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**Seniority v merit: a false binary?**

The 5-4 decision by the Judicial Commission (JC) to elevate a junior judge from the Sindh High Court to the Supreme Court (SC) has sparked discontent within the legal fraternity.

The bars claim the JC has not given cogent reasons for ignoring four of his more senior colleagues, including the chief justice. After all, they reason, if someone can head a provincial high court for four years, surely s/he is capable of being appointed to the SC? Inevitably, some have also complained a Sindhi-speaking chief justice is being overlooked at a time when a majority of the JC comprises Urdu-speakers.

But others, including one of our most thoughtful legal commentators, Salman Akram Raja, have argued in these pages that insistence on adherence to seniority – as opposed to merit – in elevations to the apex Court is a recipe for instilling mediocrity. Framed thus, it is hard to disagree with Raja. Logically, appointments based on merit are better than appointments based on seniority. Then why the outcry?

Because, as American jurist Oliver Wendell Holmes said, “[t]he life of the law has not been logic. It has been experience.” In Pakistan, bitter experience teaches that discarding the seniority rule – whether in the judiciary, military or bureaucracy – has not ushered in meritocracy. More often, the metric of length of service is replaced with the metric of proximity to the appointing authority.

In his article, Raja cites the infamous ‘Maulvi Tamizuddin’ and ‘Zulfiqar Ali Bhutto’ judgments as proving the need to appoint SC judges on merit and only if they possess both “spirit and vision”. He does not explain how that will be assessed. Moreover, he does not consider that the ‘Tamizuddin’ and ‘Bhutto’ judgments only reinforce the need to shield judges both from the temptation of out-of-turn advancements and the embitterment created by undue denial of advancement.

After retirement of the first chief justice of Pakistan (CJP), Sir Abdul Rashid, the then governor general Ghulam Muhammad was reluctant to appoint the next senior – a Bengali judge by the name of A S M Akram. So, he plucked the brilliant, yet pliable, chief justice of the Lahore High Court, Muhammad Munir, and made him CJP. Soon afterwards, Munir rewarded his benefactor through the Tamizuddin judgment, upholding the latter’s dissolution of the Constituent Assembly. It was not until 1968 that we had our first Bengali CJP – a fact that may not have gone unnoticed in East Pakistan.

Similarly, Bhutto bypassed Maulvi Mushtaq J and six others to appoint Aslam Riaz Hussain J as chief justice of the Lahore High Court. When Zia took over, however, he promptly appointed Mushtaq as chief justice who – whether out of gratitude to Zia or resentment against Bhutto – conducted Bhutto’s trial in a manner almost universally criticised as biased. And when the matter went to the SC, it was not helped by the fact it was presided over by Anwar ul Haq J, whose own appointment as CJP had initially been thwarted by Bhutto but later facilitated by Zia.

More recently, we witnessed the judicial turmoil created by Sajjad Ali Shah J’s out-of-turn appointment as CJP. Shah – who reportedly secured his appointment by touching the knees of the prime minister’s spouse and assuring him of his fealty – was the cause of tremendous bad blood among SC judges. This bad blood was exploited by others and eventually led to the Court splitting in two camps that began passing orders against each other! Any amount of “mediocrity” is preferable to that situation.

It was in this historical context that the SC laid down the rule of seniority for appointment of chief justices in the ‘Al-Jehad Trust’ and ‘Malik Asad Ali’ cases. It held that a failure to follow the seniority principle in judicial advancements leads to lobbying amongst judges, compromises their independence and integrity, causes a breakdown of judicial comity, and undermines public confidence in the judiciary. In the words of Saad Saood Jan J, it creates a “rat race” among judges. This position is not altered merely because appointments are now made by the JC instead of the executive. A judge’s independence must be jealously guarded – even from his/her peers and superiors.

In his prescient paper titled ‘Independence of Judiciary: The Final Frontier’, Asif Saeed Khosa J notes “the real threats to independence of judiciary are from within” and that the “desire to seek further elevation in his status… may also weaken a judge’s resolve to take a principled stance on issues… [and] the judiciary cannot become truly independent unless individual judges are able to shun and rise above such desires, fears or apprehensions.” He defines the final frontier of judicial independence as “the independence of an individual judge from the undue pressures of his peers” and points out that problems arise when “an individual judge starts abdicating his decision making before the dictates of the institution”. Moreover, that any degree of “independence of judiciary painstakingly achieved can effectively be neutralized through machinations from within the judiciary itself.” Sadly, after becoming CJP, he failed to heed his own warning and allowed deviation from the seniority rule.

Some have also argued that ‘Al-Jehad’ and ‘Malik Asad Ali’ only applied the seniority rule to appointments of chief justices. In the Supreme Court Bar Association’s (‘SCBA’s) case, on the other hand, the seniority rule was held inapplicable to appointment of SC judges as those were “fresh appointments” and not promotions. But so too, are appointments of chief justices! They all require fresh oaths. And surely it cannot be argued that the risk of “mediocrity” is tolerable for chief justices but not other judges?

And if the prospect of out-of-turn appointment as chief justice is likely to give rise to lobbying among judges, will not the prospect of out-of-turn appointment as SC judge? After all, for a high court judge, appointment to the SC carries a three-year extension in service. Anyone familiar with civil or military service knows what a powerful inducement that can be. At this juncture, it is perhaps fair to note that the SCBA judgment was rendered by PCO judges under General Musharraf’s martial law and it was the out-of-turn appointment of his law secretary to the SC that was under challenge.

Moreover, despite the SCBA judgment, the JC has taken scrupulous care to maintain the informal provincial quota in the apex court regardless of “merit”. Nobody has ever contended this has reduced the apex court to a “dumping ground”.

For non-judicial services, of course, the SC demands that appointing authorities justify deviations from the seniority rule and show why a senior officer was less fit or a junior officer more fit. Recently, it reversed thousands of out-of-turn promotions in the civil service and struck down, as unconstitutional, legislation intended to safeguard such promotions. Surely, merit deserves the same place in the civil service as it does in the judiciary? There, the Court recognized that subjective assessments of “merit” are often only a fig leaf used to disguise nepotism. Nothing is more deadly to the quality and morale of a service as when deserving officers are passed over unfairly.

Moreover, even for posts that are not subject to the seniority rule and where the law allows wide discretion to the appointing authority (for example, the chairpersons of SECP or OGRA), the SC has insisted the appointing authority must frame and follow objective and transparent criteria to gauge the suitability of candidates so as to ensure its discretion is not exercised capriciously. In constitutional law, this process is known as “structuring one’s discretion”.

Should judges not follow the standards they apply to others? In fact, it is even more essential to limit discretion in judicial appointments and maintain consistent career paths for judges and to define objective criteria for their elevation. In other services, obedience to one’s superiors is a virtue. For judges, at least in respect of their judicial functions, it is a sin. The advancement of judges of the high court must not, therefore, be left to the unfettered discretion and pleasure of their superiors in the SC.

It is easier, in fact, to define objective criteria for elevation of judges to the apex court than to define criteria for appointment of a chief executive of a state-owned enterprise. Judges, uniquely, leave a written record (through their judgments) of their competence. Their respective productivity, the ratio with which their judgments are upheld or reversed and the frequency with which their judgments and reasoning are cited by other judges are easily measured.

While not perfect, these measures are certainly better than the purely subjective assessments currently in vogue. And until such time as the JC frames (and applies) objective criteria for elevations to the apex court, it should adhere to the seniority rule as a guiding principle.

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