Legality of Collegium and the NJAC Debate

Shivam Singhania, Shubhendu Anand[1]*

Introduction

The judicial appointment has hardly been a settled debate in the evolution of constitutional jurisprudence. The appointment structure has seen two diametrically opposite faces – the pre *Second Judges* case and the post *Second Judges* case. Initially, Article 124 was literally interpreted and consultation was on the pleasure of the President, with the final decision resting with him. Therefore, the executive had absolute control over the appointment of judges. *Sankalchand*[2] *the* case upheld this understanding of the Constitution, although the foresight of luminaries such as P.N. Bhagwati, Fazal Ali and Krishna Iyer did act as a check on this unfettered power, by emphasising that the counsel of the Chief Justice carries great weight[3] and the government may also be asked to explain with cogent reasons, its departure from the counsel of the Chief Justice if a case is made out in this regard.[4] However, the underlining principle was that the Chief Justice has no power of veto and the government is not bound by the advice of the Chief Justice.[5] A similar view was taken in *S.P. Gupta.*[6]

The *Second Judges*[7] case completely altered the system of judicial appointments. It held that 'consultation' in Article 124 amounted to 'concurrence' with the opinion of the Chief Justice and to keep away the decision of appointments from the sole discretion of the Chief Justice, it formulated a collegium (crystallising an informal constitutional convention) to recommend the appointment of judges.

Independence of judiciary is unquestionably a part of the basic structure of the constitution. The manner of judicial appointments should, therefore, be such that independence of the judiciary is not encroached upon. An important question is whether judicial primacy is itself a part of the basic structure or only a way of judicial appointment to upkeep the independence of the judiciary? What does the primacy of judiciary possibly mean? Can it mean a scheme such that the opinion of the judiciary will hold ground, regardless of the opinion of any other stakeholder? Can another way be devised wherein independence of the judiciary is intact and the system can better facilitate the ends of justice than the collegium? Where does a structure such as the National Judicial Appointments Commission stand vis-a-vis the answers to the above questions?

Primacy, Independence of Judiciary and NJAC

Article 124(2) provides for consultation of the Judges of the Supreme Court and the High Courts as the President may deem necessary and that the Chief Justice shall always be consulted. The Constituent Assembly extensively debated the scenario and outcome of compulsorily binding the President to the advice he may seek. The contention was twofold: the President has been allowed freedom to decide whom to consult but is

[1]**Shubhendu Anand** *is an Advocate, practicing in the Supreme Court of India.* **Shivam Singhania** *is a 4th Year Law student at West Bengal National University of Juridical Sciences (NUJS), Kolkata.*

bound by advice, which can be conflicting from other such opinions he may seek and the President may have to be bound by opinions of High Court judges in an appointment at superordinate offices.[8]

Dr Ambedkar says the following in response to amendments in the Constituent Assembly to the present Article 124:

"With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly, both on the impartiality of the Chief Justice and the soundness of his judgment. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I, therefore, think that that is also a dangerous proposition".

It is amply clear that the Constituent Assembly wanted the consultation process to not tie down the President through unwritten principles. Neither the President could unilaterally make decisions with regard to appointments nor did the Chief Justice have any control to overturn the President's decisions. This middle course was further solidified in the *Sankalchand* judgment as explained above.

The involvement of the Judiciary (more specifically the Chief Justice as other consultations are purely a matter of choice of the President) in appointments has never crossed the line where it has had an overpowering effect over the President. In this context, the argument of 'constitutional convention' in the *Second Judges* case also raises pertinent questions. The Executive has been found to conventionally concur with the Chief Justice always and therefore the recommendation of the Chief Justice ought to be binding on the Executive leaves a vacuum between the two yet to be filled. Judicial primacy cannot be established because the executive has been known to concur with the Chief Justice.

Furthermore, there have been proponents of the argument that establishment of judicial primacy in the *Seconds Judges* case is in a specific, restricted context and not an intrinsic constitutional principle to be a part of the basic structure.[9]

"…This will ensure composition of the courts by appointment of only those who are approved of by the Chief Justice of India, which is the real object of the primacy of his opinion and intended to secure the independence of the judiciary and the appointment of the best men available with undoubted credentials."[10]

The driving contention for Justice Verma's majority was the fact that men in the same arena are better placed to adjudge best possible candidates to serve the judiciary and therefore it is a role assigned to the judiciary (thus establishing judicial primacy).[11]

However, judicial primacy as a concept innate to constitutional mechanism has never found any reference whatsoever apart from the undeniable basic element of independence of the judiciary. Constituent Assembly debates and all previous decisions of the Supreme Court may have hinted to a higher Executive role but never to an overriding

judicial role. The Second Judges case quickly moves from concurrence to an overpowering judicial primacy. They keep reiterating it as the only measure to uphold the independence of the judiciary because the link to the independence of the judiciary is the key to the existence of judicial primacy. Therefore, what if the independence is better served without judicial primacy?

The bench also came up with an imaginative set up called the 'collegium' by taking cognizance Dr Ambedkar's (albeit, only selectively) words that the Chief Justice alone cannot be allowed to have a voice that shall be concurred with by the President. However, the necessity of 'plurality of judges' seems more of a convenient escape route, now that they had made the judiciary the final word in appointments but could not afford a singular opinion to be final. It simply is opposite to the text of 124(1) as the President is forced upon with multiple opinions, seeking which in the first place was his prerogative.

In this light, exploring the structure of NJAC on the touchstone of constitutional jurisprudence (minus the conclusions of Second Judges case) before the *Fourth Judges* case[12] will lead us to better conclusions.

