CONCEPTUALISING JUDICIAL REFORM IN PAKISTAN

Abdul Moiz Jaferii

There is a rumour which refuses to go away - that the government is considering a constitutional amendment which will fix the tenure of the chief justice of Pakistan to a three year term. No one wants to come on the record to confirm it, but everyone who is anyone in power privately admits that there's something in the works.

We can only work on conjecture thus far, but it is still important to consider the issues which will surround such a move being attempted or even imagined at this particular time by this particular assembly with this particular court.

The ability of this assembly to tinker with the constitution in the first place, is directly related to the after effects of a Supreme Court decision which deprived a political party of its symbol prior to an election. When the Qazi led bench endorsed the ECP's decision to take away the PTI's bat due to its intra-party elections being deemed defective, it allowed the ECP in the subsequent weeks to act as if the party itself had ceased to exist. It branded every certified ticket holder of the party as independent. Not only did this cause direct chaos in the party ranks, it also later deprived them of the weighted attribution of reserved seats. The party had effectively ceased to exist in the ECP's consideration, exactly the outcome the PTI's lawyers had argued would occur. Yet the Supreme Court at the time had insisted that it was concerned only with the allotment of a unified symbol to the PTI and nothing else. That the ECP rules were illegally put together so as to make the allotment of a unified symbol far more than just symbolic and make its existence the determinant of whether a party was in fact a political party or not to be allotted reserved seats was a matter the court did not want to look into. No one had challenged the relevant rule the court had remarked. It had been argued in the court during the bat symbol proceedings that such would be the after effects, effectively amounting to taking away the constitutional right of millions to associate as a political party. The court was uninterested in such a premise, dismissing it as conjecture. In the remarks which came from the bench, it was made clear that such a turn of events would be duly considered by the relevant fora if they occurred. When all of this came to pass, the relevant fora were firstly the perpetuators of the illegality themselves, namely the ECP. The Supreme Court is yet to determine its position on the issue as the matter has not yet made it to the Supreme Court in any meaningful way. A petition filed by Salman Akram Raja arguing broadly this was dismissed by the Lahore High Court and was appealed to the Supreme Court. It is yet to be listed.

Separately, the issue of consolidation of election results by the returning officers deputed by the ECP which if decided according to the discrepancies apparent on the record between Forms 45 and 47 of the relevant constituencies would lead to a remarkable renumbering of seats by party position. These issues slowly tortoise their way to an adjudicated resolution in election tribunals. The courts have refused to see this as a larger design and insist on taking each constituency dispute on its original merits.

So the reserved seats were allotted to everyone but the party with the most elected representatives. These allotments were made to parties who contain members that are conditionally victorious pending adjudication of the numerical discrepancies in their vote tabulation in the relevant election tribunals.

This government suffers from a dual impediment to its legitimacy. Firstly, the yet to be finalised nature of their elected members' individual victories and secondly from the weight accorded to these elected members from which their parties were then allotted reserved seats. Such a government ought ordinarily to be wary of enacting even ordinary legislation. Yet here we are, considering an amendment to the Constitution.

There is an inherent democratic deficit in the functioning of this government. Any attempt at addressing judicial reform, whether constitutional or through ordinary legislation, would have to be looked at through the same lens: that the government will be trying to legislate for a pillar of the state before which lies the decision of its legitimacy to legislate. Special focus would inevitably fall upon the Chief Justice of Pakistan, and whether he can see this deficit and the perception of the entire exercise lacking legitimacy.

There is a need for reform. But contrary to public perception; the steps needed require little or no legislative interference. Yes, we need a more open and meritorious process for judicial appointments. Deliberation upon that is already underway and progress is expected in the next judicial commission meeting scheduled in the first week of May. Structuring a parallel system of alternative dispute resolution and the modernising of our arbitration laws is necessary, and in the works.

But the vast majority of reform can be affected through using existing legal provisions and by intra judicial updates to the rules which govern the high courts. All that is really needed is dialogue between the superior court judges. Perhaps a judicial convention. A meeting of all judges of the superior courts to debate and decide upon a more efficient way forward. Electronic filing of briefs and replies. The supply of copies to counsel over email. The swearing of affidavits through a secure NADRA portal over a website. The ability to give testimony over a video link from anywhere in the world. Many of these measures have been ordered to be practiced in at least one instance in the superior courts of Pakistan. They need to become the rule for everyone rather than a judicially created exception.

There should also be consequences to delays in judicial proceedings caused by parties and by their counsels. This measure on its own would radically alter the litigation landscape. There should be consequences to filing a claim or suit in court which turns out at the end to be motivated by malice or having been completely frivolous.

Our judges are empowered to rule on costs. If a costs ruling at the end of every civil law decision, where the judge would determine the amount of court time, paid for by the public, went into determining a claim which turned out to be based on lies, and made the offending party pay for it, we would not have a tenth of the pendency we have today. If lawyers were unable to get away with seeking adjournments as a part of their legal strategy, another great chunk of litigation would end abruptly or never occur in the first place. Other commonwealth jurisdictions routinely hold preliminary cost rulings before a trial commences. The judge determines the amount of public funds that would be spent on the trial which is to be held, and leaves it to the parties to come to a resolution between themselves, or to come to an agreement regarding the share of costs and who will bear them. If an agreement cannot be reached and both parties still desire a trial, it is left for the losing party to face the consequences of paying the costs of trial. For all the thousands of civil cases pending before the superior courts, the real disputes requiring adjudication are but a fraction. And in several of those real disputes, there is always one party that wants to delay the other's day in court because it fears for the strength of its own case or for the outcome of adjudication. For that party, the time taken by judicial procedure itself is the judicial remedy. The delay of process is the victory, just as in criminal matters we see that the state relies on the process itself being the punishment. And just as it should be unacceptable for the FIA to turn up to a court and admit it has nothing to show for its investigation after incarcerating a journalist for a month; it should similarly be unacceptable for a property dispute to end after twenty years with one party being proven to have fraudulent designs yet not having to pay for it.

The author is a lawyer.