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Appointment of Judges: A Key Issue of Judicial Independence

Sarkar Ali Akkas*

*University of Rajshahi, Bangladesh,

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Sarkar Ali Akkas

Abstract

This comment emphasises the importance of the mechanisms for appointment of judges in maintaining judicial independence and public confidence in the judiciary. It argues that the power of appointment of judges should not be vested exclusively in the executive government.

The paper examines the basic nature of the principal mechanisms for appointment of judges operating in different countries of the world. Particularly, it analyses the main strengths and weaknesses of the elective system of judicial selection and the system of appointing judges through parliamentary approval, consultation with the judiciary and legal profession and an independent commission. It concludes that the appointment of judges by using an independent commission may be considered an acceptable and effective mechanism for judicial appointments.

KEYWORDS: appointment of judges, independence of judiciary, national appointment mechanisms

COMMENT

APPOINTMENT OF JUDGES: A KEY ISSUE OF JUDICIAL INDEPENDENCE

*By Sarkar Ali Akkas**

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Introduction

The appointment of judges is an important aspect of judicial independence which requires that in administering justice judges should be free from all sorts of direct or indirect interference or influences. The principle of the independence of the judiciary seeks to ensure the freedom of judges to administer justice impartially, without any fear or favour. This freedom of judges has a close relationship with judicial appointment because the appointment system has a direct bearing on the impartiality, integrity and independence of judges.¹

It is widely recognised by jurists and commentators that public confidence in the judiciary is essential for the maintenance of judicial

* LLB (Hons), LLM (Rajsh), PhD (University of Wollongong); Associate Professor, Department of Law and Justice, University of Rajshahi, Rajshahi-6205, Bangladesh.

1 Shimon Shetreet, *Judges on Trial* (North-Holland Publishing Company, Amsterdam, 1976), p 46.

independence. An important requirement of sustaining public confidence in the judiciary is the openness and transparency in appointing judges. Openness and transparency in making appointments essentially depend on the mechanisms for appointment of judges. The mechanisms for judicial appointment plays an important role in selecting the persons having the professional skills and qualities that are required for judges in an independent judiciary. This paper seeks to examine the nature of the mechanisms for judicial appointment which exist around the world. Its main purpose is to analyse how far the existing mechanisms for judicial appointment are effective in maintaining judicial independence and public confidence in the judiciary.

Mechanisms for Judicial Appointment

Mechanisms for judicial appointment are important factors in appointing judges. In any society, the appointment of judges involves some formal and informal practices. The whole system depends largely on the political culture and social values of a society. Consequently, mechanisms for judicial appointment differ between jurisdictions. There are no standardised systems of appointment.² Whatever mechanism is used in any particular country, it should be transparent and open to public scrutiny. Transparency and public scrutiny in the mechanisms for judicial appointment are of paramount importance to ensure appointment of the best available persons to judicial office and to enhance public confidence in the judiciary.

Mechanisms for judicial appointment operating in some different countries may be classified under two sub-headings: elective and appointive systems.

Elective System

The elective system has two basic models, popular election and election by the legislature. Under the popular election model, judges are elected on the basis of either partisan election or non-partisan election.

In the United States, the model of popular election is employed in selecting judges of some states, and a mixed system that combines the features of both appointment and popular election is employed in other States.³ The model of election by the legislature is employed in a few states of the United States, in the

2 Eleni Skordaki, *Judicial Appointments: An International Review of Existing Models* (The Law Society, London, 1991), p 12.

3 Henry J Abraham, *The Judicial Process* (Oxford University Press, New York, 1986), pp 38-39; see also Robert J Martineau, *Appellate Justice in England and the United States: A Comparative Analysis* (William S Hein & Co, Inc, New York, 1990), p 83.

election of Federal judges in Switzerland and in the election of judges of the German Federal Constitutional Court.⁴

At one time, a majority of American States employed the elective system of selecting judges, but during the latter part of the nineteenth century, the general trend began to move away from the elective system.⁵ Now only nine states use partisan election, twelve states use non-partisan election, five states use election by the legislature and nine states use combined merit selection and different election methods.⁶

Proponents of the elective system offer two predominant arguments. First, since judges are periodically required to submit themselves to the electorate, it ensures accountability of judges. Secondly, judges make law and, therefore, they should be selected or chosen by the people who will be subject to or affected by those laws.⁷

