Judicial Appointments: Blurred Lines between Executive and Judiciary

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Abstract

Independence of Judiciary is an integral part of the basic structure of the Constitution as laid down in the case of *S.P. Gupta v. Union of India And Onr. (AIR 1982 SC 149).* The function of this organ is to interpret the laws that are made by the legislature and to check whether the laws are according to the spirit of Constitution, and the execution of this function requires independence so that the decisions are not influenced and affected by external forces. But such independence should not extend to an extent which may result in, in the words of Alladi Krishnaswami Iyer, "*The creation of a Super Executive or Super Legislature*."

One of the important facets of Independence in this regard is the appointment of judges. This has been a very controversial issue since the inception of the Constitution. The Collegium System, which came as a result of Judicial Activism, has various defects. To overcome these defects, The 99th Constitution Amendment Act, 2014 was passed by Parliament and subsequently, National Judicial Appointments Commission Act (NJAC) of 2014 was enacted. The Amendment Act and NJAC Act were struck down by Supreme Court in the landmark case of *Supreme Court Advocates on Record Association and Others v. UOI (WP(C) 13 of 2015)* on the grounds that it violated the independence of the Judiciary, which is part of the 'Basic Structure' of the Constitution of India.

The Author in the paper has dealt with two issues:

I. Evolution of the Doctrine of Independence of Judiciary.
II. The second issue has further sub-issues-
    a) What were the fallacies and lacunas in NJAC Act of 2014 that led to its striking down?
    b) Both Collegium System and NJAC have defects. So what should be the next form of Judicial Appointment that it ensures that the Fundamental Principle of Independence of Judiciary remains intact.

KEYWORDS: Independence of judiciary, separation of powers, judicial appointments, democracy, organs of the government

Introduction

The Legislature, the executive and the judiciary are the three organs of the government assigned with different tasks, according to the doctrine of separation of powers, as propounded by Montesquieu. India doesn't follow the doctrine as strictly as other countries like the United States of America does, but independence of judiciary is something that is the basic tenet of a democracy, and thus has to be preserved. What constitutes independence of judiciary has not been specified in the

Constitution, and is based only on judicial interpretation. The current paper has thus been divided into three parts. Part I deals with the concept of independence of judiciary and the separation of powers. Part II talks about the independence of judiciary in judicial appointments from the Indian perspective, and Part III enumerates the alternate methods for judicial appointments better than Collegium System and erstwhile National Judicial Appointments Commission.

Part 1: Independence of Judiciary and Separation of Powers

In India, we have Parliamentary form of government, which consists of Lower House (Lok Sabha), Upper House (Rajya Sabha) and The President. Like that of other Democratic Countries, the function of Legislature is to make laws; of executive is to enforce law; and of judiciary, is to interpret laws. It is important that all the three organs work independently and the power is not concentrated on one hand as that would lead to tyrannical rule or despotism. To stop this tyrannical rule Montesquieu, the French Philosopher propounded the Doctrine of Separation of Power. Montesquieu stated that, *"There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing laws, that of executing public resolutions, and of trying the causes of individuals"*[1]. In India we do not follow the doctrine strictly like that of United States of America rather we follow it liberally i.e. we follow the system of 'checks and balances'. The power of President is executive in nature but he can have legislative power when he promulgates ordinance when Houses are not in session. Other example can be that both the Houses of Parliament carry out the impeachment of executive head i.e. The President. Though there is Separation of Powers, it is very much required that judiciary should work independently. Firstly, so that the legislature or executive does not exceed its power. Secondly, that in no circumstances we can compromise with the liberty of common man. In order to make judiciary independent we came up with 'Collegium System', which was a result of Judicial Activism (a philosophy of judicial decision making whereby judges allow their personal views about public policy among other factors to guide their decision)[2].

