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JUDICIAL SUPREMACY & INDEPENDENCE: A CHALLENGE FOR MODERN DEMOCRACY*

Introduction

The structure of the constitution is constructed upon the pillars of judiciary. The role of judges is vital in the pronouncement of justice. The judiciary strives to make sure that all the state organs are within its control, thereby secures rule of law. Besides this, the judiciary helps in protection and progression of the society by averting injustice along with being a determiner of disputes and maintains rights of citizens. The judiciary is a mode for getting a social difference for the improvement of the citizens and democracy of India. It is a decipherer and protector of the constitution of India. From the above aspect, it becomes very essential to make sure that the right individuals sit in the distinguished post of judges. Individual judges determine the quality of the judiciary. Thus, the proper appointment of judges is of prime necessity. The procedure of selection of judges has encountered a massive change from pre-independence era till date. It is well seen that howsoever the system is, the governance of the law and the standard of justice would be based mostly on individual judges as it would on the foundation of judiciary as a whole. “The integrity, qualification, training and experience of a person is of utmost importance in the selection of the judges and the modality of selection with a view to achieve that objective is therefore of vital concern”¹ The judiciary is a peculiar organization in a democracy which retrenches misdeed of constitutionally given authority by the legislature and the executive along with managing the laws made by it. Its role is to give independence a real meaning.

Nowadays the appointment of judges has become a topic of conflicts between the Executive and Judiciary. Before moving further we should know what exactly is “independence” of judiciary. In layman’s language it could be understood as that the judiciary has a very vital role to play. It

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¹Speech delivered in the seminar on Appointment of Judges conducted by the Bar Association of India and the Indian Society of International Law on 17-18 September, 1999.

is the protector of justice, a system which keeps a constant eye on the the functioning of executive and the final resort or the authority which has the last say. Briefly non-interference and impartiality could be seen as the main features of Judicial independence. In plain words, judiciary is supposed to be responsible towards its citizens by its reasonable decisions while making sure that there isn't any other kind of interference in its working by other organs.

Judiciary acts as the guardian of the constitution and in acting that way might have to strike down the executive, legislative, and the administrative acts of the Governments at the Central and the State level. For the prevalence of rule of law, it is regarded that prime importance should be given to judicial independence.

The parley on judicial appointments revolves around the centre of the subject as to who is responsible for appointing the judges. The significance of each of these appointments to the Supreme Court or a High Court was brought into light in the majority opinion in the case of *K. Veeraswami v. Union of India*². It said: "A single dishonest judge not only dishonours himself and disgraces his office but jeopardizes the integrity of the entire judicial system... a judge must keep himself absolutely above suspicion; to preserve the impartiality and independence of the judiciary and to have the public confidence thereof".

A BRIEF OVERVIEW OF THE JUDICIAL APPOINTMENT COMMISSION BILL

A collegium consisting of the Chief Justice of India and four senior most judges of the Supreme Court of India shall appoint the judges of the Supreme Court and the High Courts. However, collegium has not been mentioned in the Indian Constitution. The origin of the collegium system could be hunted down to the three judges" case, which is analysed in the next part of this paper. The appointment of the judges of the Supreme Court and the High Courts is provided under Articles 124(2) and 217(1). These Articles provide for the selection of the judges by the President of India after due deliberation with the Chief Justice of India in case of appointments to the Supreme Court and Chief Justices of the respective High Courts, Governor and Chief Minister of the state where the appointments are to be made. The provision related to posting of judges from one high court to another could be seen under Article 222(1) of the Constitution of India. In 2003, the Government had made an attempt to switch the collegium system with a new system. However, the bill had been passed this time by both the houses of the Parliament of India so as to amend the appointment process.

²(1991) 3 SCC 655

The Judicial Appointment Commission bill has been passed by both the houses of the Parliament almost without any opposition (latest by Lok Sabha in August, 2014). This bill was brought up in the Parliament, with One Hundred and Twentieth Constitutional Bill, which would successively introduce Article 124A in the Constitution of India and build a National Judicial Appointments Commission comprising of six members viz., the Chief Justice of India (chairman), two other judges of the Supreme Court of India (next in seniority to the Chief Justice of India), Union Minister of Law and Justice and two eminent persons to be selected by the collegium comprising of the Prime Minister, the Chief Justice of India and the Leader of Opposition. The prime duty of this Commission would be to recommend the suitable persons for selection as the Chief Justice of India and also as the judges of the Supreme Court, chief justices of the High Courts along with other judges. In case of empty slots, the advice to the Commission would be made by the Central Government within a specified time period. The Commission may if it deems fit make provisions for the short-listing of the approved candidates. The main objective of this bill is to make sure that there is equal participation of the Executive and the Judiciary and that the posts for which the appointments are made are more transparent, objective and participatory. The Commission's

main aim would be to work on tasks in connection to appointment, transfer and quality of the selected candidates.