Opponents of the elective system argue that this system does not consider any formal qualifications and competence for the persons to be appointed as judges. In partisan election systems, political considerations are instrumental in the selection process and judges are selected on campaign expertise rather than merit.⁸ In some states of the United States with a view to being elected as a judge 'a candidate must not only participate in a party campaign, but must almost constantly be active in party politics'.⁹ The opponents of the elective system also argue that most voters are not competent to evaluate the candidates' qualifications and it may result in the election of candidates who are not best-qualified.¹⁰

4 Shimon Shetreet, 'Who will Judge: Reflections on the Process and Standards of Judicial Selection' (1987) 61 *Australian Law Journal* 766 at 768; see also Carl Baar, 'Comparative Perspectives on Judicial Selection Processes' in *Appointing Judges: Philosophy, Politics and Practice* (Ontario Law Commission, Ontario, 1991), p 146.

5 Marvin Comisky and Philip C Patterson, *The Judiciary - Selection, Compensation, Ethics and Discipline* (Quorum Books, New York, 1987), p 7; see also Shetreet, above n 4, p 768.

6 American Judicature Society, *Judicial Selection Methods in the States* (April 2002) <<http://www.ajs.org/select11.htm>> 8 June 2002 (Copy on file with author).

7 Comisky & Patterson, above n 5, p 8; see also Peter D Webster, 'Selection and Retention of Judges: Is there one "best" Method?' (1995) 23 *Florida State University Law Review* 1 at 17.

8 K E Scheuerman, 'Rethinking Judicial Elections' (1993) 72 *Oregon Law Review* 459 at 460-461.

9 J D Fabian, 'The Paradox of Elected Judges: Tension in the American Judicial System' (2001) 15 *Georgetown Journal of Legal Ethics* 155 at 167.

10 Webster, above n 7, at 14-15; see also M W Barnett, 'The 1997-98 Florida Constitution Revision Commission: Judicial Election or Merit Selection' (2000) 52 *Florida Law Review* 411 at 418.

Appointive System

The appointive system of judicial appointment is widely employed all over the world. Under this system appointments to judicial office are made by the executive government. The *Universal Declaration on the Independence of Justice* [*Montreal Declaration*] 1983 provides:

Participation in judicial appointments by the Executive ... is consistent with judicial independence, so long as appointments of judges are made in consultation with members of the judiciary and the legal profession, or by a body in which members of the judiciary and the legal profession participate.¹¹

*The principle of judicial independence requires that the power of appointment of judges should not be vested exclusively in the executive government. This is because if the executive government enjoys an exclusive privilege in selecting judges, a risk always exists of misuse of the power of appointment. Sometimes political or other considerations may prevail over the merit criteria for appointments. Thus by facilitating nepotism and political favouritism the quality of the judiciary might be weakened. Judges who obtain their position as a result of executive discretion or favour could be obligated to serve the interests of their appointing authority in a manner which might undermine judicial independence.*¹²

Therefore, the appointment of judges exclusively by the executive government is not well accepted by jurists and commentators. The exclusive executive power to appoint judges may be reduced by involving other mechanisms including parliamentary approval, consultation with the judiciary and legal profession, and use of an independent commission.

Parliamentary Approval

Under this mechanism the executive government initially selects the candidates for judicial office, but makes formal appointments only when the selections are approved by parliament. For example, in the United States the President

11 *Montreal Declaration* 1983, Art 2.14(b). The *Montreal Declaration* was adopted at the first World Conference on the Independence of Justice held at Montreal on 10 June 1983.

12 Eric Colvin, 'The Executive and the Independence of the Judiciary' (1986-1987) 51 *Saskatchewan Law Review* 22 at 239-240; see also Martin L Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Canadian Judicial Council, Toronto, 1995), p 233.

nominates and 'by and with the Advice and Consent of the Senate' appoints federal judges.¹³

