



JUDICIAL APPOINTMENTS IN INDIA: A QUEST FOR DEMOCRATIC LEGITIMACY

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ABSTRACT

The role, position, and significance of the Indian Judiciary is as complex as the country itself. On October 16, 2015 a Constitution bench of the Supreme Court of India declared the 99th Constitutional Amendment and the National Judicial Appointments Commission Act, 2014 as ultra vires the Constitution. The Court by reverting to the collegium system of Judicial Appointments has once again set the tone for Judicial Supremacy over Constitutional Democracy and breached the sacred Doctrine of Separation of Powers.

This essay highlights the Court's hijack of the process of Judicial Appointments, reducing the role of the Executive to that of a mere postman, comfortably placing such Judicial (mis)interpretation in the glory and ever so exploited area of Judicial Review.

I. INTRODUCTION

The Indian Constituent Assembly's exercise of insulating the Judiciary from coercive political forces was a careful and tedious one.¹ Several key provisions were drafted keeping in mind Judicial Isolation including the salaries and allowances of the Judges,²

¹ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (26th Impression, Oxford University Press 2015) 218-219.

² Constitution of India, 1950, Article 112(3)(d).

power to punish for contempt,³ and impeachment of Judges.⁴ In so far as appointments were concerned, the framers were mindful to not give unfettered power to any of the three organs of the State. A free hand to the Executive or the Legislature would have led to influenced appointments backed by political considerations.⁵ Thus, in order to deny unchecked authority to the Executive, consultation with the Chief Justice was made mandatory⁶ before any appointment to the Higher Judiciary could be made. However, requiring concurrence of the Chief Justice was also a dangerous proposition. As Dr. Ambedkar observed, *The Chief Justice is also a human being and is a man with all the failings, sentiments and prejudices which common people are supposed to have.*⁷

II. POST-INDEPENDENCE EVOLUTION

It was the case of *Sankalchand Himatlal Sheth*⁸ that brought forth for the first time the simmering animosity between the Executive and Judiciary over the latter's fight for its independence and composition. The then

³ Constitution of India, 1950, Articles 129 and 215. (The power to punish for contempt is accorded only to the Supreme Court and the High Courts).

⁴ Constitution of India, 1950, Article 124(4) and 217(1)(b).

⁵ Statement of Dr. B.R. Ambedkar, Constituent Assembly Debates Vol. VIII Page 258 (May 24, 1949).

⁶ Constitution of India, 1950, Article 124(2) and 217(1) (Concerning the appointment of Judges to the Higher Judiciary).

⁷ Statement of Dr. B.R. Ambedkar, Constituent Assembly Debates Vol. VIII Page 258 (May 24, 1949).

⁸ *Union of India v Sankalchand Himatlal Sheth and Anr.* (1977) 4 SCC 193.



Prime Minister Mrs. Indira Gandhi declared a nationwide emergency and upon facing resistance sought to transfer as many as 16 Judges of various High Courts including Justice Sankalchand Sheth, who challenged this order of transfer. This case observed that, the term "consultation" used in Article 222⁹ of the Constitution ought to be interpreted literally adding that the process of consultation had to be "*Real, substantial and effective,*" and "*Based on full and proper materials placed before the Chief Justice by the Government.*"¹⁰ Were the government to depart from the Chief Justice's opinion, "*Such a decision could be subject to Judicial Review.*"¹¹ This position was however later reversed in *SP Gupta v. Union of India*¹² wherein, Court ruled that the President, acting through the Council of Ministers had the power to completely disregard the Chief Justice's opinion¹³ further noting that, consultation could never mean concurrence.¹⁴

Notwithstanding Judicial Grant of Executive Supremacy, out of 547 appointments made between January 1983 and April 1995 only 7 were not in harmony with the opinion of the Chief Justice.¹⁵ Yet, more than a decade later, the Supreme Court decided to review the *SP Gupta* Judgement in the case of

*Supreme Court Advocates-on-Record Association and Others v. Union of India*¹⁶ (Hereinafter: "*Second Judges Case*"). The Court took a dramatic turn practically re-writing the Constitution,¹⁷ in the guise of Constitutional interpretation. The Court ruled that the word "consultation" in Articles 124(2) and 217(1)¹⁸ denoted "concurrence" and that the primacy of opinion of the Judiciary in matters of Judicial Appointments rested with the Chief Justice.¹⁹ The bench created the collegium system wherein, the Chief Justice was now required to consult with his two senior most colleagues,²⁰ before making a binding recommendation to the President. Later, the collegium was expanded to include the 3rd and 4th senior most Judges as well in the *Third Judges Case*.²¹

In one full sweep, the Supreme Court arrogated to itself the process of appointment of Judges. The discussions of the collegium were shrouded in secrecy and the criteria employed for appointments kept completely outside the scope of democratic deliberations leading to widespread criticism of the said system.²² This process of Judicial

⁹Constitution of India, 1950, Article 222. (Concerned with the transfer of Judges).