The NJAC provides for the Chief Justice and two senior-most judges, the Law Minister and two 'eminent persons' nominated by a committee of the CJI, PM and LoP (or Leader of single largest party) in the Lok Sabha. The concerns raised by various judgments on Executive interference, political appointees etc. is not lost upon us after the supersession of judges and notions of 'committed judiciary'. It is valid that the era of Constituent Assembly and *S.P. Gupta* was a completely different one, wherein jurisprudence began with an assumption of 'committed executive' always acting in common interest of the people and its institutions. Therefore, a continued stubbornness to follow words spoken half a century ago is not recommended. Independence of the judiciary will not seem to be protected at the fancy and pleasure of the President. Also, the inconsistencies of the collegium—opaqueness, closed knit system, alleged favouritism[13] and the above-discussed arguments of questions on its legal basis show us that a system of blindly submitting to the wisdom and impartiality of judges and accepting what they decide without any evidence or a question or two because they are judges and will not do a wrong defies the strong checks and balances culture that the judiciary itself has tried to popularise in our democracy.

In this regard, a Judicial Appointments Commission serves the purpose of 'concurrence' best. It is an Executive-Judiciary model[14] in which decisions without the concurrence of the two blocks is not possible. Accountability is a sure outcome as the Commission will be self-regulated. Whether any appointment procedure should be available for public scrutiny is another debate which raises questions over prejudicing a candidate's chances or jeopardises his functioning as a judge. Even without that, two organs of a state on the same table is a self-accountable system which can be trusted per se rather than a gang up of a handful few of either the Executive or Judiciary.

The NJAC had majorly three contentions with its composition – (a) the presence of Law Minister (b) ambiguity over 'eminent persons' and their nomination process and (c) veto of any two

members.

The presence of Law Minister as raised by Justice Joseph is a conflict of interest issue because he represents the largest litigant in the country on a body for appointing judges. Not delving deeply into the discussion, the conflict of interest persisting even in the collegium system, even though the Executive's was a ceremonial role. It persisted before *Second Judges* when the Executive had absolute control over the appointment. It is a difficult proposition to accept that framers of the Constitution discussed, debated and continued with an apparent conflict of interest along with the judiciary for close to four decades. The understanding is that the Law Minister is in a different capacity (not a litigant) as representative of the President to look for 'concurrence'. Concerns for favoured appointees are well found but 1/6th of voting power in a body cannot appoint cronies alone.

The last thing we require is persons not capable or versed with the functioning of the judiciary or the justice system to be involved in the appointment. Eminent persons should only be restricted to jurists, practitioners or scholars of eminence. Two eminent persons exercising a veto over the Executive and Judiciary, who may be nominated by the PM and LoP in collusion against the CJI is a valid concern. It is proposed that the Commission should have a position for one eminent person. Possibility of a bipartisan compromise between the PM and LoP is extinguished if the nominee is only one.[15]

Veto of any two members is significant otherwise it would replicate the collegium without any change. The existence of a veto in itself cannot set off flares and impinge upon the independence of the judiciary. Considering its practicality, the highest probability is of the judges' candidate passing through (with added transparency utilizing presence and agreement of a neutral and eminent legal luminary/scholar) while it becomes difficult for the government to stall uncomfortable appointments as there is little scope for the single eminent person to not be neutral.

Conclusion

The independence of the judiciary is a part of the basic structure of the Constitution. Judicial appointments are directly linked to the independence of the judiciary. Therefore, judicial appointments cannot be done in a manner infringing the independence of the judiciary. However, judicial primacy per se is not a part of the basic structure itself as seen through Constituent Assembly debates and Constitutional jurisprudence before the *Second Judges* case. Even in the *Second Judges* case, judicial primacy was the only way to ensure judicial independence. However, the fallacies in the collegium are not a secret. Moreover, a system of complete Executive exclusion and a judiciary-only appointment was not thought of and is a matter of judicial imagination.

The NJAC would rather serve better to achieve 'concurrence' between the Executive and Judiciary (consultation being an outdated concept as it gives complete control to the Executive). With a different structure suggested above, the NJAC will ensure the right balance by making a judicial nominee the easiest to be appointed but not without the support of the Executive or a neutral distinguished legal mind. On the other hand, it remains substantially difficult for the Executive to

References:

2 *Sankalchand Himatlal Sheth v. Union of India, (1977) 4 SCC 193.*

3 ed, *¶115 per Iyer. J.*

4 Id.

5 Id, *¶125 per Untwalia. J.*

6 *S.P. Gupta v. Union of India, 1981 Supp (1) SCC 87.*

7 *Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441.*

8 *Constituent Assembly Debates, Vol. VIII,* speech by *Rohini Kumar Chaudhari (May 24, 1949).*

9 *Debating the NJAC: Round-up and Conclusions, https://indconlawphil.wordpress.com/2015/07/ (last visited September 20, 2017).*

10 *Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441, ¶72.*

11 Id, *¶462.*

12 *supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1.*

13 *Abhinav Chandrachud,* The Informal Constitution: Unwritten criteria in selecting judges for the Supreme Court of India *(2014).*

14 *Recasting the Judicial Appointments Debate, Centre for Policy Research (Working Paper 1 / 2014) available at http://nja.nic.in/P-950_Reading_Material_5-NOV-15/3.Judicial%20Appointments%20Debate.pdf*

15 *Derived from the discussion of Chelameshwar, J. in Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1, ¶1219, 1224, 1225.*

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