Independence of Judiciary is not a new concept. United States of America had this doctrine since the inception of their Constitution. In order to have Rule of Law it is essential to have Judicial Independence, which means that the other two organs should not influence the decisions given by the judges and it should also not serve the benefit of others including the judges. As said by Irwin R. Kaufman, Judicial Independence was not created for the benefit of judges but for the benefit of the judged and in order to achieve this objective it is essential to have a spirit of mutual co-operation and voluntary self-restraint on the part of all three organs[3]. Founding Fathers of our Constitution went with the idea of Doctrine of Judicial Independence by carefully scrutinizing its working in USA and UK. Professor K.T. Shah in Constituent Assembly particularly mentioned "*Judiciary in India shall be completely separate and independent from the Executive or the Legislature*". The question that arises now is what is to be construed as Independence of Judiciary. This answer was given by Dr. P. S. Deshmukh. He said that "*The independence of the judiciary is*

[1] Montesquieu and the Separation of Powers,M.J.C. Vile s' Chapter 4 in Constitutionalism and the Separation of Powers (2nd ed.) (Indianapolis, Liberty Fund 1998).
[2]Black Law Dictionary, 8thEdn.
[3] Irwin R. Kaufman, Maintaining Judicial Independence: A Mandate To Judges, 4 American Bar Association J. 66, 470-72 (1980).

secured more by a proper selection of the method of the appointment of the judges, by providing that there shall be no interference by the executive in the judicial functions of the judicature, by making the judges not easily removable and so on and not by a direct provision that the Judges of the Supreme Court shall be independent[4]*."*This meant that Appointment of Judges in the Higher Judiciary also comes under the purview of the above-mentioned Doctrine. The reason why Judiciary should be independent given by the members of the constituent assembly were Firstly, Judiciary deals with enforcement of Fundamental Rights and secondly, it also sees the matter between the states and citizens so for that purpose also it is very much required that it is not under the influence of Executive.

Part 2: Independence of Judiciary in Judicial Appointment: Indian Prospective

Independence of Judiciary is not only in appointment of Judges but in other things as well like Salary of Judges are not put to vote in any House of Parliament and is charged in Consolidated Fund of India. The judges should not feel that they are subject to favors that the Executive might grant to them from time to time and which would naturally influence their decision in any matter they have to take where the interests of the Executive of the time being happens to be concerned. Their salary can be reduced only during financial emergency. In order to provide security of tenure so that Judges give decisions, which is not only independent but also upheld the Rule of Law. The tenure of Supreme Court judges is till 65 years and of High Court is 62 years[5]. Directive Principles of State Policy mentioned under Part IV of Constitution also mentions Independence of Judiciary in a way that State should take measures in order to separate Executive from Judiciary[6]. But still the present situation is that the meaning of the independence of the judiciary is still not clear after years of its existence**.**

Appointment and Transfer of Judges in Higher Judiciary has been under question since decades now. After we gave ourselves the Constitution on 26th January, 1950, the appointment of Judges in Supreme Court and High Court was "by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years: Provided that in the case of appointment of a Judge other than the chief Justice, the chief Justice of India shall always be consulted"[7] which was interpreted by court then was that the President should consult the Chief Justice of India before appointing any Judges. The issue regarding appointments came into picture when Indira Gandhi came up with the concept of "Committed Judiciary". Mohan Kumarmangalam who was the Minister of Steel during Indira Gandhi's regime propounded the doctrine in which the executive had the right to recruit or promote those who subscribed to the philosophy of the government[8]. As a result of which two supersession took place. Firstly, after the decision of Supreme Court in the famous case of His Holiness

[4] Constituent Assembly Debate, Volume viii, Monday 23rd May, 1949.
[5]The Constitution of India, Art.124(2) and Art. 217(1).
[6]The Constitution of India, Art. 50.
[7]The Constitution of India, ART. 124(2).
[8]Sushil Kumar Jain, *Should we have independent or committed Judiciary?,* The Shillong Times, (Jan. 26,2013), http://www.theshillongtimes.com/2013/01/26/should-we-have-independent-or-committed-judiciary/.

Kesavananda Bharati Sripadagalvaru and Ors. v. *State of Kerala and Anr*[9], Indira Gandhi appointed Justice A.N. Ray as Chief Justice after superseding three other senior judges and Secondly, Justice H. R. Khanna was superseded by Justice M. H. Beg after the case of *ADM Jabalpur* v. *Shivkant Shukla*[10]. The supersession of judges was against the general convention whereby the senior-most judge is made the Chief Justice of the Supreme Court. This was the situation Pre First Judges Case[11].