¹⁰ *Union of India v Sankal Chand Himatlal Sheth* (1977) 4 SCC 193 [115] (Iyer J.).

¹¹ *Ibid*.

¹² 1981 Supp (1) SCC 87 (Famously known as the *First Judges Case*).

¹³ *Ibid*[30], [87](Bhagwati J.).

¹⁴ *Ibid* [30], [48] (Bhagwati J.).

¹⁵ *Supreme Court Advocates-on-Record Association and Another. v. Union of India*(2016) 5 SCC 1 [1149] (Chelameswar J.).

¹⁶ (1993) 4 SCC 441 (Hereinafter: "*Second Judges Case*").

¹⁷ Raju Ramachandran, 'Judicial Supremacy and the Collegium' (February 2013) <http://india-seminar.com/2013/642/642_raju_ramachandran.htm#top> accessed 12 January 2017.

¹⁸ Constitution of India, 1950, Article 124(2) and 217(1). (Dealing with appointment of Judges to the Higher Judiciary).

¹⁹ *Second Judges Case* (n 16) [478(5)], [478(6)] (Verma J.).

²⁰ *Ibid* [450], [478] (Verma J.).

²¹ *In Re Presidential Reference*, (1998) 7 SCC 739 (Famously known as the *Third Judges Case*).

²² Editorial, 'My unsolicited suggestion' *The Indian Express* (7 September 2016) < <http://bit.ly/2cszj1H>>



Appointments seemed rather ironic for a country championing the cause of Constitutional Democracy.

Taking a cue from international practices of UK²³ and Israel,²⁴ recommendations of the Law Commission²⁵ and of the National Commission to review the Working of the Constitution,²⁶ the Parliament passed the 99th Constitutional Amendment Act 2014 establishing the National Judicial Appointments Commission (hereinafter: NJAC) for appointments and transfers to the

higher Judiciary replacing the collegium system of appointments.

III. THE AMENDMENT

The 99th Constitutional Amendment introduced Articles 124A, 124B and 124C in the Constitution. Article 124A provided for the composition of the NJAC.²⁷ Article 124B set forth the duties of the NJAC, which included appointments to Higher Judiciary and recommending transfers. Article 124C permitted the Parliament to regulate appointment procedures and empower the NJAC to enact regulations necessary to carry out its functions. The NJAC Act, 2014, was a direct product of the power vested in the Parliament through Article 114C. However, an important aspect of the Amendment was the power of veto wherein, the NJAC could not recommend a nominee for Judicial office if two of its six members did not concur with the said appointment.²⁸

IV. THE JUDGEMENT

The 99th Amendment and the NJAC Act 2014 were challenged in the Supreme Court in the case of *Supreme Court Advocates-on-Record Association and Another. v. Union of India*²⁹ (Hereinafter: “*Fourth Judges Case*”). The contention being that, the 99th Amendment abrogated the Basic Structure of the Constitution and thus, as per

accessed 7 January 2017; Editorial, ‘Why the collegium system needs to go’ *The Business Standard* (17 October 2015) <<http://bit.ly/2imQEMF>> accessed 7 January 2017; Aamir Khan, ‘Top lawyers condemn collegium system’ *The Indian Express* (Mumbai, 1 February 2015) <<http://bit.ly/2iOzbOI>> accessed 7 January 2017.

²³ Constitutional Reforms Act 2005, Part 4, Chapter 1, Section 61 (Schedule 12) (The Judicial Appointments Commission in the UK is responsible for selection of Judges in Courts and tribunals in England and Wales and for some tribunals whose jurisdiction extends to Scotland or Northern Ireland. The Commission has fourteen members including lay persons (5), Judicial (5), professional members (2), Tribunal Judge (1), non-legally qualified Judicial member (1)).

²⁴ Basic Law- The Judiciary, Chapter II, Section 4 (The Israeli Judicial Committee appoints Judges to the Israeli Courts. The committee has nine members including members of the Cabinet (2), Judges (3), Lawyers (2) and Legislature (2)).

²⁵ Law Commission of India, 80th report, (1977), Chapter VII, Page 29, <<http://bit.ly/2j13bsM>> accessed 10 January 2017; Law Commission of India, 121st report, (1987), Chapter VII, Page 40, <<http://bit.ly/2iaakT7>> accessed 10 January 2017.

