

CONSTITUTIONAL COURTS FOR PAKISTAN: THE FORGOTTEN PROMISE

Dr. Usman Quddus

Assistant Professor Law,

University of Swabi

usmanquddus1980@gmail.com

Mr. Sultan Sheheryar

Research Associate Law,

University of Swabi.

sulsher2000@yahoo.com

ABSTRACT

The article aims to propose solution for long delays in litigation before Superior Courts in Pakistan by way of formation of constitutional courts for provinces and centre. The methodology of the research in hand is a descriptive analysis of the issue. The findings mandate formation of constitutional courts for Pakistan. The limitations of the study were obtaining data from foreign jurisdictions due to restricted scale of the research. The idea of constitutional court was proposed before, however, in a different form then in the present research; therefore, idea of a constitutional court as suggested in this research is a novel proposal.

Key Words: Constitutional courts, delay, fundamental rights, writ, superior courts

Introduction:

Separate constitutional courts for provinces is a need of the hour for division of work between superior courts as this will assist in shortening the time period for litigation by empowering superior courts to deal with issues of masses effectively with curtailed number of cases. Presently superior courts remain engaged in cases of constitutional nature with little regard for other cases that pertain to individual rights and grievances. This has led to increased frustration among masses with little trust in the justice system. It is therefore proposed that a constitutional court be formed so that there is division of work and judges are more engaged in disposing of normal judicial work besides the constitutional cases. The objective of the study is to propose the formation of constitutional courts for provinces with enlarged jurisdiction and apex constitutional court with a limited jurisdiction to decide cases of disputes between governments only so that courts are not overburdened with work and the tendency of making headlines among the superior judiciary is curbed.

Literature Review:

The historic agreement known as Charter of Democracy between two major political parties of the country at that time when Islamic Republic of Pakistan was in transition stage for return to the assumed political democracy after the dictatorship of Gen (R) Pervez Musharraf inter-alia envisaged a 'constitutional court' for the future of Pakistan (Editorial, *Constitutional courts* 2015). However, the promise was soon reneged after the ending of Musharraf's rule and what could have been a major step towards basic judicial reforms was let-go by way of the forthcoming constitutional amendment pursuant to the charter of democracy, i.e. 18th amendment to the constitution of Islamic Republic of Pakistan.

The constitutional jurisdiction of the Superior Courts of Pakistan can be outlined as:

- i.) Original jurisdiction of High Courts under article 199 of the Constitution of Islamic Republic of Pakistan.
- ii.) Original jurisdiction of Supreme Court under article 184(3) of the Constitution of Islamic Republic of Pakistan.
- iii.) Appellate jurisdiction of Supreme Court of Pakistan under article 185(3) of the Constitution of Pakistan.
- iv.) The jurisdiction of Federal Shariat Court to declare any law as un-Islamic under article 203(D) of the Constitution of Pakistan.

The article 199 of the Constitution of Pakistan prescribes original jurisdiction for the High Courts. High Courts i.e. top most courts within a province along-with Federal Shariat Court are second in hierarchy to the Supreme Court of Pakistan and possess appellate along-with original jurisdiction to decide cases. The power to issue writs for enforcement of fundamental rights is vested in High Courts by virtue of the aforesaid article 199 (*Constitution of Pakistan*, 1973). Besides Supreme Court of Pakistan can also issue writs under article 184(3) for enforcement of fundamental rights if the question involved is that of public importance (*Constitution of Pakistan*, 1973). Supreme Court of Pakistan also has original jurisdiction under article 184(1) of the Pakistani Constitution to decide disputes between two governments within the federation of Islamic Republic of Pakistan. Furthermore, appellate jurisdiction is also vested in the Supreme Court of Pakistan as the highest court of the country within the constitutional dispensation, from the decisions of High Courts within a province under article 185(3) of the Constitution of Pakistan (*Constitution of Pakistan*, 1973).

