Source : www.thehindu.com Date : 2023-02-09

THE LESSON FROM A COURT APPOINTMENT DRAMA

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

February 09, 2023 12:16 am | Updated 01:39 am IST

‘What is needed is an appointments process that genuinely safeguards judicial independence from executive dominance’ | Photo Credit: AP

The recent war of words between the higher judiciary and the political executive has revolved around the question of who has the power to appoint judges to the High Courts and the Supreme Court of India. Under the “collegium system” — itself the product of a 1993 judgment of the Supreme Court — the three senior-most judges of the Supreme Court make recommendations for appointments to High Courts; while the government may provide inputs, and ask for reconsideration, if a recommendation is reiterated, then formally, the government is bound to accept it.

Editorial | **Bench and bigotry: On advocate Victoria Gowri’s appointment as Madras High Court judge**

The now well-known controversy around the appointment of L. Victoria Gowri to the Madras High Court saw a reversal of this pattern. After the collegium recommended her name for judgeship, a petition was filed in the Supreme Court challenging this appointment, on the basis that she had, allegedly, engaged in “hate speech” against Muslims and Christians. The Chief Justice of India (CJI), who heads the collegium, stated that the collegium had taken cognisance of new material; but before anything could be done about it, the appointment process was completed. A last-ditch attempt to stop it by way of a legal challenge was rejected by two other judges of the Supreme Court.

The controversy indicates certain continuing, structural problems with the process of judicial appointments. The first problem is opacity. The functioning of the collegium can be contrasted with judicial appointments in other democratic countries, such as the United States, South Africa, or Kenya; while the specific processes are different, they are all open. In each of these jurisdictions, the names of the judicial candidates are publicly known before the formal commencement of the selection process. In such a scenario, facts, such as Ms. Victoria Gowri’s statements, would inevitably come to light, and would be known to the selection bodies. The selection bodies would take them into account, and indeed, given that these jurisdictions require judicial candidates to face questions, the candidate would be asked to explain and justify the statements, and how they relate to her judicial philosophy — a discussion that would be public. At the end of the process, the selection body would make its decision.

By contrast, in India, the candidate's name is effectively made public after their selection by the collegium. The selection process is behind closed doors, where the parties involved are the collegium and the government (through the Intelligence Bureau). This not only has transparency costs, but also, the costs are asymmetrical: it is but obvious that where the government approves of a particular candidate, it can simply withhold relevant information from the collegium (indeed, this is the only possible implication from the CJI's observations about the allegations of hate speech). This, then, creates a situation like the present one: by the time that a candidate's name is in the public domain — thereby allowing for relevant material to be brought to the collegium's notice by the public — the selection has already been made. Once again, the fall-out of this is asymmetric: given that the government retains the power of formal appointment, when it approves a candidate, it can rush the process through (as happened in the present case). In other cases, the government can exercise a pocket veto (which it has also done with respect to the Madras High Court, by refusing to appoint a judge in the teeth of an express direction by the collegium).

The above issue leads directly into the second problem. Once a collegium recommendation has been made, the only way of contesting it is through a legal challenge. However, that challenge must be before the Supreme Court itself, leading to a set of awkward situations: the decision of the collegium — the three (or five) senior-most judges of the Supreme Court — must be challenged before their own junior colleagues (and these colleagues will be assigned the case by the CJI, who is himself the head of the collegium). While technically, in recommending a name, the collegium acts as an administrative body, and all administrative decisions are open to judicial review, in practice, one can immediately see the problem with judges being asked to sit in judgment over their own senior colleagues.

The problem was evident during this hearing, where both judges (understandably) exhibited repeated discomfort with being asked to sit in judgment over the collegium's recommendation, and insisted that the collegium must have been aware of all facts when it made its recommendation (notwithstanding the CJI's public observation to the contrary).

It need not be this way. Consider the case of South Africa, where proceedings of the judicial appointments commission have been subjected to judicial review, and where the courts have directed the commission to make their deliberations public. This is not to suggest that the South African appointments process is perfect, but what does exist is a system of checks and balances, at the heart of which are the values of transparency and publicity. And this can only happen if there is a degree of separation between the judicial appointments commission and the court: this allows for a check, and it allows for a corrective mechanism in case of mistakes and errors (because to err is human).

When, however, the appointments body (the collegium), the body for the constitution of Benches (the CJI's office), and the judicial review body (the Supreme Court) are all effectively one and the same, but trying to play different and functionally independent roles, correction becomes very difficult.

Furthermore, the judges insisted that the only question they could consider in judicial review was L. Victoria Gowri's eligibility and not suitability. Leaving aside the question of whether alleged hate speech is a question of suitability or eligibility, this is a correct position, but once again, it depends on the question of suitability having been fully considered during the selection process. We, therefore, return to the problematic structural opacity of the collegium, and how it benefits the political executive: because the proceedings are opaque, and the only other party is the government; the government can influence the materials on the basis of which the collegium determines "suitability". And once the collegium has made its determination, and the names are public (allowing for further material to come out) the question of "suitability" has now been

foreclosed. It should be immediately obvious that this is severely detrimental to judicial independence.

The judicial order dismissing the challenge to Ms. Victoria Gowri's appointment was the chronicle of a failure foretold: once the collegium's recommendation was in, it was obvious that, for the reasons explained above, there would be no going back, regardless of the desires and motivations of the individual actors involved. But taking a step back from the specific actors in this drama, it is important to locate the roots of the problem in the structure of our judicial appointments process. The present structure is problematic both in principle but also because it asymmetrically benefits the political executive. While L. Victoria Gowri's case is a stark example of this asymmetry, the problem does not begin or end with this appointment. What we need is an appointments process that genuinely safeguards judicial independence from executive dominance.

Gautam Bhatia is a Delhi-based lawyer