

25 July 2022

Hon'ble Chairman and Hon'ble Members of the Judicial Commission of Pakistan ('JCP')

Assalamu aleykum,

1. While on my annual leave I received a Whatsapp message from the Additional Registrar of the Supreme Court ('SC') informing me that the Hon'ble Chief Justice of Pakistan ('CJ') has convened a meeting of the JCP on 28 July 2022 to consider appointing five judges to the SC. When availing of annual leave no meeting of the JCP was scheduled but as soon as I left Pakistan the CJ decided to hold two meetings of the JCP to consider appointments to the Sindh and Lahore High Courts, and now a third unscheduled meeting of the JCP is to be held during the summer vacations of the SC. The summer vacations of the SC were notified by the CJ himself, and then these were gazetted in the Official Gazette. If the CJ renders his own notification utterly meaningless then let him first withdraw it, instead of violating it.
2. In the JCP meeting held on 28 June 2022 everyone, except the CJ and the Hon'ble Justice Ijaz-ul-Ahsan, voted to postpone the meeting as there was no justification to call it during the gazetted summer vacations and as the senior most judge was on sanctioned annual leave. It was also noted that for the first time ever, the senior puisne judge had been excluded from chairing either the antecedents or the competence gauging committees of the JCP. Therefore, calling yet another JCP meeting when all the same reasons, on the basis of which earlier meetings were postponed, still subsist and there is the added reason of the Attorney-General having recently been operated upon, is inexplicable.
3. I most respectfully submit that the CJ cannot reject decisions of the JCP. In calling another meeting during notified-gazetted vacations, when some members are on annual leave, and at a time when the Attorney-General is recovering from the second surgery he has recently undergone, is unjustified. The democratically taken decision by the JCP not to meet in such circumstances must be abided by. Democracy is the bedrock of the Constitution and the basis on which Pakistan came into existence.
4. When the CJ also knows that in a few days the senior puisne judge returns to Pakistan (insh'Allah on 13 August 2022) then why can't he wait for a few more days? Not to have JCP meetings for months and then to schedule three such meetings when the senior puisne judge is on sanctioned annual leave suggests that the CJ does not want him to be physically participate, which is illegal and unconstitutional. Incidentally, I worked throughout the winter vacations, and generally the last to leave work late in the evening and did not leave a single pending decision nor left any 'short order' awaiting provision of detailed reasons.
5. The CJ did not schedule meetings when the vacancies in the SC occurred but all of a sudden wants to make wholesale appointments to the SC hurriedly. To appoint five judges

means more than a third of the SC, which the CJ wants to pack during notified-gazetted vacations, and by avoiding the participation of all members.

6. The CJ wants to fill-in an 'anticipated' vacancy too. Article 175(8) of the Constitution does not permit this. Nor does the Constitution permit that the CJ alone proposes names, which is the sole prerogative of the JCP. However, badly drafted rules are cited to override the Constitution.

7. The anticipated vacancy will occur on the retirement of Hon'ble Justice Sajjad Ali Shah. He is being called upon to choose his own successor. This is unconstitutional. Pakistan is not a kingdom of yore in which kings decided their successors. If this is permitted then the CJ may next call a meeting of the JCP to fill-in 'anticipated vacancies' that will occur in respect of all the judges of the SC, including those retiring after him. Nominating or appointing judges prior to their retirement is a major breach of the Constitution. Pakistan is to be governed according to the Constitution and not as per the desire or wish of the CJ.

8. The SC has repeatedly held that those decisions which have a long-term effect must not be made by one just prior to retirement. This was presumably also a reason why the Hon'ble Justice Mazhar Alam Miankhel gracefully declined to recommend any judge for appointment close to his retirement. Hon'ble Justice Sajjad Ali Shah remains a judge for only two weeks more yet has been burdened to recommend five judges who will remain in office for years.

9. The matter of appointing judges to the superior courts requires utmost care and due deliberation as it is a matter of extreme delicacy. CJ please do not ridicule the JCP and your nominees by contravening the Constitution. Restricting the JCP to consider only the CJ's pre-selected nominees is inappropriate. The JCP deserves to be treated with respect and consideration by its Chairman.

10. The CJ admits to having acted discriminatingly as he says that he decided to consider only a certain number of judges, and this he did arbitrarily. He informs that he considered 3 judges from Peshawar, 6 from the Lahore till and 12 from Sindh. This does not stand to reason because the Lahore High Court is a much larger than the High Court of Sindh; neither the same number were considered nor of the same proportional ratio.