²⁶ Consultation Paper on Superior Judiciary by the National Commission to Review the Working of the Constitution Para 9 and 10, <<http://bit.ly/2jwhMgp>> accessed 10 January 2017.

²⁷ Constitution of India, 1950, Article 124A (1) (As proposed in the amendment, the NJAC is a 6 member body comprising of: The Chief Justice and 2 other senior-most Judges of the Supreme Court, Union Minister in charge of Law and Justice and two other “eminent persons”).

²⁸ National Judicial Appointments Commission Act, 2014, Section 5(2).

²⁹ (2016) 5 SCC 1. (Hereinafter: “*Fourth Judges Case*”).



the law laid down in *Kesvananda Bharati*,³⁰ void. The Judgment was delivered by a Constitution Bench of 5 Judges split 4:1 declaring the 99th Amendment and the NJAC Act 2014 as unconstitutional. The majority opinion was led by Justice J.S. Kehar, the dissent by Justice J. Chelameswar.

The majority, placing reliance on the *Second Judges Case*, held that by including three non-judicial members alongside an equal number of Judicial members,³¹ primacy of opinion of the Judiciary had been rendered a devastating blow.³² The Court said that, it was not sufficient to ensure that, “The Judicial component in the NJAC was capable enough to reject the candidature of an unworthy nominee.”³³ Rather primacy meant that, “The Judicial component should be capable enough to ensure the appointment of a worthy candidate”³⁴ notwithstanding opposition from any of the other 2 non-judicial members with veto powers.³⁵ Thus, by not providing primacy to the Judiciary the 99th Amendment “liable to be set aside for violating the Basic Structure” of the Constitution.”³⁶

The majority dismissed the inclusion of the Union Minister in charge of Law and Justice³⁷ in the NJAC, stating that the same introduced political influence in the appointment and transfer of Judges. Since the Executive is the biggest litigant in a majority of the cases,³⁸ the participation of the Minister would have the inevitable effect of undermining the “Independence of the Judiciary”³⁹ and “Separation of Powers.”⁴⁰ Hence, the same is unconstitutional.

The Court opined that, “in the absence of any positive or negative qualifications” statutorily imposed as pre-conditions for the nomination of the two eminent persons an element of vagueness is introduced in the appointment process.⁴¹ Noting that the possible use of veto by the two unspecified members, without any specific justification would radically shift the balance of power,⁴² the Court declared the 99th Amendment and the NJAC Act 2014 as unconstitutional.

V. COMMENTS

In my view, the majority opinion in the *Fourth Judges Case* is bad in law. The debate on primacy is intended to determine, which Constitutional functionary involved in the process of appointments is best equipped to discharge the burden of making the proper choice. At the same time, it is imperative to ensure that the will of the Constituent Assembly in making the process broad based is also preserved. The majority

³⁰ *His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.* (1973) 4 SCC 225 is a landmark Judgement of the Hon’ble Supreme Court of India. In this case, a 13 Judge bench of the Supreme Court limited the amending power of the Parliament. The Court held that, the Constitution could not be amended in a manner that destroyed or infringed its Basic Structure.

³¹ Constitution of India, 1950, Article 124A (1).

³² *Fourth Judges Case* (n 29) [306] (Kehar J).

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ National Judicial Appointments Commission Act, 2014, 2nd Proviso to Section 5(2) and, Section 6(6).

³⁶ *Fourth Judges Case* (n 29) [308] (Kehar J).

³⁷ Constitution of India, 1950, Article 124A(1)(c).

³⁸ *Fourth Judges Case* (n 29) [317] (Kehar J.).

³⁹ *Ibid* [319] (Kehar J.).

⁴⁰ *Ibid.*

⁴¹ *Ibid* [333] (Kehar J.).

⁴² *Fourth Judges Case* (n 29) [884] (Lokur J.).



has erred in stating that primacy of opinion is a part of the Basic Structure. In fact it is one of the many basic features that constitute the Basic Structure i.e. Independence of Judiciary. A mere alteration in the basic feature may or may not tantamount to the abrogation of the Basic Structure itself.⁴³ “According primacy to the Judiciary in the matter of Judicial appointments is not the only way of ensuring an Independent Judiciary.”⁴⁴ The process established by the NJAC gives the Judiciary predominance⁴⁵ over the different constitutional authorities, involved in the joint exercise of appointments. Likewise, the appointment process (also a basic feature) is quintessential to preservation of Judicial Independence.⁴⁶ Non-investiture of absolute power to any one of the three organs of the state is necessary to ensure an independent and efficient Judiciary.⁴⁷ Thus, it is incorrect to say that a mere alteration in the collegium system and establishment of a plural and collective process violates the Basic Structure rather, it preserves it.

