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Judicial appointments and norms

Anil Divan

"...The public injury which may be caused by appointment of a Judge lacking in integrity would be infinitely more than the public injury which may result from non-appointment of a competent Judge possessing integrity."

The controversy relating to the proposed appointment of Justice P.D. Dinakaran to the Supreme Court is unique and unprecedented. The citizen is entitled to be informed about the many issues that have arisen.

The procedure and process of appointment of Judges of the High Courts and the Supreme Court has been the subject matter of three judgments of the Supreme Court.

The first one (Justice P.N. Bhagwati in *S.P. Gupta v. UOI*) has picturesquely described this process:

"The exercise of the power of appointment and transfer remains a sacred ritual whose mystery is confined only to a handful of high priests, namely... The mystique of this process is kept secret and confidential between just a few individuals, not more than two or four as the case may be, and the possibility cannot therefore be ruled out that howsoever highly placed may be these individuals, the process may on occasions result in making of wrong appointments and transfers and may also at times, though fortunately very rare, lend itself to nepotism, political as well as personal and even trade-off."

This judgment has been overturned only on two points. First, primacy is now given to the opinion of the CJI and not the Central government. Secondly, in view of the wider consultation required, judicial review is excluded except where the requisite consultation is not done or the appointee is ineligible.

Yet, the mystique of the "Sacred Ritual" remains, with certain changes introduced by two subsequent judgments of the Supreme Court (*SCAORA v. UOI* and *Presidential Special Reference No. 1 of 1998*). Both these are nine-Judge Bench judgments. The first change is that the circle of "high priests" has been enlarged to include some senior judges in different collegiums, and a wider consultation amongst knowledgeable judges is taking place. Secondly, the substantial exclusion of judicial review makes the process virtually non-transparent and unaccountable. What was opaque has now become total darkness.

Has this exercise gone awry in the case of Justice Paul Daniel Dinakaran Premkumar?

On August 28, *The Hindu* came out with the news that the Supreme Court collegium had recommended five names for elevation to the Supreme Court. These were of A.K. Patnaik (the Chief Justice of the Madhya Pradesh High Court), T.S. Thakur (Chief Justice: Punjab and Haryana), K.S. Radhakrishnan (Chief Justice: Gujarat), S.S. Nijjar (Chief Justice: Calcutta) and P.D. Dinakaran (Chief Justice: Karnataka).

On September 8, the Chief Justice of India and the collegium as well as the Law Minister were informed by a few senior members of the Bar by means of letters that "we have got very disturbing reports about the integrity of one of the proposed appointees from multiple reliable sources." (The author of this article was a co-signatory.)

On the same day the letter was followed by a communication enclosing a representation from several responsible members of the Tamil Nadu bar with detailed facts and particulars. The President of India and the Prime Minister were apprised of the situation. A second representation by members of the Tamil Nadu bar with additional facts has now been communicated to the authorities concerned.

Upon the news breaking in the print and electronic media the Karnataka Bar Association passed a resolution calling upon Justice Dinakaran to refrain from discharging judicial duties. Justice Dinakaran stoutly denied the allegations and any wrongdoing.

Issues mixed up

In view of the demand made by the Karnataka Bar Association, two issues have got mixed up and this is confusing the public mind.

The first is regarding the suitability of a candidate to be appointed as a Judge of the High Court or the Supreme Court. The second is whether the allegations and complaints against the Judge are to be inquired into and findings arrived at, and for what purpose? The mechanism and the tests for arriving at an opinion on these two issues are entirely different.

This article only deals with the first issue.

In the celebrated case of *S.P. Gupta v. UOI*, Justice Bhagwati was called upon to deal with a similar issue. Justice S.N. Kumar was appointed an Additional Judge of the Delhi High Court for two years and the question arose whether he should be recommended for further extension as an Additional Judge. The then Chief Justice of India (Justice Y.V. Chandrachud) recommended him for further extension. But the then Chief Justice of the Delhi High Court (Justice Prakash Narain) wrote to the Law Minister that he was not in a position to recommend such extension for Justice Kumar. His reasons included several complaints and also the fact that some responsible members of the Bar and some of his colleagues had expressed doubts about Justice Kumar's integrity. The Chief Justice of the Delhi High Court frankly stated that he had no investigating agency to conclusively find out whether the complaints against Justice Kumar were genuine or not. But he added that "all the same, the complaints have been persistent." The Law Minister, accepting the views of Chief Justice of the Delhi High Court, did not give an extension to Justice Kumar.

On a challenge to this decision, Justice Bhagwati discussed the entire record of relevant correspondence between the Law Minister and the Chief Justice of India and the Chief Justice of the Delhi High Court, and observed: "While making his recommendations whether S.N. Kumar should be continued as an Additional Judge or not, the Chief Justice of Delhi had to consider the fitness and suitability of S.N. Kumar at the time... and doubts about the integrity of S.N. Kumar were expressed by responsible members of the Bar and some of his own colleagues, the Chief Justice of Delhi could not be said to have acted unreasonably in declining to recommend S.N. Kumar for an extension. It may be that on full and detailed investigation through an independent and efficient investigative machinery, the complaints and the doubts against S.N. Kumar might have been found to be unjustified but such a course would have been neither practicable nor desirable."

The contention urged on behalf of Justice Kumar was that the question to be addressed was whether in fact the judge possessed honesty and integrity and not whether the judge enjoyed a good reputation for honesty and integrity. This argument was rejected.

It was held that while arriving at his opinion on suitability the matter was not required to be adjudicated or a quasi-judicial or judicial inquiry to be held to find out whether the Additional Judge was in fact lacking in honesty and integrity.

It was observed (by Justice Bhagwati):

"Such an inquiry against a Judge whether additional or permanent would not be permissible except in a proceeding for his removal. What the Chief Justice of the High Court has to do is merely to assess the suitability of the Additional Judge for further appointment and where lack of integrity is alleged against him, the assessment can only be on the basis of his reputation for integrity."...

"It is therefore not enough in order to be able to recommend a person for appointment as a Judge to say that there is no proof of lack of integrity against him, because, if such were the test to be applied, there would be grave danger of persons lacking in integrity being appointed as Judges. The test which must be applied for the purposes of assessing the suitability of a person for appointment as a Judge must be whether the Chief Justice of the High Court or for the matter of that, any other constitutional authority concerned in the appointment, is satisfied about the integrity of the person under consideration... The public injury which may be caused by appointment of a Judge lacking in integrity would be infinitely more than the public injury which may result from non-appointment of a competent Judge possessing integrity."

No inquiry necessary

In sum, to make an appointment no inquiry into allegations is necessary. What is essential is that the constitutional functionaries have to be satisfied about the appointee's integrity. In other words, as Justice Verma put it pithily, "The collective wisdom of the constitutional functionaries involved in the process of appointing superior Judges is expected to ensure that persons of unimpeachable integrity alone are appointed to these high offices and no doubtful persons gain entry."

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