Supreme Court in *S.P. Gupta* v. *Union of India*[12] (Famously Known as First Judges Case) was of the view that opinion of Chief Justice of India (CJI) will not be having primacy in the matters of appointment of Judges of High Court. The reasoning given by Justice Bhagwati in this matter was that the State Government or Chief Justice (CJ) of High Court will know more about the merits, character or antecedents of the person more than that of the CJI. So if he differs from the opinion of the State Government then the decision of Central Government will be final as the consultation here does not mean concurrence. CJI objection should not be biased on the basis of caste or religion. In the First Judges Case executive had an upper hand in appointing judges to Higher Judiciary because the opinion of CJI were not binding and since the President appoint the judges he cannot act independently. He has to take the advice of the Council of Ministers. This according to Justice Desai mitigates the doctrine of Judicial Independence.

The process developed by the First Judges case continued for a decade, but the system seemed to be partial towards the executive. Eminent jurists and members of Bar suggested that a system be developed where the members of judiciary and executive, both have a say in the appointments. Due to these circumstances emerging, Subhash Kumar, an Advocate-on-Record, filed a petition before the Supreme Court. To review its decision of the First Judges case, the Supreme Court constituted a nine judges bench in *Supreme Court Advocates-on-Record Association* v. *Union of India* (Famously known as Second Judges Case)[13]. The court held that there should be a harmony between both the branches in the process of judicial appointments, viz, Executive and Judiciary, but in a case where there is a difference in the opinion of the President and the Chief Justice, the primacy will be given to the view of the Chief Justice.

This case also gave birth to the famous, or the infamous Collegium System. The collegium meant that instead of the view of the CJI alone, the view of two most senior judges would be taken as well.

The judgment thus overturned the first judges case, as judiciary now had the final say, and this say will be of a collegium comprising of the Chief Justice as well as two other senior judges. The case thus reached from one extreme to the other extreme, and was a damage control measure that was done by the first judges case.

Though this case gave power and supremacy to the judiciary in judicial appointments, many jurists including Fali S. Nariman and Justice J.S. Verma have criticized the way

[9] AIR 1973 SC 1461.
[10] AIR 1976 SC 1207.
[11] *S.P. Gupta* v. *Union of India And Anr.,* AIR 1982 SC 149
[12] Id at 11.
[13] AIR 1994 SC 268.

the judgment was interpreted as this resulted in internal disturbances and collision between judges, and the process still was as clandestine as it was before the judgment.

In Special Reference No. 1 of 1998 (Famously known as Third Judges Case)[14] the then President, K. R. Narayanan, under Article 143 of the Constitution, sought the opinion of the Supreme Court on three broad issues i.e. (1) Consultation between the CJI and other senior judges for appointment in the SC and the HCs. (2) Judicial review of the transfer of judges. (3) The relevance of high court judges in making appointments to the Supreme Court.

In this case, the court followed the principles that were laid down in the second judges case, and expanded the collegium, which now consisted of 4 other senior judges along with the Chief Justice, against the two earlier.

These two cases together, though intentionally good, upset the power of the Constitution, as the judiciary entered into a territory it was not supposed to i.e. judicial appointments. The notion of Judges appointing judges attracted wide criticism and this resulted in the enactment of NJAC Act of 2014 which was subsequently enacted by 99thConstitution Amendment Act.

The Fourth Judges Case[15] came before the Supreme Court of India as a petition challenging the Constitutional validity of the National Judicial Appointments Commission Act that was passed by the Parliament. The Act prescribed that a commission be formed to carry out the process of recommending names of prospective judges to the President. This commission would comprise of The Chief Justice of India, two senior most judges of the Supreme Court, The Union Law Minister and two eminent persons. These two eminent persons were to be decided by a committee of the Prime Minister, The Chief Justice and the Leader of Opposition.

There were many arguments raised during the course of the hearing, and some of the excerpts are given:

"*The Constitution has devised a structure of power relationships with checks and balances wherein limits are placed on the power of every authority or instrumentality under the constitutional scheme,*" Attorney General Mukul Rohatgi.

"*The independence of the judiciary is protected under the basic structure through various facets and is not drawn from the appointment of judges alone*."

"*In addition to the independence of the judiciary and separation of powers, public confidence stemming from democratic nature of our country also has to be kept in mind while making appointments*."

