March 1, 2010

Judicial Appointments: Notes from India

Shubhankar DAM, City University of Hong Kong
Judicial appointments (and non-appointments) in India, like in Pakistan, have been in the news lately. And usually for the wrong reasons.

In August 2009, the Chief Justice of India (CJI) and his senior colleagues recommended the elevation of Judge Dinakaran – then Chief Justice of Karnataka High Court – to the Supreme Court. Around the same time, the CJI and his colleagues overlooked Judge A. P. Shah – then Chief Justice of Delhi High Court – for appointment to the same Court.

Judge Dinakaran's personal integrity was in doubt. He had “sold” his judgments, or so the Bar alleged. Senior lawyers, jurists and activists petitioned against his appointment. In contrast, Judge A. P. Shah had authored some of the most progressive decisions in recent times. In 2009, he wrote a decision decriminalizing gay sex in India, wrote in favor free speech and made the CJI accountable under the Right to Information Act.

So, why did the Chief Justice recommend the elevation of an allegedly tainted judge? Or, why did he not recommend someone of the caliber and standing of Judge A. P. Shah to the Supreme Court? No one really knows. And ironically, the CJI is not obliged to tell us.

That suggests something about the appointment of judges in India. It is shrouded in secrecy, kept away from public eye and apparently used to settle personal scores. How did this state of affair come about?

The Text: Who has a say?

Article 124 in the Indian Constitution says that “there shall be a Supreme Court of India,” consisting of a Chief Justice and not more than 25 judges. And every Judge “shall be appointed by the President ... after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary ..."

However, in “the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted.”

It would appear from the foregoing provision that the President is both the deliberating and the appointing authority. First, the President deliberates. Who should be appointed? What additional qualifications must a person satisfy beyond the minimum set forth in the Constitution? This deliberation, it appears from the text, is discretionary.

The President may decide by herself, or do so in “consultation” with Supreme Court and High Court judges, if she deems necessary. Put another way, the President may talk to everyone. Or, she might talk to none. And based on her (individual or collective) deliberation, she appoints the judges.
This deliberative discretion is restricted in one situation. In appointing judges to the Supreme Court, the provision specifically requires that the Chief Justice of India “always be consulted.”

What is the precise nature of this “consultation”? Does it mean taking inputs from the Chief Justice, with the discretion to disregard it? Or, does it mean finding concurrence, that is finding potential candidates who are acceptable both to the President and the Chief Justice? Or, does it mean that the President is bound by the suggestions of the Chief Justice?

In the first scenario, consultation is presumably formal. Though he may take the advice of the Chief Justice seriously, the President is not bound by suggestions made to him.

The second scenario, requires some relatively “serious talking.” Indeed, it requires concurrence. Not all presidential suggestions might be acceptable to the Chief Justice. Conversely, not all suggestions from the Chief Justice might be acceptable to the President. And, therefore, the need for negotiation.

Finally, the third scenario makes the President practically irrelevant: He is bound by the advice of the Chief Justice. “Consultation” here is more like fiat. The Chief Justice proposes, and disposes.

Which of these three possibilities best suits Article 124? Notice that the third alternative – one that makes the President redundant – is rather implausible. It undoes the text of Article 124 in serious ways. The text inserts the consultative role of the Chief Justice in an exceptional capacity. That is to say, it is still the President who deliberates and appoints.

But in specific cases, the Chief Justice is to be included in the process. Undoing this exceptional role, the third alternative makes the Chief Justice central to the appointment process. Therefore, the first or second alternative, or something in between may suit Article 124 better.

From Practice to Norms: How has it worked?

For the most part, appointments during the Nehruvian years were relatively, though not entirely, uncontroversial. Nehru’s personal chemistry, coupled with the high moral standing of the first Chief Justice generated healthy conventions.

There were differences to be sure. At times, Nehru prevailed. But mostly, the Executive deferred to the wishes of the Chief Justice. In some ways, the de facto rule of appointment during these years was somewhere between the second and third scenario. Nehru and Chief Justice Kania worked to find concurrence in a process where the latter had an upper hand.

Indira Gandhi’s reign, however, was a different story. In 1973, contrary to the convention that the senior-most judge be appointed Chief Justice, she held out the post for her personal favorite, superseding three senior judges. She did the same in 1976. Judge H. R. Khanna was denied the position for his courageous dissent in the Emergency case.

Despite these developments, the Supreme Court tolerated executive primacy in appointments for many years. In S. P. Gupta decided in 1982, the Supreme Court constitutionalized the first scenario: The opinion of the Chief Justice of India could be completely ignored in the matter of appointment of Supreme Court and the High Court judges. “Consultation,” in other words, was no more than a formal exercise.

All that changed in 1993 when the Supreme Court in S.C. Advocates on Record Association decided to “take over” the appointment process. Following a clarification sought by the President in 1998, the appointment procedure now stands something like this.

A collegium of the Chief Justice and four senior judges will initiate the appointment process. Based on private deliberations, they will make recommendations to the President. If the President objects to a particular proposed appointment, she may return the same to the Chief Justice, noting her reasons.
The collegium will reconsider the recommendation. And on reconsideration, it may either drop the name of the person not found suitable by the President or reiterate its recommendation. In the latter case, the President is bound by the recommendation.

So it has been for the last decade or so. Through a literary heist, the judiciary has practically become a self-deliberating, self-appointing body. In making the President redundant, the Supreme Court has legalized the third scenario described earlier – one I have suggested is the least plausible of the three alternatives.

And that’s where things stand now. The Chief Justice of India has an undue influence in the appointment process. Other judges in the Supreme Court and High Courts matter, but only to an extent. The Prime Minister and state Chief Ministers almost don’t matter.

**To Where?**

Appointments matter for a host of reasons. Judges wield enormous power. They have an important (and sometimes, an overbearing) say in everyday affairs. And they are difficult to remove. So much so that despite credible evidence of corruption, impeachment motions have never succeeded in Parliament.

Recent events have exposed the failings of the appointment process in India, yet again. What should we do about it? At the least, the secrecy needs to go. Why are some judges appointed? Why are others refused? The public has a right to know.

But there is a case for reforming Article 124 itself. And the case has been repeatedly made in the last four decades.

For some politicians, the appointment process was a governmental largesse, to be doled out to friends and phonies. But its replacement has proved no better. The (near) appointment of Judge Dinakaran, and the non-appointment of Judge A. P. Shah are both sides of the same coin. Potentially incompetent people may end up in high offices, while highly competent judges may be left behind.

Rather than an executive or judicial monopoly, a diffused body with people drawn from the executive (government and opposition), judiciary (sitting and retired) and elsewhere might be the best bet against appointment excesses.