Parliamentary approval provides a check on the power of the executive and there is scope for public scrutiny of the appointment process.¹⁴ Nevertheless, this system has some inherent defects. Firstly, parliament has nothing to do with the initial stages of selecting candidates. Since the initial selection of candidates is a vital issue in appointing judges and it is exclusively vested in the executive, this system may not be effective to control pre-eminent political or other irrelevant considerations in selecting candidates for judicial office. Rather it may foster an increasing tendency to introduce political bargaining.¹⁵ Secondly, although the requirement of approval by parliament may impose some restrictions on the discretion of the executive government, it may not be effective to change the basic form of 'political infighting'. Moreover, it may 'result in the kind of coalition building behaviour common in other legislative matters'.¹⁶ Thirdly, if the party in power commands a majority in parliament, political 'patronage may still be a strong factor' in appointing judges.¹⁷

Therefore, though parliamentary approval has some implications for checking exclusive executive power in appointing judges and making the appointment process open to the public through parliament, it has serious drawbacks. The parliamentary mechanism is transparent and open to public scrutiny, but if there is a majority in Parliament, nothing can be done: even if the public does not approve of the appointment.

Consultation with Judiciary and Legal Profession

The executive government may appoint judges in consultation with the senior judiciary and legal profession. Generally, senior members of the judiciary and legal profession are consulted, and the consultations may be formal or informal.

Judges are in a position to assess the performance of lawyers who are to be appointed to judicial office. Therefore, consultation with

13 *Constitution of the United States of America*, Art II, s 2.

14 Christopher N Kendall, 'Appointing Judges: Australian Judicial Reform Proposal in Light of Recent North American Experience' (1997) 9 *Bond Law Review* 175 at 182; see also Richard Devlin, A Wayne MacKay & Natasha Kim, 'Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a "Triple P" Judiciary' (2000) 38 *Alberta Law Review* 734 at 825-826.

15 Michael Kirby, 'Models of Appointment and Training of Judges - A Common Law Perspectives', a paper presented in a seminar on *Legal Institutions in Transition* held in Belfast, Northern Ireland, 8 June 1999
<<http://www.hcourt.gov.au/speeches/kirbyj/judicial.htm>> 24 May 2001 (Copy on file with author) [26].

16 Baar, above n 4, p 146.

17 Devlin, MacKay & Kim, above n 14, at 826.

*members of the higher judiciary is very significant in appointing the best-qualified persons to judicial office. It is an important means to strengthen the independence of the judiciary.*¹⁸

*Consultation with members of the legal profession is also very important. A body representing the legal profession may be able to assess the character and ability of the lawyers to be appointed as judges.*¹⁹ *It can help to select suitable persons for judicial office.*

*Therefore, the consultation system has significant implications for the quality of the judiciary and public confidence in it. However, it has a serious limitation, because the efficacy of consultations depends mostly on the attitude of the executive government. It could be that after consultation with the judiciary and legal profession the executive government will ignore the opinion given by them.*²⁰ *Thus the ultimate weight of the consultation system is dependent on the executive. If the executive is reluctant to give due consideration to the advice of the judiciary and legal profession, this system is useless. In fact, consultation should be an effective consultation and in this regard the Indian system of consultation with the judiciary is worth consideration.*

In respect of consultation with the judiciary a significant system was introduced in India by a decision of the Supreme Court. Under the Indian Constitution, the President of India appoints all judges of the Supreme and High Courts including the Chief Justices after consultation with different functionaries as follows:

- (1) In appointing the Chief Justice of India, the President consults such of the judges of the Supreme Court and High Courts, as he or she 'may deem necessary for the purpose'.²¹
- (2) In appointing other judges of the Supreme Court, the President consults such of the judges of the Supreme Court and High Courts as he or she 'may deem necessary', but consultation with the Chief Justice of India is mandatory.²²
- (3) In appointing the Chief Justice of a High Court, the President is under an obligation to consult the Chief Justice of India and the Governor of the State.²³

18 Baar, above n 4, p 149.

19 Sir Harry Gibbs, 'The Appointment and Removal of Judges' (1987) 17 *Federal Law Review* 141 at 145.

20 Sir Harry Gibbs, 'The Appointment of Judges' (1987) 61 *Australian Law Review* 7 at 11.

21 *Constitution of India*, Art 124(2).

22 *Constitution of India*, Art 124(2).

(4) In appointing the puisne judges of a High Court, the President consults the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court.²⁴

The constitutional provision of consultation was an important issue of interpretation in a series of decisions of the Indian Supreme Court. In *Gupta v President of India*²⁵ popularly known as the *First Judges Case*, the Supreme Court observed that the President was obliged to consult the Chief Justice, but the opinion of the Chief Justice was not binding upon the President.

