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JUDICIAL APPOINTMENT: ANACHRONISTIC OR PROGRESSIVE?*

Introduction

The objective of the Judicial Appointments Bill is to bring transparency and objectivity in the process of appointment of the judges of Supreme Court and High Courts of India. It is indeed a much required law as the system of appointing the judges has been under dubiousness even after the collegiums system was introduced. This bill mainly purports the introduction of a Judicial Appointments Commission (hereinafter referred as "the Commission") which comprises the Chief Justice of India, two other Judges of the Supreme Court next to the Chief Justice of India in seniority, the Union Minister in charge of Law and Justice, two eminent persons, to be nominated by the collegium consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People.

This composition puts forth an equal participation of the executive and the judiciary in the process of appointment and transfer of judges which in turn enables accountability and is intended to increase the confidence of the public in the judiciary. The commission has also been given the scope of deciding the rules and regulations regarding the short listing and procedure of appointment.

The following is the analysis of the bill on the basis of three major points:

- Judicial independence
- No one can be a judge in his own case
- Separation of power riding over independence of judiciary
- Non- arbitrariness.

JUDICIAL INDEPENDENCE

The amendment enabling greater participation of the executives in the process of judicial appointments[1] brings effect in two theories, which are basic to the structure of the constitution of

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India. One being Judicial independence and the other, separation of powers between Judiciary, Executive, and, Legislature.

Judicial Independence as the term indicates is the independence of the judiciary from the clutches of the other two branches namely executive and the legislature so as to adjudicate without any prejudice. It was held that, "Now the independence of the judiciary is a fighting faith of our Constitution. Fearless justice is a cardinal creed of our founding document. It is indeed a part of our ancient tradition which has produced great judges in the past. In England too, from where we have inherited our present system of administration of justice in its broad and essential features, judicial independence is prized as a basic value and so natural and inevitable it has come to be regarded and so ingrained it has become in the life and thought of the people that it is now almost taken for granted and it would be regarded an act of insanity for anyone to think otherwise."[2]

This concern of judicial independence in the constitutional assembly debate was responded by Dr. B R Ambedkar as, "There can be no difference of opinion in the House that our judiciary must be both independent of the executive and must also be competent in itself. And the question is how these two objects can be secured."[3] The concept has seen its existence for a very long time."Hamilton" one of the authors of the federalist papers, described judges of the Supreme Court to be the "guardians of the constitution".[4] His description includes two theories, which enabled the judges to act as the guardians**.** Firstly, the final power of testing the constitutionality of legislative and executive action should be upon the knowledge of the judges.[5] And, secondly, the judiciary would be an independent institution, a co-equal branch of government separated from the executive.[6]

Taking into consideration the role of the judges the power of judicial review[7] is of paramount importance in our constitution. It is emphatically the province and duty of the judicial department to say what the law is.[8]In the case of *Bidi Supply Co. v. The Union of India*,[9] it has been stated, the heart and power or core of a democracy lies in the judicial process.[10] And in the judiciary, one of

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[1]The Constitution of India, 1950 (Article 124 and Article 217 of 1950).
[2]*Union of India v. Sankalchand Himatlal Sheth*[(1977) 4 SCC 193]; *B S Yadav and Ors. v. State of Haryana* (AIR 1981 SC 561);*R K Jain v. Union of India and Ors.* (AIR1993 SC 1769).
[3]*Constituent Assembly of India,* Vol 7, (2003).
[4]Federalist No 78 in The Federalist 508. For critical perspectives regarding the concepts in Federalist No 78, Stephen B Burbank, 'The Architecture of Judicial Independence' [1998-99] 72 Southern California Law Review 315, 318.
[5]Federalist No 80 in Supra The Federalist 521, 522.
[6]Federalist No 78 in Supra The Federalist 508.
[7]Constitution of India, 1950(Article 32 and Article 226 of 1950).
[8]*Marbury v. Madison* [(1803)1 Cr 137 USSC].
[9]AIR 1956 SC 479.
[10]*Harjinder Singh v. Punjab Ware housing Corporation*(2010) 3 SCC 192;*Shersingh v. State of M.P. and Others*(AIR 1976 MP 86); *Kona Srinivas and others v. State of A.P. and Ors*. [(2004) 2 ALD HC 654]; T.*K.Rangarajan v. Government of Tamil Nadu and Ors.*(AIR 2003 SC 3032).

the magnum opus lies in its power of judicial review. In one of the celebrated case, of *State of Madras v. V.G. Row*[11] CJ PatanjaliSastri, describing judicial review, observed, "Judicial review is undertaken by the courts not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution."[12] There are ample evidences in the Constitution, namely, the power of judicial review expressly stated in article 32 and article 226.[13]The jurisdiction conferred on the Supreme Court by Article 32 is an important and integral part of the basic structure of the Constitution.[14] Judicial review has been stated in a number of Supreme Court judgments to be a major weapon for maintain checks and balances in the system.[15]These provisions are enforced by the judiciary to curtail the power of the other two branches of the state, whenever they exceed their limit.