"*One way to look at it is that such a person may not possess legal acumen, but is bound to have a deeper understanding of life beyond the courtroom. We have to look beyond and cannot be oblivious to the world outside. It would not be wise to continue on a path completely insulated from the world,*" Attorney General, Mukul Rohatgi.

The Constitutional bench in this case, comprising of 5 judges, declared the National Judicial Appointments Commission as unconstitutional by a ratio of 4:1. The lone

[14] In Re: Appointment and Transfer of Judges, (1998) 7 SCC 739.
[15] *Supreme Court Advocates on Record Association and Another* v. *Union of India*,(2016) 5 SCC 1

dissenter in the case was Justice Jasti Chelameswar. There were various parts of his judgment that laid down why the NJAC is a reform much needed in the field of Judicial Appointments, and why eliminating the government entirely was against the principles of democracy.

In his judgment favouring the NJAC, Justice Chelameswar had observed that:

"*Only an independent and efficient judicial system can create confidence in the society which it serves. The ever increasing pendency of matters before various Constitutional Courts of this country is clearly not a certificate of efficiency. The frequency with which the residuary jurisdiction of this Court under Article 136 is invoked seeking correction of errors committed by the High Courts, some of which are trivial and some profound coupled with bewildering number of conflicting decisions rendered by the various benches of this Court only indicate that a comprehensive reform of the system is overdue. Selection process of the Judges to the Constitutional Courts is only one of the aspects of such reforms. An attempt in that direction, unfortunately, failed to secure the approval of this Court leaving this Court with the sole responsibility and exclusive accountability of the efficiency of the legal system.*"[16]

He opined that transparency is a vital factor that is required in constitutional governance, as it is an aspect of rationality. The proceedings of Collegium System are absolutely opaque, as there is no accountability to the public, and everything is carried out behind closed doors. The records are inaccessible to anyone. Also, he mentioned that the Primacy of Judiciary in appointing judges is a flawed notion that the court has assumed, and there is nothing similar to this mentioned in the Constitution. There have been instances, where once an appointment has been cancelled by the collegium at first, but then had to retrace its steps, as the decision was later on found out to be wrong. This led to a great deal of speculation, as there is no accountability, as to why was the recommendation rejected, and this, thus, results in loss of credibility of the institution of judiciary as a whole, which is not good for the country.

Also, excluding the government totally from the appointment process will be totally against the foundations of democracy, as they are the elected representatives, capable of voicing the opinions of the people, and are directly answerable to the people, unlike the unelected judges. This results in disturbance in the system of checks and balances, an element necessary for the separation of powers, as enshrined in the Constitution.

The Fallacies and Lacunas in the National Judicial Appointments Commission

Justice J.S. Khehar, in the NJAC case delivered the majority judgment, fortifying the decision of the second judge's case. He stated that the primacy of judiciary in appointments has always been there, and has been accepted by the Supreme Court in a series of cases starting from the case of Shamsher Singh. The first judges' case was the only exception to this, but was effectively overruled by the second judges' case.

He further mentioned that as in the Collegium System too, it is the president that is the appointing authority, and he works on the aid and advice of the council of ministers, thus executive still has participation in the appointing process of the judges,

[16]Id. at 15

as the names can be rejected by the president after they have been recommended by the collegium, and only when there is a stalemate that the collegium is given primacy. He also stated that the intention of the constituent assembly, while the word "consultation" was being discussed, was to control the will of the executive in judicial appointments, as it would result in influence of executive over this organ. The debates also indicate that the assembly discussed judicial appointments in context of judicial independence, and thus, appointments are an integral part of the independence of judiciary.

He thus supported the view of the second judges' case, where the word consultation was given a meaning exceeding the dictionary meaning, thus shielding the appointment process from the executive altogether. Also, through collegium, there is no complete veto with the chief justice, and there is a body of judges that is deciding upon the recommendations.

He was also against the ambiguity that was provided by the Act upon the qualifications of "eminent persons". Any person could be an eminent person, as there is no set definition for the word eminent. In the words of senior advocate Ram Jethmalani, anyone, even the accused of the 2G-spectrum case are eminent persons. Thus, there should be no room for ambiguity in a law that deals with matter as important as appointments to the higher judiciary.