Time frame of Constitutional Cases Decided by Supreme Court in 2019:

If we randomly study the time frame of constitutional cases excluding the ordinary civil and criminal appeal cases decided by the Supreme Court of Pakistan from the year 2019, we find that it can takes years for the conclusion of such cases. One such case titled, National Commission on Status of Women vs. Government of Pakistan took almost more than six years to decide (*National Commission on Status of Women vs. Government of Pakistan*). Ishaq Khan Khaqwani vs. Railways Board was decided in almost the same period of more than seven years (*Ishaq Khan Khaqwani vs. Railways*

Board). The cases of suo motto jurisdiction also were decided in a period of more than one year despite the fact that such cases involve important urgency due to question of precious fundamental rights of masses involved in them (PLD 2019). It is no hidden secret that it takes years for Supreme Court to decide constitutional cases which normally reach upto five or more years. This can be verified from persons practicing advocacy in the field and survey of other alike cases from yonder and forthcoming year. A case involving status of the employees of Islamabad high court from 2013 also took years to resolve and is recently concluded by way of overturning of a previous decision (*Chaudhry Akram vs. Islamabad High Court*). It is also a practice within the Supreme Court that contentious questions are regularly resolved by forming of larger benches or the constitution of full benches involving all judges. This leads huge delay in other judicial work while judges remain busy deciding questions of constitutional nature. The total strength of Supreme Court of Pakistan comprises of seventeen judges. It is also well known that litigation is an extremely costly hobby in Pakistan and an ordinary individual cannot think of engaging in it unless due to some extreme necessity. The position is much worse in other cases of appellate nature as they are numerous appellate forums and sometimes it takes life time of individuals to get outcome of their cases.

Time Frame of Constitutional Cases Decided by Peshawar High Court and Federal Shariat Court:

Looking at the time frame of constitutional cases decided by the Federal Shariat Court and as a reference Peshawar High Court from one of the leading law journals for judges and lawyers, it is again noted that it generally can takes years for high courts to decide such cases despite important questions of fundamental rights involves in them (*Pakistan Law Digest*). It may be observed here that court procedure in such proceedings is short as compared to other adversarial litigation before lower forums but still cases linger on for years due to unnecessary adjournments. Similarly, other cases that undergo a cumbersome procedure at lower forums meet the same fate and take quiet some length to be decided despite important rights of individuals at stake. All this requires the urgent attention of the law makers, without any heed to the concern of the judges and lawyers that can be said to be the primary reason for such a worse situation in case of Islamic Republic of Pakistan. Most of the lawyers like businessmen are concerned with money making and not at all interested in enforcing rights of individuals as a sacred duty. This can be verified from the record of cases as stated above. To remedy the problem, lawmakers need to bring lawyers and judges in tight regulatory framework for ameliorating the grievances of masses at large. It may be observed here that, a recent report by an international organization reveals that judiciary of Pakistan is ranked 120th amongst 128 countries of the world and better in South Asia to only Afghanistan (Correspondent, *Rule of law: Pakistan falls by one position in global ranking* 2020).

Analysis:

It can be safely stated that superior courts in Pakistan are extremely overloaded with cases. Moreover, there is a tendency in Supreme Court of

Pakistan to give priority to political cases and cases of suo-motto nature involving questions of fundamental rights of supposedly public importance. One of the reasons that come to mind for giving priority to such cases is that these cases in most of the times create headlines and accolades for Judges in newspaper and media which the judges are fond of advancing in a developing country like Pakistan e.g. the visiting of a previous Chief Justice of Pakistan to hospitals on the pretext of jurisdiction under Article 184(3) for rectifying the poor conditions relating to hospitals. This purely was a policy matter and exclusively in the domain of executive, however utilized for personal ends without any fruitful result. There is no dearth of judges in Pakistan that have been engaged in giving items to newspapers and media by virtue of their observations. This has led to receding from the actual matters before courts relating to fundamental rights of citizens and courts are seemed busy in engaging in a matter which deviates them from their prime duties. The Supreme Courts in Pakistan are extensively engaged in suo motto jurisdiction neglecting the real judicial work rendering plethora of published judgments for their political appetite. All this mandates revision of existing policy by the law makers regarding courts and formation of constitutional courts to remedy the problem is one of the solutions which will also benefit people of Pakistan in general. It is therefore proposed by virtue of this article that a separate constitutional court be formed for all the provinces with separate hierarchy of judges that ultimately get elevated to the Constitutional Court of Supreme Court. It is inter-alia proposed that the constitutional court for provinces be mandated with all the powers to decide any question regarding fundamental rights and pertaining to Islamic provisions while the original jurisdiction for apex constitutional court should be limited to the jurisdiction of questions of disputes between two governments and appellate jurisdiction form the provincial constitutional court. Lead can be taken from the Constitution of Pakistan, 1962 wherein Supreme Court of Pakistan was not vested with original jurisdiction to decide questions relating to fundamental rights. A separate constitutional court for provinces will save a lot of time for the judges and also imperative for ensuring provincial autonomy of provinces. Besides, litigants from far flung areas will not have to travel to federal capital for enforcing of their fundamental rights immediately and will get their grievances redressed their and then at the local forum. Constitutional courts with separate judges as distinguishable from normal hierarchy will ensure that litigants rights donot remain unnecessary trampled for long and they get justice within due time as cases of exclusive fundamental rights not including normal civil and criminal cases will be dealt with by such courts. Moreover, it is also proposed that these constitutional courts should have specialized Shariah benches with specialist in them of such matters to decide questions pertaining to Islamic law. Federal Shariat Court with all its paraphernalia may be dispensed with in interest of economy. It is also suggested that jurisdiction under article 184(3) should be completely done away with as it is more of a cause of judges rather than justice. As stated earlier, judges remain busy deciding such questions while the real judicial work remains hindered. This will not be a novel case as