For the appointment of High Court judges, the NJAC Act, 2014 requires the views of the Governor and Chief Minister to be given in writing and “as prescribed by the regulations.” But the Act is silent as to what happens if the Governor or Chief Minister or both object. It is criticized that the Constitution (99th Amendment) Bill, 2014 and the National Judicial Appointment Commission Act, 2014 are both seriously flawed and contrary to elementary principles of constitutional law. Both laws will also be wholly unworkable in practice.

There is also a flaw is the failure to give supremacy to the views of the judges in the selection process. The National Judicial Commission that was suggested by the Venkatachaliah Committee was a five-member body consisting of three senior-most Supreme Court judges, the Union Minister and one eminent person. There is no clarity as to what happens if there is a deadlock? Is there any quorum? What are the provisions for removal of the members of the JAC when necessary? What if the veto power is misused to appoint someone undesirable?

It is also important to note that the Supreme Court has dismissed a few writ petitions challenging the constitutional validity of the Constitution (99th Amendment) Bill and the National Judicial Appointments Commission Bill, 2014 (NJAC Bill).

INDEPENDENCE V. TRANSPARENCY AND ACCOUNTABILITY

During the inceptive years of the working of the Indian Constitution, it was being recommended that this practice of selection of judges was being affected with intrusion from the executive, especially in the Indian states and was leading to the wearing away of the independence of the judiciary in turn. In 2008, however it was said that the original constitutional method be reinstall in respect of the Supreme Court adjudication in the Judges“ Appointment Cases and suggested the establishment of National Judicial Appointments Commission and to consider the three judges“ case.

Corruption has become all pervasive and has attacked the roots of Indian democracy as well and has tried to challenge its legitimacy.³ Absence of clear cut method to check it often leads the way to unreasonableness and further leads to an increase in it. Such situations generate the requirement of making sure the accountability in the regime of citizen reviving. The need for responsibility actually arises from within the judiciary, it being the promoter of justice in the

country so that a proper system of checks and balances for the prevention of the interruption of any appropriation of authority could be established. It has often been expressed that the collegium system has given unrestrained power to the judges to appoint the judges of Supreme Court along with the High Court judges and thus is very cloudy and not democratic. The collegium system was deeply scrutinized after it appointed Chief Justice P.D. Dinakaran of the Sikkim High Court in 2009 for the Supreme Court and later on due to cases of misconduct and corruption against his name he had to resign from his post and the recent pulling out of name by senior Supreme Court advocate Gopal Subramaniam after the Government replaced his name back to the collegium in respect of negative reports by the Intelligence Bureau and the Central Bureau of Investigation and many such recommendations and appointments made earlier. So, without any doubt, the collegium system somewhere has its own serious defects. On this front, it has been required that executive should have a role to play in the appointments of judges, being

³ <http://www.legalservicesindia.com/article/article/national-judicial-appointment-commission-1779-1.html>

the representation of the people. To make the appointments more accountable and transparent, the Judicial appointments commission bill was made.

However, a lot has been spoken about the bill as being a compromise over the independence of the organ of judiciary. This debate largely revolves around the point that whether it is a compromise over the independence and status of judiciary, or, a compromise, in tracking the accountability and transparency. Senior Bar leaders seem to have taken the view that this independence would be largely compromised by the “outside participation”.⁴ Justice VN Khare, former Chief Justice of India, says there is nothing bad with the existing system but accepts that there is scope for its improvement. "There is nothing bad with the collegium system. It is, in fact, superior to the NJAC in many ways. It will also be unfair to say that it is not transparent. But yes, it can be further improved by making it more transparent. One or two persons nominated by the President can be included in the selection committee". In achieving judicial independence, an important mechanism is the selection of judges. Judges should be independent of the executive, senior judges and their views and ideology. The NJAC as what it is, might not be able to accomplish these ideals. The government may use the Law minister as a member of the NJAC in appointing judges of its choice. There's no precise definition as to the expression “eminent persons” and this haze is deliberate.