In 1993, this decision was overruled in *Supreme Court Advocates-on-Record Association v Union of India*²⁶ known as the *Second Judges Case* which held that in the case of a difference of opinion between the Chief Justice and the President, the opinion of the Chief Justice shall prevail and no judge should be appointed without the concurrence of the Chief Justice. The Chief Justice, however, should consult the next two senior judges of the Supreme Court. The Court held:

The process of appointment of Judges to the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach [sic] an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise. ... In the event of conflicting opinions by the constitutional functionaries, the opinion of the judiciary 'symbolised by the view of the Chief Justice of India', and formed in the manner indicated has primacy. ... In exceptional case alone, for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice of India and the other Judges who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India, the appointment should be made as a healthy convention.²⁷

In July 1998, the President of India asked for the advisory opinion of the Supreme Court on various areas of the judgment of 1993 including the issue of consultation.²⁸ In October 1998, the Supreme Court in its advisory opinion

23 *Constitution of India*, Art 217(1).

24 *Constitution of India*, Art 217(1).

25 AIR 1982 SC 149.

26 AIR 1994 SC 268.

27 *Supreme Court Advocates-on-Record Association v Union of India* AIR 1994 SC 268, [508].

28 Under Art 143(D) of the *Constitution of India*, President K.R. Narayanan made the Reference to the Supreme Court on 23 July 1998. The Supreme Court disposed of the Presidential Reference by its Advisory Opinion on 28 October 1998 in *Re Presidential Reference*, AIR (1999) SC 1.

confirmed the primacy of the Chief Justice's opinion over that of the President in appointing judges. The Court, however, observed that the 'sole, individual opinion of the Chief Justice of India' does not constitute 'consultation' within the meaning of Arts 217 and 222(1) of the Constitution. In appointing judges to the Supreme Court, the Chief Justice must make a recommendation in consultation with the four most senior puisne judges of the Supreme Court. In the case of appointments to the High Courts, the Chief Justice must consult the two most senior puisne judges of the Supreme Court. The views of the puisne judges 'should be in writing and should be conveyed to the [President] by the Chief Justice of India along with his [or her] views'. The Supreme Court further observed that the Chief Justice is under an obligation to follow the 'norms and requirements of the consultation process', and recommendations made by him or her 'without complying with the norms and requirements of the consultation process' are not binding upon the President.²⁹

Use of an Independent Commission

The use of an independent commission in appointing judges is the most acceptable mechanism among the commentators in the contemporary world.³⁰ The *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region [Beijing Statement]* 1995 states:

In some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Service Commission has been seen as a means of ensuring that those chosen as judges are appropriate for the purpose. Where a Judicial Service Commission is adopted, it should include representatives of the higher judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.³¹

The commission system is operating well in different countries including Canada, South Africa and in many jurisdictions of the United States.³² There are also judicial appointment committees in Ireland, Israel, New Zealand and the

29 *Re Presidential Reference*, AIR (1999) SC 1, 16.

30 Baar, above n 4, p 153.

31 *Beijing Statement* 1995, Art 15. The 6th Conference of Chief Justices of Asia and the Pacific unanimously adopted the *Beijing Statement* on 19 August 1995.

32 American Judicature Society (AJS) reported in April 2002 that Judicial Nominating Commission is used for all terms of appointment to all courts of Alaska, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Iowa, Maryland, Massachusetts, Nebraska, New Hampshire, New Mexico, Rhode Island, Utah, Vermont and Wyoming. It is also used for midterm vacancies on some or all levels of court in Alabama, Georgia, Idaho, Kentucky, Minnesota, Montana, Nevada, North Dakota and Wisconsin. For details of the Report, see *Judicial Selection Methods in the States* <<http://www.ajs.org/select11.html>> 8 June 2002(Copy on file with author).