The present amendment which brings into the judicial appointment panel, the Union Minister in charge of Law and Justice-Member, ex officio, one representative of the legal profession, two eminent persons, to be nominated by the collegium consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People-Members. The Secretary to the Government of India in the Department of Justice shall be the convener of the Panel, who is an executive functionary. The presence of executive in the appointment panel is assumed to bring in political influence in the appointment process. During the assembly debates, on the context of appointment of judges, Dr B R Ambedkar, said, "It seems to me, in the circumstances in which we live today, where the sense of responsibility has not grown in the same extent which we find in the United States, it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day. Similarly, it seems to me that to make every appointment which executive wishes to make subject to the concurrence of Legislature is also not a very suitable provision."[16]

There have been instances of executive and legislative influence over the judiciary. In one of the instances, the then Prime Minister Madam Indira Gandhi aftermath of the Emergency superseded four judges, including HR Khanna, handpicking the pliable AN Ray as the CJ.[17]These discrepancies were protected by subsequent decisions of the Supreme Court (1st judges case[18]and

[11]AIR 1952 SC 196.
[12]*Sankinala Hari Nath and Ors. v. State of Andhra Pradesh and Ors*. [(1993) 3 ALT SC 471].
[13]The Constitution of India, 1950 (Article 32 and Article 226 of 1950).
[14]*Fertiliser Corporation Kamgar Union v. Union of India*[(1981) ILLJ SC 193].
[15]*Minerva Mills and Ors. V. Union of India and Ors*. (AIR 1980 SC 1789) ; *L.Chandra Kumar v. Union of India and Ors.* (AIR 1995 SC 1151); *Bhim Singh v. Union of India,* (2010) 5 SCC 538; *State of West Bengal and Others v. The Committee for protection of Democratic Rights, West Bengal and Ors.* (AIR 2010 SC 1476); *Raja Ram Pal v. The hon'ble Speaker, Lok Sabha and Ors.* (2007) 3 SCC 184.
[16]Constitution Assembly Debates, Volume 8.
[17]Samanwaya Rautray, "Constitutional Law", available at: <http://articles.economictimes.indiatimes.com/2013-07-07/news/40408009_1_seniority-rule-cji-chief-justice>(Last accessed 20 December 2013).
[18]*S P Gupta v. Union of India* (AIR *1982 SC 149).*

2nd judges case[19]), where primacy of the chief justice whose decision is the collective decision of the collegium was held, and not that of the executive. One pivot example could be Indira Gandhi's idea about, committed judiciary.

Keeping in mind the importance given to judiciary, for guarding the law of the land and for administrative purposes, the trend should be maintained. This bill has infringed the independent ambit of the judiciary which can be very detrimental in the way ahead. The political process will get strengthened if all the branches run as per the party in power. That is worse than the current mala fide practices that we are witnessing. A way needs to be found which leaves no scope for judiciary riding rough shot as well as the dignity and independence of the organ is maintained.

NO ONE CAN BE A JUDGE IN HIS OWN CASE

The amendment envisages to bring, "greater" participation of the executive. There are indeed two different notions of the relation of the appointment of judges and the functioning of the judges. The present amendment brings in provision regarding the appointment of judges, and not the latter. But on a closer scrutiny, there is indeed a relation. The doctrine of "Nemojudex in suacausa" says that, No person shall be judge in his own case, is a natural law.[20] This doctrine enunciates that the proceedings must be free from bias. It was held that this principle not only applies to the justices, but to all tribunals and bodies which are given jurisdiction to determine judicially the rights of the parties.[21] This principle of natural justice ensures that, a person who tries a case, must do so in absolute sense, of objectivity, fairness, impartiality and free from 'bias'.

The present amendment brings in the presence of executive in the appointment process, the appointment of the same judges who behold the power of judicial review, to have a check and balance on the same executives. Now, can it be safely assumed that, there shall be bias, while adjudicating against the executive?

