³*District Bar Association Rawalpindi vs Federation of Pakistan*, PLD 2015 SC 863.

¹⁴Usman Quddus, “Judicial immunity or Judicial impunity: Judicial immunity with special reference to Islamic Law”, *HazaraIslamicus*7: 1(2018), 19-49.

¹⁵Ghulam Murtaza Azad, “Qualifications of a Qadi”, *Islamic Studies* 23:3 (1984), 249-250.

¹⁶John Bennett Sinclair, “Case Notes: Torts — Judicial immunity: A Sword for the Malicious or a Shield for the Conscientious? *Stump v Sparkman*, 98 S. Ct. 1099 (1978),” *University of Baltimore Law Review* 8, no. 1 (1978), 157.