THREE JUDGES' CASE

SP Gupta Case (First Judges Case)

The origin of judicial appointments is in the landmark case of S.P. Gupta v Union of India⁵, which is popularly known as the First Judges Case. Before this, short term extensions were granted to additional judges by the President of India and several judges of the High Courts were transferred. Such actions of the executive were challenged in this case. The most important issue amongst various other issues was that whether the view of the Chief Justice was to be given preference over the other constitutional functionaries and that whether the president in matters of judicial appointments was bound by the opinion of the Chief Justice. The decision was held in

⁴ <http://www.legalservicesindia.com/article/article/national-judicial-appointment-commission-1779-1.html>

⁵ S.P. Gupta v Union of India , A.I.R.1982 S.C. 149.

favour of the executive. P.N. Bhagwati stated that “the Chief Justice of India, the Chief Justice of the High Court and such other Judges of the High Court and of the Supreme Court as the Central Government may deem it necessary to consult, are merely constitutional functionaries having a consultative role and the power of appointment resides solely and exclusively in the Central Government.”⁶

Further, it was held that the decision of the President cannot be questioned in the Court on mala fide intentions or on the ground that it was based on irrelevant considerations. This case, therefore, virtually gave the power of veto.

First judges’ appointment case (Second Judges case)

Issues and difficulties in the selection of judges began to float up. In corollary of this decision, the judiciary had bias and political overtones that lacked merit which also diluted judicial independence. Executive was given the authority to maneuver the appointments. As a result, the appointments and transfers were done in capricious and discerning manner. One such instance was during the emergency of June 1975 to January 1977, Chief Justice A N Ray had directed transfer of judges from one high court to another, not on the basis of exigencies of work but solely because those judges had decided certain important cases which had political overtones against the central government. They were known as „punitive“ transfers.⁷ Thus, in the backdrop of the excessive interference of executive in the judicial independence, the collegiums system came about as a result of the case, S.C.Advocates on Record Association v. Union of India⁸ in 1993 (and by a follow up president’s reference to the court in 1998.) This case is famously known as the Second Judges Case. This case came up as a public interest writ petition filed by the Lawyers Association in the Supreme Court challenging certain debatable and vital issues regarding the judges of the Supreme Court and the High Courts. The two important questions in this case were- whether the chief justice of India has primacy over judicial appointments and

⁶ Abhishek Sudhir, Restoring the judiciary’s credibility, The Hindu, (Nov. 15, 2014), <http://www.thehindu.com/opinion/lead/restoring-the-judiciarys-credibility/article6242504.ece>

⁷ Supra Note 9

⁸ S.C.Advocates on Record Association v. Union of India , A.I.R.1994 S.C. 268

transfers and whether these matters were justiciable.⁹ Briefly stating, the Supreme Court of India held that this process of appointing judges should be consultative as well as an integrated participatory process. It laid emphasis on the Chief Justice of India for playing an important role in the appointment process. The judges remarked that the Chief Justice of India has a pivotal role in the upkeep of the judiciary and its image and hence shall have a decisive say in the appointments and transfers of the judges of the Supreme Court and the High Court where the Chief Justice of the respective High courts would do the necessary. In case there is incongruity in opinions, the Chief Justice plays an important role. The bringing about of the collegiums system is deep rooted in this case. The Apex Court expressed that such system would make strides to attain the constitutional purpose of selecting those to the higher judiciary, who are most apt for the post and which in turn will help to safe guard the independence of the judiciary. And thus it was stated that the Chief Justice of India, and the Chief Justice of the High Court shall be the best in deciding who shall be best suitable for the position of the judges in the Supreme Court and the High Court respectively. This case was successful in ruling the S.P. Gupta case. The collegium system has been criticized for its impracticality, lack of transparency and improper implementation.¹⁰ Besides the collegium's deliberations are secret, the system is opaque and the choice of a judge is only known when his name is forwarded to the government for formal appointment.¹¹ Since the collegiums system is lacking in any kind of investigative machinery, the Judges were becoming illiterate qualitatively and dubious largely or principles that are obligatory for selection. As a result, nepotism, favoritism, casteism and other irrelevant considerations marred the selection process. Corruption started to evolve due to the absence of a performance commission, into the functioning of judiciary. Aghast, corruption and mediocrity, favouritism and influence had frequently been imputed to judges.¹² Fali S Nariman also stated that "If there is one important case decided by the supreme court of India in which I appeared and won, and which I have lived to regret, it is the decision that goes by the title – Supreme

⁹ Abhinav Chandrachud, *The Informal Constitution-Unwritten criteria in selecting judges for the supreme court of India* 121-122 (Oxford University Press 1st ed. 2014)

¹⁰ N H Hingorani, *Collegium System of Judicial Appointments : Constitutionally Invalid*, (Oct. 28, 2014), <http://www.lawyersupdate.co.in/LU/1/1591.asp>

¹¹ Supra Note 13.

