

Appointment of Judges of the Supreme Court and the High Courts

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Though India is a Union of States we have a judicial system which is hierarchical, from the court of first instance right up to the Supreme Court. In all legal matters competent judicial officers can pronounce judgements on both Central laws and State laws. By contrast in the United States Federal laws are interpreted and adjudicated upon by Federal courts and State laws by State courts. In India the Supreme Court is at the apex, but under Article 227 of the Constitution the power of superintendence over all courts and tribunals throughout the territory over which a High Court has jurisdiction vests in the High Court. At the same time under Article 141 the law declared by the Supreme Court is binding on all courts and, therefore, the position of all courts, including High Courts vis-a-vis the Supreme Court is one of judicial subordination.

The appointment of judges to these two courts is strictly defined by the Constitution. In the scheme of things there is separation of powers between the three organs of the State which, nevertheless, are equal, that is, the Executive, the Legislature and the Judiciary. In order to ensure the balance of power the Constitution provides for the Legislature to be constituted through a process of election, the Executive through a process of recruitment governed by an independent constitutional body called the Public Service Commission and the Judiciary to be completely free from interference by the Executive or the Legislature by giving the judges complete independence. Article 124 governs the appointment of judges to the Supreme Court and Article 217 does the same for the appointment of judges of a High Court. In the case of the Supreme Court Article 124 (2) reads "Every judge of the Supreme Court shall be appointed by the President, by warrant under his hand and seal, after consultation with such of the judges of the Supreme Court and of the High Courts in the States as the President may deem fit... Provided that in the case of appointment of a judge other than the Chief Justice, the Chief Justice of India shall always be consulted". In the matter of judges of the High Court under Article 217 the President is required to consult the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court. The Supreme Court, in its wisdom, decided that consultation of the President with the Chief Justice means that a Collegium of Judges to be constituted by the Chief Justice will vet every case and on its recommendations the Chief Justice will give his advice to the President. This is an internal matter of the Supreme Court and need not be commented upon. As it is, there is a move to legislate for the setting up of a Commission for recommending judicial appointments, but this is still only at the proposal stage. Despite opinions to the contrary I would suggest that the system as it has evolved has served us quite well and we should not hasten to alter it.

The latest matter which has given rise to public controversy is the issue of appointment of Shri Gopal Subramaniam as Judge of the Supreme Court as recommended by the Chief Justice of India. Apparently out of a panel of four persons recommended for appointment government has no problem with three names, but has strong reservations about Gopal Subramaniam. The controversy has led to much acrimony and Gopal Subramaniam has withdrawn his assent to be considered for elevation to the Bench and in the process has made scathing remarks about government. His allegation is that because he was amicus curiae in the Sohrabuddin case he is being targeted by the government for denial of the post of a judge of the Supreme Court. The present Central Government has resented his role in having the investigation of the case transferred from the Gujarat Police to CBI. He further alleges that whereas he had not opposed

bail to Amit Shah he had suggested that in the interest of fair investigation the Supreme Court may debar Amit Shah from entering Gujarat. The Prime Minister and the Government of India have, therefore, deliberately opposed Gopal Subramaniam's appointment, which smacks of the present government being politically biased and desirous of having on the Bench only convenient judges.

With great respect to Gopal Subramaniam, who is indeed one of the leading lights in the world of law, his statement about government wanting convenient judges does hint at slander. In any case this would not be the first time when government has opposed a nominee of the Supreme Court. In the United States of America it is a well known practice to try and pack the Supreme Court. A liberal President like Franklin Deland Roosevelt wanted liberal minded judges in the Supreme Court of the United States. A President such as George Bush or Ronald Reagan wanted conservative judges. Certainly Indira Gandhi wanted judges like A.N. Ray and P.N. Bhagwati who ruled that when there was a proclamation of Emergency under Article 352 a citizen did not even have the right to life because the fundamental rights stood suspended. Justice H.R. Khanna strongly opposed this judgement and, therefore, was denied the post of Chief Justice, which he deserved. But do these two examples really suggest that India's judicial independence has been jeopardised? The fact is that our courts are zealous in guarding their independence. During the Emergency in the Bhimsen Sachhar case Chief Justice Tatachar of the Delhi High Court ruled that whereas the fundamental rights may have been suspended the inherent powers of the High Court under section 482 Cr.P.C. remained, which meant that the issue of a writ of habeas corpus to secure the ends of justice was within the competence of the High Court. There are many other such examples, including the order of the Gujarat High Court in the Himmat case striking down censorship.

I quote these instances of judicial independence because I think it is an unfair comment by Gopal Subramaniam that by denying him appointment to the Supreme Court the government of the day is attacking the independence of the Judiciary. He is such an eminent lawyer that I do not have to draw his attention to the words of the Article 124 of the Constitution, whereby the ultimate power to appoint a judge of the Supreme Court vests in the President. Consultation with the Chief Justice of India means that the President may not appoint a judge whose name has not been recommended by the CJI. Conversely it does not mean that the President cannot reject a recommendation made by the CJI. This is an issue which has to be looked at case by case and whereas the Bench would have been richer by the presence of Gopal Subramaniam, his absence thereon is by no means an assault on the independence of the Judiciary.