11. However, the CJ states that he excluded from his consideration the Chief Justice of the Sindh High Court. The reason given by the CJ is that he had declined, and refers to his letter of 13 March 2022. But this letter states to have been written in continuation of a letter of 12 March 2022 (which is not provided). In any case the said 13 March letter states that, 'given the facts, circumstances and developments since 5th August 2021 of which your lordship is aware, I am not interested'. It is clear that this letter was written in an altogether different context. In any case if a chief justice is nominated for appointment to the SC and he declines to accept the position then the Constitution stipulates that he stands retired; there is a precedent in this regard too of Chief Justice Amir-ul-Mulk Mengal of the Balochistan High Court. The Constitution does not permit the CJ to rewrite or circumvent the Constitution. In soliciting opinions from judges whether they would want to be appointed as a judge of the SC or even if an unsolicited opinion is tendered and



the desire expressed therein accepted it would negate Article 206(2) of the Constitution, which states that, 'A Judge of a High Court who does not accept appointment as a Judge of the Supreme Court shall be deemed to have retired from his office...'. The CJ has effectively rendered this constitutional provision meaningless.

12. The CJ further discriminates by excluding for his kind consideration Chief Justice and Judges from the Balochistan High Court and the Chief Justice and Judges from the Islamabad High Court. The prevailing sense of deprivation of the peoples of these areas is being further aggravated. With utmost respect, it appears that CJ has resorted to reverse engineering by first deciding who all to nominate and then find some pretext to justify his nominations.

13. There are decisions of the SC holding that there is a legitimate expectancy for appointment. Those qualified cannot be whimsically discarded and that too for reasons beyond their control. In this regard the CJ states that such and such has only headed heard and decided civil, criminal or tax cases and then goes on to state that he does not have requisite experience in other areas of the law. Judges do not (themselves) determine what type of cases they hear therefore punishing them on this account is unjust and unfair. Also a judge may be perceived to be too independent and so is intentionally not given certain type of work and/or given only unimportant and mundane work, despite the fact that the judge may be competent and well versed in the work that he is kept away from. Such injustice which a judge may have been subjected to in the High Court should not be perpetuated by the JCP.

14. All appointments must be made in accordance with the Constitution, on the basis of a predetermined and non-discriminatory criteria. And above all without any impression of favouritism. The Constitution does not grant the CJ any powers additional to those of the other members of the JCP; the CJ is only designated as the Chairman of the JCP.

15. When the CJ was the senior most judge he was appointed to chair a five-member committee of the JCP tasked to determine criteria in the appointment of judges, in the event that Chief Justices and senior most judges were not to be nominated. The task assigned to him remains incomplete. Only one meeting of the committee was called on 9 March 2022; Hon'ble Justice Umar Ata Bandial signed the minutes of this one meeting writing that: 'Hon'ble Chairman thanked all the members for sharing their valuable thoughts and suggestions and expected to meet soon with some concrete ideas on paper to proceed further.' No further meeting took place, no 'concrete ideas on paper' came and the committee did not submit its report to the JCP yet the CJ (now) says that the committee had completed its task. The members of the committee who I spoke to confirm said that the committee met only once, and no decision was taken.

16. However, the CJ superciliously took it upon himself to create meaningless and perfunctory 'criteria'. And, having done so himself proceeds to gauge his pre-selected nominees against this 'criteria'. With respect, this mocks the JCP and violates the Constitution.

17. Prior to writing this letter I penned a note to the CJ requesting him not to act arbitrarily and reminded him that arrogance (takabbur) and ego (anaa) is abhorred by Almighty Allah, but



since the CJ did not respond I am compelled to write to all of you as this is the dictate of my office and of the oath taken by me to defend and protect the Constitution.

18. Article 175A of the Constitution is very clear on the subject of appointing judges to the superior courts and it must be strictly applied. The Constitution grants to the JCP the prerogative to nominate judges to the Parliamentary Committee. The CJ cannot act unilaterally. If the rules made by the first JCP to govern its workings say something contrary to the Constitution this must be disregarded, and not the Constitution. Every citizen must abide by the Constitution (Article 5) and on judges lies the added responsibility to uphold, protect and defend it as stipulated in the oath that they take which also stipulates that favours must not be extended. The JCP selects a judge against a vacancy and it is not constrained to only select or reject a judge nominated by the CJ. Article 175A of the Constitution DOES NOT mention that the CJ alone can nominate a judge nor permits him to give reasons for nominating or not nominating someone.