¹² V R Krishna Iyer, *Time for change*, *Frontline*, (Oct. 21, 2014), <http://www.frontline.in/static/html/fl2805/stories/20110311280510600.htm>

Court Advocates on Record Association v. Union of India.”¹³ “The collegium,” senior lawyer Rajeev Dhawan says, “has created a cabal in court and we know nothing about how this cabal functions”.¹⁴ As a result of this, various appointments took place which were not satisfactory and thus judiciary became self appointing.

Second Judges’ Appointment Case (Third Judges Case)

The major issues in the Third Judges Case was that whether the word “consultation” stated in Articles 217(1) and 222(1) meant the view of majority of the judges or the opinion of the Chief Justice of India only, whether judiciary had the power to review the transfer of judges, if the term “consultation” involves broader consultation with the help of other judges also, under Article 124(2), whether the Indian Government is bound by the suggestions made by the Chief Justice. In this case, the Supreme Court focused on not endowing the power of appointing the judges in one person, but the Chief Justice and the other judges simultaneously. The decision of the First Judges Case was again criticized stating that there was no point in giving prime importance to the executive in the process of appointing judges. The view communicated in the Second Judges Case was recapitulated by saying that the opinion of the Chief Justice is an image of the views of the judiciary. Finally the collegium system was brought into force for appointment of judges which would comprise of the Chief Justice of India and four other judges of the Supreme Court on the basis of seniority. It was expressed that the executive would not have a say in the selection of judges even if it has the last say in appointing the judges.

There is no indication as to what happens if there is no consensus among the consultees or if the majority disagrees with the Chief Justice of India.¹⁵ The process was not open to inspection by the public and this became the method of selection.

¹³ Supra Note 9.

¹⁴ Anuradha Raman, Order Order Order!, Outlook, (Nov. 6, 2014), <http://www.outlookindia.com/article/Order-Order-Order-/264322>

¹⁵ Supra Note 6.

NJAC VERDICT

The Supreme Court rejected the National Judicial Appointments Commission (NJAC) Act expressing that the judiciary cannot and the Declaring that the judiciary cannot afford to be caught in a “web of indebtedness” towards the government and it also denied the 99th Constitutional Amendment which desired to give lawmakers and civil society a final approval in the selection of judges to the highest courts.

The Bench with a majority of 4:1 the bench rejected the NJAC Act and the Constitutional Amendment expressly stating it as “unconstitutional and void.” It held that the collegiums system of judges appointing judges as how it was would again become operational.

HOW THE SELECTION PROCESS WORKS UNDER VARIOUS JURISDICTIONS

INDIA: In India, since 1993, a collegium comprising of the Chief Justice of India and various other senior judges recommend suitable persons for the appointment of Supreme Court and High Court judges.

UK: The committee for appointing the judges consists of the President of Supreme Court, his deputy and one member selected by the JACs of England, Northern Ireland and Scotland. The JAC consists of lay persons, members of judiciary and the Bar.

US: In US, the Justices are recommended by the President and appointed by the US Senate. Hearings are held by the Senate Judiciary Committee and voting is done on whether the nominations should go to the full Senate.

GERMANY: The country has a process of election of judges. Federal Constitutional Court elects half the members and the other half is elected by the legislature.

SOUTH AFRICA: The Judicial Services Commission of South Africa suggests the list of candidates for the appointment as judges of the Supreme Court.

CONCLUSION

The detractors argue that the proposed laws vest excessive power in the executive, including a potential ability to veto nominations, thereby impinging on the independence of the judiciary.

Also, the composition, voting, structure etc, has been created by a statute (NJAC Act) and it has not been amended by our constitution. Thus, it is unprotected from statutory changes by a simple majority in the Government or even by ordinance. This is another negative point.

Section 6(4) of the NJAC Bill intends to seek advice from the senior-most judges of the High Courts and the eminent advocates. Section 6(7) states the opinion of the Governor will be obtained but, shall not be binding. Thus, through NJAC, the ones at the Centre, shall select the judges of the High Court Judges, in spite of their lack of knowledge of High Courts and lack of State-level mechanism for a fair system based on assessment of individual merit. This nullifies the constitutionally guaranteed federal traits in the realm of judicial appointments.

It should be left to the judges to decide who should be appointed as a judge as they are familiar with the working of this system. They would know more as to who would act as a better suited person for the position of judge than the executive. The presumption that the judiciary will protect the rights of the citizens of this country, can only be secured, by keeping it absolutely independent and insulated, from the other organs of government. By including other organs, the decisions get a political basis and there could be favoritism and partiality.

The 21 year old collegium system of “Judges appointing judges” also needs improvement. It is suggested that predominance of judiciary must be maintained as long as they are accountable for their decisions. The process of appointment should be completely transparent. It is also recommended that merit should be given priority over seniority. Diversity could also be encouraged in terms of gender, ethnicity, etc without compromising on merit.

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