Netherlands.³³ Such commissions and committees are entrusted with the task of either making the actual selection of the candidates, or making 'recommendations only', or providing 'a shortlist outside of which' appointments should not be made by the executive without justifying the reasons for doing so.³⁴

*The effectiveness of the commission system depends on the composition of the commission and the system used by it. The commission may be constituted by senior judges, senior lawyers and distinguished legal academics. Community representatives and parliamentary representatives may also be included.*³⁵

*The commission system can provide a stronger form of scrutiny of prospective candidates for judicial office.*³⁶ *It can ensure the selection of the best-qualified candidates for judicial office, if the commission uses a fair and non-discriminatory selection process. In addition, if the system used by the commission is transparent and open to public scrutiny, it can reduce the exclusive executive control over judicial appointments and maintain public confidence in the appointment system. Thus, it is likely to increase transparency and accountability and to remove improper political control or other irrelevant considerations from the appointment system.*³⁷

In respect of the composition of the commission and the system that may be used by it, the South African Model of a Judicial Service Commission is an important example. The South African Commission established under the Constitution of 1996 consists of the following members:

- (a) the Chief Justice, who presides at the meetings of the Commission;
- (b) the President of the Supreme Court of Appeal;
- (c) one Judge President designated by the Judges President;
- (d) the Cabinet member responsible for the administration of justice, or an alternate designated by that cabinet member;

33 C Blair, *Judicial Appointments* (Criminal Justice Review Group, Belfast, 2000) 59 <<http://www.ireland.com/newspapers/special/2000/justice/05.pdf>> 5 July 2001 (Copy on file with author).

34 Michael Lavarch, *Judicial Appointments - Procedure and Criteria* (Discussion Paper, Attorney General's Department, Canberra, 1993), p 22.

35 Kate Malleson, *The New Judiciary* (Ashgate, Aldershot, 1999), p 133; see also M Spry, 'Executive and High Court Appointments', Research Paper, Parliamentary Library, Australia, (2000) [91] <<http://www.aph.gov.au/library/pubs/rp>> 24 May 2001 (Copy on file with author).

36 Lavarch, above n 34, p 23.

37 Ibid; see also Kendall, above n 14 at 184; Malleson, above n 35, pp 128, 136, 152.

- (e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;
- (f) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the president;
- (g) one teacher of law designated by teachers of law at South African universities;
- (h) six persons designated by the National Assembly;
- (i) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;
- (j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and
- (k) when considering matters relating to a specific High Court, the Judge President of that division and the Premier, or an alternate designated by the Premier, of the province concerned.³⁸

Evidently, the South African Commission consists of judges, the Minister of Justice, practising and academic lawyers, members of the National Assembly including a substantial number of opposition members, members of the Provincial parliaments, persons nominated by the President of South Africa after consulting leaders of all political parties represented in the National Assembly and in some cases the Premier of the Province or the Premier's nominee. Thus the composition of the Commission is representative in nature and is not under the exclusive control of the executive government.

The system used by the South African Judicial Service Commission in appointing judges is credited with having 'a fair degree of openness'. The Commission identifies a list of meritorious candidates by advertising judicial vacancies and interviewing the 'short-listed candidates in public, as if in open court'.³⁹ It 'must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President' who 'may make appointments from the list'.⁴⁰ The President 'must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made'.⁴¹ The Commission then 'must supplement the

38 *Constitution of South Africa*, s 178.

39 Hugh Corder, 'Seeking Social Justice? Judicial Independence and Responsiveness in a Changing South Africa', in Russel PH and O'Brien DM (ed) *Judicial Independence in the Age of Democracy: Critical perspective from around the world* (University Press of Virginia, London, 2001), p198.

40 *Constitution of South Africa*, s 174(4)(a-b).

41 *Constitution of South Africa*, s 174(4)(b).

list with further nominees and the President must make the remaining appointments from the supplemented list'.⁴²

Conclusion

All mechanisms for judicial appointment may have some advantages and disadvantages and therefore, no particular system can be treated as the best system. Despite this, in order to maintain public confidence in the appointment system and to ensure judicial independence the commission system is perhaps a very effective mechanism for judicial appointment. However, to ensure the effectiveness of this mechanism the commission should be representative in nature comprising members of the executive, legislature, judiciary, legal profession and lay persons. In addition, it should be ensured that the commission uses a system which is transparent and open to public scrutiny. In this regard the composition and working system of the South African Judicial Service Commission may be an acceptable model. Such a mechanism may be very effective to ensure the appointment of the best-qualified people to judicial office.

⁴² *Constitution of South Africa*, s 174(4)(c).