19. The CJ formulated a questionnaire, sent it out, collected information and documents, got it compiled and presented 2,347 pages for our consideration without having first obtained the authorisation of the JCP to do so. What was done must have taken months yet not once did the CJ discuss or disclose this. The Constitution does not permit the CJ to act unilaterally and does not permit concealment or secrecy in public matters affecting the people and the Judiciary.

20. The kind of power exercised by the CJ is not permitted by the Constitution. The CJ arbitrarily and unilaterally decided: (1) the number of judges to be appointed, (2) the High Court from which they should be taken, (3) considered judges upto a particular number, (4) gave his preemptive opinion on who the best candidates are, (5) put up for consideration to the JCP only his preselected candidates, (6) formulated a questionnaire soliciting information, which included compelling serving judges to disclose their financials (ironically the CJ refused to do so himself when the SC received a written request for information pursuant to Article 19A of the Constitution) and (7) sought medical information in derogation of the constitutional protection of privacy and dignity.

21. A factor which the CJ mentions as a disqualifying factor for being chosen is the delay in writing judgements. High Courts judges have far more work assigned to them as compared to SC judges. If this is a criterion, and there is nothing wrong with it, let us also self-reflect and do a little self-accountability. The CJ should order a survey of SC judges to ascertain (1) how long the CJ and each judge takes on average to write judgments, (2) how many cases are disposed of through 'short orders', (3) how long after does it take for the detailed reasons to come and (4) how many are still awaited. I may mention that the malaise of 'short orders' is a novelty; Article 189 of the Constitution mentions 'decisions' of the SC, 'short orders' are an invention not sanctioned by the Constitution.

22. Pakistan is an Islamic Republic and the Constitution commences by stating that sovereignty belongs to Almighty Allah alone and the limits prescribed by Him have to be observed. Therefore, to disobey the Commands of the Almighty also constitutes disobedience to the Constitution. The Holy Qur'an mandates consultation in its verse 42:38, and no less a person than Prophet Muhammad (peace be upon him) was ordained to consult (3:159). 'None was more

apt to seek council of his companions than the Messenger of Allah' (Sunan al-Tirmidhi, Kitab al-Jihad, Hadith No. 48, on the authority of Abu Hurairah.)

23. The opinion of Qur'anic exegetes through the ages with regard to verse 42:38 is generally the same. I'll cite just two examples, first of the notable Pakistani Islamic scholar Abul A'la Maududi (1903-1979) from his 'Tafhim Al-Qur'an' (vol. 4, pp, 508-510) and of the Qur'anic exegete and muhaddith Abu Abdullah Muhammad bin Ahmad al-Qurtabi (1214-1273) of Cordoba, Spain, from his 'Al-Jami li-Ahkam Al-Qur'an' (vol. 18, pp 586-588) which say that, verse 42:38 prescribes that consultation is obligatory in respect of matters which pertain to more than one person. Because: (a) none should impose his will on others, (b) imposing one's will on others either means that one does not give importance to others or that one deems oneself to be more intelligent, both of which are morally evil, (c) deciding an issue that pertains to people is a serious thing and one should fear Allah. And, they amongst others derived the following principles from verse 42:38, that: (1) all requisite information be provided, (2) appointments should not be made on the basis of fear or favour, (3) leaders should seek advice from advisors, (4) advisors must give their honest and well considered opinion and (5) matters should preferably be resolved consensually, failing which through majority opinion.

24. The CJ wants to rush through a most delicate matter in a very questionable manner. He wants 2,347 pages of documents to be examined in a week. However, I have not even been provided with these documents. Instead, an attempt to Whatsapp them was made, but only the first document of 14 pages I accessed and could read. Regarding the others my phone states 'storage full'. I have informed of this but the documents have still not been couriered to me or sent to the Pakistan Embassy at Madrid for onward transmission to me. If someone else was dealt with similarly and the matter was litigated, the court would have deplored such arbitrariness and rushed conduct as it would constitute insufficient notice and would have violated the constitutional provision of 'due process'. The CJ cannot blitzkrieg due process and sufficient notice.

25. Therefore, I request that the JCP meeting should be postponed. Instead, let us first meet to consider how to proceed further in the matter. And, if Chief Justices and senior puisne Judges of the High Courts are to be bypassed then to first develop for consideration of the JCP criteria for nominees, since the then senior most judge failed to accomplish the task assigned to him.

Yours sincerely,

Qazi Faez Isa

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