Constitution of Islamic Republic of Pakistan, 1956 & Constitution of Pakistan, 1962 did not have such like jurisdiction as prescribed by virtue of Article 184(3) in the present constitution, 1973. Such question of public importance pertaining to fundamental rights can be tackled by lower appropriate forums as they possess the requisite jurisdictions in this regard by virtue of relevant laws. The constitutional courts as proposed should have men and women of integrity possessing legal acumen from other than advocates too as bright Constitutionalists are present in legal academia too with proven metal. Moreover, the practice in such courts should also be enlarged to include legal academia and intelligentia too so that courts are properly guided in relation to important questions of constitutional importance. Presently all seats for higher judiciary have been practically reserved by advocates for themselves which speaks volumes and in negative proportions for a country like Pakistan where polity was conceived as an egalitarian society. Constitutional courts are the only way ahead for Pakistan as judgments in such decisions of constitutional nature are extremely lengthy covering hundreds of pages which are also criticized by some as verbal diarrhea mostly shying away from the crux, however, the personal appetite for lengthy judgments may be satisfied by the judges after formation of constitutional courts saving a lot of time expense of poor litigants. Constitutional history of Pakistan is also ample evidence of the facts that constitutional decisions are not consistent and frequently overruled. This problem will be rectified by formation of constitutional courts as a specialized court in this regard will lead to refinement in the law and its evolution.

Conclusion:

Constitutional courts are extremely imperative to bring reforms to the constitutional dispensation of the Islamic Republic of Pakistan. Specialized benches comprising of individuals well versed in constitution will lead to betterment in constitutional law and evolution of the law which is necessary as Pakistan lacks far behind in this field where constitutional nature errors are too frequent leading to confusion within law and consequently lack of certainty. Formation of constitutional courts at centre will provide a mechanism to curtail time period of litigation within Pakistan if judges perform their duties with good faith and with due regard to rights of the citizens. Litigation time period will lessen as by formation of additional constitutional courts judges will be engaged in less amount of judicial work.

References:

- i. *Chaudhry Akram vs. Islamabad High Court*, PLD 2016 SC 961, *Shehzada Aslam and others*, C.M.A 6310/2018.
- ii. Correspondent, O. (2020, March 12). Rule of law: Pakistan falls by one position in global ranking. Retrieved October 25, 2020, from <https://www.thenews.com.pk/print/627983-rule-of-law-pakistan-falls-by-one-position-in-global-ranking>

- iii. Editorial. (2015, October 05). Constitutional courts. Retrieved October 07, 2020, from <https://www.dawn.com/news/1210921>
- iv. *Ishaq Khan Khaqwani vs. Railways Board*, PLD 2019 SC 602
- v. *National Commission on Status of Women vs. Government of Pakistan*, PLD 2019 SC 218
- vi. PLD 2019 Supreme Court
- vii. Pakistan Law Digest, 2010-2019
- viii. *The Constitution of Islamic Republic of Pakistan*, 1973
- ix. *The Constitution of Islamic Republic of Pakistan*, 1956
- x. *The Constitution of Islamic Republic of Pakistan*, 1962