

An article from Justice (retired) Fakhruddin G. Ibrahim, former judge of Supreme Court of Pakistan, forwarded by the Asian Human Rights Commission

PAKISTAN: Again a judicial crisis – not a bonafide crisis but a crisis created for ulterior reasons

Ostensibly the crisis is the elevation of chief justice for the Lahore High Court in the Supreme Court of Pakistan, the elevation of the next senior most judge Justice Saquib Nasir, as acting Chief Justice of Lahore High Court (a la Zia ul Haq style).

Being of the view that more harm is done by ignoring seniority, which opens the door for exercise of discretion in principle, I am against seniority being ignored, particularly in judiciary.

My first reaction, therefore, was that the appointment of Chief Justice Lahore High Court to the Supreme Court and elevation of the next senior-most judge as Lahore High Court Chief Justice was justified.

I had assumed that in accordance with the Article 177 of the constitution, these appointments were made by the president after consultation with the Chief Justice of Pakistan, and that the president was bound by such consultations.

Was the Chief Justice of Pakistan even consulted?

We are in such a sorry state of affairs where there is a denial whether such a consultation took place between the two highest functionaries of state.

The president's spokesperson asserts that the consultation took place and is denied vehemently by the honorable Chief Justice of Pakistan.

There must be some documentary evidence to prove that such consultations took place. But much to our regret the people have been kept in the dark creating further controversy. With a poor credibility score of the government, the latter's version will not be acceptable to the people.

Without consultation, these appointments, in contradiction to the binding recommendations of the Chief Justice of Pakistan remain invalid, being in violation of Article 177 of the Constitution.

To my mind, this issue, which is so obvious and cannot possibly become controversial, has a reason for other reason, namely, the appointment of judges in the High Courts.

There are a large number of vacancies in all the High Courts which need to be filled on an urgent basis, in the interest of litigant public. There can be no controversy over the appointment of these judges. The government has, without cogent reason, evaded the issue of these appointments.

The procedure for the appointment of judges is clear cut. The Chief Justice of the High Court, in order to fill up vacancies, first consults with his colleagues and invites advocates and/or members of the lower judiciary, with a view to obtain their consent to become a judge. Even if there is one seat vacant, the Chief Justice of the High Court recommends two or three names which are forwarded to the provincial government. The limited function of the provincial government is to ascertain the antecedent of the candidate, and along with any adverse material, but without any deletions or additions of names, forwards the list to the Ministry of Law, which, with its comments, further forwards it to the Prime Minister.

Then starts the process of consultation between the Chief Justice and the Prime Minister and if a candidate has the concurrence of both the Chief Justices (High Court and Supreme Court), such a person is elevated to become the judge of the High Court.

It may be noticed that neither the President nor the Prime Minister has a right to add to, or subtract, from the list of proposed candidates.

This is obviously correct for two reasons – firstly, the Chief Justices know better the competency of the candidate secondly, this appointment is for an initial period of one year, to enable the Chief Justices to ascertain the ability and integrity of the judge.

I will repeat that a candidate whose appointment is confirmed by both the chief justices is binding on the government. In exceptional cases, the PM may give his reasons for his disagreement and the same may be reviewed by the chief justices. But the primacy remains with both the chief justices.

To my mind, the immediate controversy regarding the notifications elevating Lahore High Court Chief Justice and his elevation to Supreme Court is directly related to the government's reluctance to initiate the process of appointment of Lahore High Court's judges nominated by its Chief Justice.

Our past history, in matters of appointment of judges, has been chequered for it is public knowledge that the Executive has, more often than not, been interested in appointment of judges of its own choice, which in fact, seriously affects the independence of judiciary for the largest single litigant before the courts is the government.

We have fortunately evolved a procedure, which is not only fair and just, but, in public interest.

In the four HCs large number of judges remain un-appointed for the last so many months only because of the undue obduracy and the expectation that the parliament will provide for another procedure for appointment of judges, to suit the executive.

In my humble opinion, the whole controversy must be resolved without further delay by appointing the judges in the HC in accordance with the Constitution.

In so far as the elevation of the judge from the LHC to fill up permanent position from Punjab in the SC is concerned, it should not be a pretext for delaying the appointments of judges to the Lahore High Court. We are urgently required in larger public interest for immediate appointments of judges as the litigants are suffering for no fault on their part.