In one of the cases, it was observed by the honorable bench that, "If a member of judicial body, is subject to bias(whether financial or other) in favor of, or against , any party to dispute, or is in favor of , or against, any party to a dispute, or is in such a position that bias must be assumed to exist**,** he ought not take part in the decision or sit in the tribunal; and that any direct pecuniary interest, however small, in the subject matter of inquiry will disqualify a judge, and any interest, though not pecuniary will have the same effect, if it be sufficiently substantial to create a

[19]*Supreme Court Advocates-on Record Association v. Union of India*(1993) 4 SCC 441.
[20]*Canara Bank and Ors. v. Shri Debasis Das and Ors*. [(2000) 2 CALLT HC 170].
[21]*Maneklal v. Premchand* (AIR 1957 SC 425); *Shamrao Narayan Wankhede v. Municipal Council and Ors.* [(2003) 3 MHLJ Bom 814.

reasonable suspicion of bias."[22] The observation of the judgment, bring in assumption on the fact that, the position could be biased. Or else, there could be sufficiently substantial position to create a reasonable suspicion of bias. As it is, the assumption must be of reasonable and prudent manner. This was subscribed by an observation that, "there must be a reasonable likelihood of bias in deciding which questions of human probabilities and ordinary course of human conduct must be taken into consideration"[23]

The inclusion of political influence could be related to the influence of the executive on the judiciary, through the appointment process. The "rule of law" being the Basic structure doctrine,[24] includes the previously argued doctrine. John Locke's social contract theory which defined the formation of state was founded on the very idea of this theory. If a person becomes the judge in his own case, this defeats the very purpose of "rule of law" which is another basic feature of the constitution.[25]

In the Constituent Assembly, judicial independence was seen as a necessary requirement for the judiciary to adjudicate impartially, insulated from political interferences. Such non-politicization was deemed necessary given the experience of colonial appointment of judges which was at the unfettered discretion of the executive and consequently led to the appointment of several judges favorable to the colonial government.[26] The debate on the possibility of favorable judges can be brought into argument, on this amendment. The larger involvement of the executive in the judiciary appointments could politicize the judiciary and the judiciary is expected to give out decisions on the executives, in independence. This is a far sighted utopia of the independence of judiciary.

In this bill the panel consists of the two most senior judges. Now in the case of appointment of the Chief Justice as per the trend followed in Indian judiciary the senior most judge should be the Chief Justice. Hence indirectly we are asking the senior most judge to recommend himself as the Chief Justice. This is clear and blatant violation of the principle of natural justice which states no one can be a judge in his own case. This whole process will then be proved worthless when it comes to appointment of the highest position in the judiciary. Either this composition has to be changed or else we will witness a change in the trend in appointment of judges.

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[22]*G Nageswara Rao v. State of Andhra Pradesh* (AIR 1959 SC 1376); *Mineral Development Ltd. V. State of Bihar* (AIR 1960 SC 468).
[23]*A. K Kraipak v. Union of India* (AIR 1970 SC 150); *Kirti Deshmankar v. Union of India*(1991) 1 SCC 104 ;*R. v. Deputy Industrial Injuries Commissioner ex P. Moore*[(1965) 1 LR QB 456]; *Mahon v. Air New Zealand Ltd.*[(1984) AC];*Lalit Kumar Modi v. Board of Control for Cricket in India and Ors.* (2011) 10 SCC 106; *Madhya Pradesh Special Police Establishment v. State of Madhya Pradesh and Ors.* (AIR2005 SC 325).
[24]*KeshavnandaBharati v. State of Kerala* (AIR 1973 SC 1461).
[25]Locke, J. *Concerning Human Understanding. History of Philosophy*. Ed. George L. Abernethy and Thomas A. Langford (1st, Dickenson, California 1965) 386-408.
[26]TejBahadurSapru (ed.), 'Constitutional Proposals of the Sapru Committee' (1st Edition, Bombay 1945).

SEPARATION OF POWER IS OVER RIDING THE INDEPENDENCE OF THE JUDICIARY

Article 50, one of the directive principles of State policy, mentions about separation of judiciary from the executive in the public services of the state. This particular provision is a guiding principle and not legally enforceable, however, while enacting a new law the State must keep these principles in mind so that we preserve the very essence of our Constitution. J. Bhagwati in Sankal Chand case stated, "This provision, occurring in a chapter which has been described by Granville Austin as "the conscience of the Constitution" and which embodies the social philosophy of the Constitution and its basic underpinnings and values, plainly reveals without any scope for doubt or debate, the intent of the Constitution makers to immunise the judiciary from any form of executive control or interference."[27]

In *M M Gupta and Ors. v. State of Jammu and Kashmir*, A.N.Sen, J observed, "Various articles in our Constitution contain the relevant provisions for safeguarding the independence of the judiciary. Article 50 of the Constitution which lays down that "...the State shall take steps to separate the judiciary from the executive in the public services of the State," postulates separation of the judiciary from the executive."[28]Article 50 being one of the fundamental principles of governance of the country and constitutionally binding on the government, the latter is obviously obliged voluntarily to refrain from any interference in judicial appointments and reduce its role to one which is purely formal or ceremonial, ensuring that the decisive factor is the wish and will of the judicial family.[29]