Part 3: Alternate Method for Judicial Appointment better than Collegium System and Erstwhile NJAC

As we've observed that both the Collegium System and the NJAC have been criticized by jurists as one is autocratic, and the other hinders the independence of judiciary. The big question that arises now is that what should be ideal system, which does not have any of the above-mentioned defects, and has the concurrence of both executive and judiciary. Various commissions have been set up from time to time to identify such method. Also, we can take inspiration from other common law countries, and frame our law accordingly.

Judiciary should be independent both externally and internally. Externally, as we know that there should be no influence by the executive but what about the internal independence. In past there have been cases where collegium was proved to be fatal as there is no transparency in it. And sometimes it also happens that executive decide who should be appointed as a judge. Chief Justice R.C. Lahoti extended the term of an Additional High Court Judge of Madras on the basis of the letter sent to them by the then Law Minister Mr. H. R. Bharadwaj. If Judiciary continues to work in the present format then there will be a day when people s' faith from judiciary will be lifted.

It is the high time that a well-defined system for Appointment of Judges in higher judiciary is brought so as to keep it independent both internally and externally and where executive do not usurp the power of Judiciary. Supreme Court also in Fourth Judges Case recognized that Collegium System is prone to defects. With this regard after having discussions with eminent jurists all across the country Supreme Court directed the government to prepare Memorandum of Procedure (hereinafter referred to as MoP) for appointments of Judges, which has to be approved by the Chief Justice of India. The MoP should contain the measures to be taken so as to make Collegium System more transparent. The procedure regarding appointment of Judges in Higher

Judiciary should be published on the website of concerned court and also in Department of Justice, Government of India. The minutes of the meeting of Collegium Members should also be published. Eligibility criteria should also be mentioned in the MoP and with seniority, merit should also be considered before making any appointment. As per the MoP there should also be a secretariat for better management of appointment of judges both in High Court and Supreme Court. Appropriate measures in order to deal with complaints regarding appointment of judge will also be provided in the MoP[17].

The contents of MoP will no doubt make the judiciary independent internally but for external independence we can have something like that of Judicial Appointment Commission as given by Justice Venkatchaliah.

Justice Venkatachaliah Commission was set up in the year 2000, and gave its recommendations in the year 2002. This commission suggested that a National Judicial Commission be set up, and it should consist of 5 members, viz, The Chief Justice of India, Two senior most judges of the Supreme Court, The Union Minister for Law and Justice and an eminent person nominated by the President after consultation with the Chief Justice of India. This commission can be considered a better alternative because it has primacy of judiciary, as there a majority of judges in the commission, as opposed to the NJAC. Also, as the Union Law minister and an eminent person nominated by the President, the executive head, is present, the say of executive is also taken care of, thus respecting the principle of separation of powers.

United Kingdom Judicial Appointment Commission* v. *NJAC

In the United Kingdom, the provisions of the Constitutional Reform Act, 2005, appoint judges. This Act lies down that the Lord Chancellor has to convene a selection commission for the appointments. This is a commission made only to look after the judicial appointments, and there are various conditions laid down as to that can be the member of the commission. There are guidelines in the Act that the commission has to follow while making the recommendations; such as if two people of same merit are being considered, then the person from a diverse background will be given preference.

Thus, in the case of United Kingdom, as a separate commission is being set up, with members different from the judges and the executive, the tussle between the organs is minimized, and as the commission set up only for judicial appointments, the merit part will also be taken care of, as there is less space for bias and internal politics.

Conclusion

Independence of judiciary is an inseparable tenet of a democracy, and thus, there is no question as to whether it should be existing or not. The only question to be raised is that to what extent does it extend to, and whether appointments are a part of the independence. Also, this independence should not extend to an extent where, in the words of Alladi Krishnaswami Iyer, leads to the creation of a super executive. Thus, to maintain separation of powers and to make sure that one organ is not interfering

[17] ApporvaMandhani, Draft Memorandum of Procedure for judicial appointments reaches Prime Minister's Office for approval http://www.livelaw.in/draft-memorandum-procedure-judicial-appointments-reaches-prime-ministers-office-approval/ (last visited Aug. 19, 2016)

with the working of the other, inspiration can be taken from other countries such as the United Kingdom, or the recommendations of various committees can be materialized.

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