The Court in the *Second Judges Case* opined that, the appointment of Judges is a “participatory consultative process.”⁴⁸ Yet, appointing oneself above others involved in the process defeats the very purpose of consultation with those others. The inclusion of the Union Minister for Law and Justice in the NJAC would not compromise the

Independence of Judiciary since, his vote accounts for 1/6th of the total vote of the Commission. The Minister is the representative of the Council of Ministers who are responsible to the people of the country by means of the Parliament. The Executive is accountable for the administration of a State (which would encompass within its scope, the administration of Justice as well⁴⁹) and therefore, must also have a significant role in the appointment process.

Judicial appointments made through the NJAC would not only ensure accountability but would also act as a check against arbitrariness. “To wholly eliminate the executive from the process of selection would be inconsistent with the foundational premise that, the Government in a Democracy is formed by the chosen representatives of the people.”⁵⁰ Established principles of Constitutional Government, practices in other Democratic arrangements⁵¹ and the Constituent Assembly Debates clearly prohibit the inference that Executive participation in the selection process erodes Independence of Judiciary.⁵²

⁴³*Minerva Mills v. Union of India* (1980) 3 SCC 625 [91] (Bhagwati J.).

⁴⁴*Fourth Judges Case* (n 29) [1217] (Chelameswar J.).

⁴⁵*Second Judges Case* (n 16) [450], [451] (Verma J.).

⁴⁶*Fourth Judges Case* (n 29) [126] (Kehar J.).

⁴⁷*Ibid* [1213] (Chelameswar J.).

⁴⁸*Second Judges Case* (n 16) [461] (Verma J.).

⁴⁹*S.P. Gupta v. Union of India and Ors.* AIR 1982 SC 149 [30] (Bhagwati J.).

⁵⁰*Fourth Judges Case* (n 29) [1218] (Chelameswar J.).

⁵¹ **Unites States of America** (Constitution of the United States of America, 1787, Section 2, Article II.), **Japan** (Constitution of Japan, 1947, Article 6), **Canada** (Constitution Act, 1867, Article 96) and **New Zealand** (The Judicature Act, 1908, Section 4(1C)). In all the aforementioned practices, the executive exercises a predominant role in so far as Judicial Appointments are concerned.

⁵²*Fourth Judges Case* (n 29) [1218] (Chelameswar J.).



The majority's holding that, an element of vagueness is introduced in the absence of fixed guidelines for the nomination of "eminent persons"⁵³ is plausible. Yet, the same is an anomaly of a rectifiable nature. The power to nominate the two eminent persons is conferred upon three of the highest Constitutional functionaries of the Democracy viz. -the Prime Minister, the Chief Justice, and the Leader of the Opposition.⁵⁴ This brings to the fore the knowledge, experience and, scrutiny of all three organs of the State ensuring that only the best possible candidate is selected. The conferment of veto power to any two members of the Commission is primarily done to prevent any potential trade-offs either among the representing members of the Judiciary or between the Judiciary and the Executive. *"The induction of Civil Society representation will bring about critically desirable transparency, commitment and participation of the ultimate stakeholders – the people."*⁵⁵

Arguendo, the Court always had the option to strike down the provision dealing with grant of veto powers to any two members of the Commission⁵⁶ while upholding other provisions following the Doctrine of Severability.⁵⁷ Just a mere possibility of abuse of power conferred by the

Constitution, is no ground for denial of conferment of such power to a particular authority.

VI. CONCLUSION

The process of Judicial Appointments in India is neither Constitutionally nor Statutorily regulated. The 99th Amendment was a golden opportunity for the Supreme Court to correct the ills of the past and, in an age of transparency and accountability, accord to itself some form of Democratic authority. The Court's revival of an unconstitutional status quo in the light of democratic change has dealt a blow to the foundations of Democracy and to its credibility. If the 42nd Amendment was the cornerstone of Executive dictatorship⁵⁸ then, the *Fourth Judges Case* has earmarked an era of Judicial Anarchy, the rule of the unelected.

⁵³Ibid[333] (Kehar J.).

⁵⁴ Constitution of India, 1950, Article 124 (1)(d) (As introduced by the 99th Constitutional Amendment).

⁵⁵*Fourth Judges Case* (n 29) [1212] (Chelameswar J.).

⁵⁶ National Judicial Appointments Commission Act, 2014, 2nd Proviso to Section 5 (2) and Section 6 (6).

⁵⁷ *Kihoto Hollohan v. Zachillhu And Others* 1992 Supp (2) SCC 651[70] (Venkatchaliah J.).

⁵⁸ *Minerva Mills v. Union of India* (1980) 3 SCC 625 [74] (Chandrachud CJ.).