Rule of law and independence of the Judiciary forms a very essential feature of the basic structure. Independence of Judiciary has been recognized as part of the basic structure of the Constitution in cases like *Supreme Court Advocates-on-Record Association v. Union of India*[30], *State of Bihar v. BalMukund Shah*[31], *Shri Kumar Padma Prasad v. Union of India*[32], *and All India Judges Association v. Union of India*[33]. If 'Impartiality' is the soul of Judiciary, Independence' is the life blood of Judiciary. Without independence, impartiality cannot thrive.[34] In the case Judicial Accountability v. Union of India and Ors.,[35] it was stated rule of law is a basic feature of the Constitution and independence of judiciary is an essential attribute of the rule of law. The principle of independence of the judiciary

[27]AIR 1977 SC 2328.
[28](1982) 3 SCC 412.
[29]*Supreme Court Advocates-on Record Association v. Union of India*(1993) 4 SCC 441.
[30](1993) 4 SCC 441.
[31](2000) 4 SCC 640.
[32](1992) 2 SCC 428.
[33](2002) 4 SCC 247.
[34]*Union of India v. R. Gandhi, President, Madras Bar Association* (2010) 11 SCC 17.
[35]*Judicial Accountability v. Union of India and Ors*. (1991) 4 SCC 699.

is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community.[36]The independence of judiciary is the 'cardinal feature' and observed that the judiciary which is to act as a bastion of the rights and freedom of the people is given certain constitutional guarantees to safeguard the independence of judiciary. [37]The purpose of this very Act is to form a panel which is to make recommendations to the executive for appointment. This clearly gives the power exclusively to the executive and is against the basic features of separation of power and independence of judiciary.

NON ARBITRARINESS HAS NOT BEEN JUSTIFIED

The essential attribute of rule of law, to preserve the democratic system, of non-arbitrariness has not been maintained. It has to be borne in mind that the principle of non-arbitrariness which is an essential attribute of the rule of law is all pervasive throughout the Constitution; and an adjunct of this principle of the absence of absolute power in one individual in any sphere of constitutional activity.[38] Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives.[39]The basic postulate of this concept is to have a more effective judicial system with its full vigour and vitality so as to secure and strengthen the imperative confidence of the people in the administration of justice.[40]

CONCLUSION

In the memorandum on the Judicial Appointments Bill, it has been suggested that that the eminent persons to be included in the Committee should not be persons from the legal background or having a legal profession. However, in our opinion this is a quite contradictory to one of the basic concepts behind having the earlier collegiums system which must be taken into consideration. The collegium system was seen to be a participatory consultative process so that the opinion sought for appointment or transfer is from those personalities who have a thorough knowledge about the entire judicial organ and its agents. The persons involved in the appointment have to suggest as to who can be appointed as judges or transferred for that matter. For making suggestion one should have intense knowledge of the integrity of the system. The conduct,

[36]*S. P. Gupta v. Union of India* (AIR 1982 SC 149).
[37]*Union of India v. Sankal Chand HimatlalSheth and Anr.*[(1978) 1 SCR 423] ;*Union of India v. J.P. Mitter*[(1971) 3 SCR 483] ; *Shri Kumar Padmaprasad v. Union of India* (1992) 2 SCC 428.
[38]*Supreme Court Advocates-on Record Association v. Union of India*(1993) 4 SCC 441.
[39]Office of the United Nations High Commissioner for Human Rights Geneva, 'Human Rights- A Compilation of International Instruments' (OHRCR 1988), available at:
http://www.ohchr.org/Documents/Publications/Compilation2en.pdf,(last accessed 19 January 2014).
[40]*Supreme Court Advocates-on Record Association v. Union of India* (1993) 4 SCC 441.

knowledge, approach and many other such vital aspects can be known only when one is completely into the functioning of the body. If the eminent persons will be outside this pool then there is scope of them not having the required efficiency and in depth knowledge sought by the post.

The collegium system no doubt was kind of an independent act of the judiciary which was practiced under the shelter of independence of the judiciary. This Bill is an attempt to strike a balance between separation of powers and independence of judiciary. However, in the memorandum the suggestions are comparatively more in favour of separation of power than independence of judiciary. One such example is appointment of eminent persons devoid of legal profession or background. What should also have been emphasized is non-arbitrariness which is one of the crucial concepts of rule of law. Scope of influence of other organs will undermine the domain of the judiciary in a way. The judicial bodies' main purpose, in simple words, is to give justice to the citizens. This may shift to giving the government a privileged position always which is contrary to the basic foundation of the rule of law.

The most striking feature of the memorandum was disputing the presence of the two senior most judges in the committee when they themselves are the prospective candidates for the post of the Chief Justice. This is a very fundamental mistake in the Bill which cannot be expected from the law making body of our country. The way of presenting or proposing the suggestions after pointing out the possible disputed areas was very simple and clear which itself gives it a very over powering outlook.