

# Tussle For Control: A Fragility Of Indian Democracy

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*Abstract: Our founding father showed great respect to the Judiciary and accept almost all the recommendations made by its Chief Justices from time to time regarding the appointments and transfer of judges. In the year 1993, the scenario was changed by the case of Supreme Court Bar Association vs. Union of India (1993 4sc 441) where the Justice J.S. Verma himself was disillusioned about the working of the collegium system. A National Commission to review the working of the of NDA government led by then prime minister Atal Behari Vajpayee was set up on 22<sup>nd</sup> February 2000 for suggesting possible amendments to the constitution of India, recommended a National Judicial Appointment Commission(NJAC) for the appointment and transfer of the judges of higher Judiciary. Subsequently the NJAC bill was drafted and passed and also struck down in 2015. There was a lot of debate in favour and against the provision of the NJAC. Appointment of judges is a participatory constitutional function. It is not, obviously a role played by a sole authority exercising supreme power and right. Therefore it is need of hour to analyze the legal aspect of NJAC to the end of tussle between Executive and Judiciary.*

## I. INTRODUCTION

Tussle between judiciary and executive for transparency and accountability over judicial appointments seems their duties only towards each other, and not towards people and society. The parliament introduced National Judicial Appointment Commission (NJAC) bill in 2014 to make the appointment of high court and Supreme Court judges and chief justices more transparent and was passed in 2015 making it 99th constitutional amendment Act of India. With the amendment of Articles 124, 217, 222 Articles 124A, 124B and 124C were added to the Constitution to make the NJAC valid. Hon'ble Justice Jagdish Singh Khehar, Pronounced that the National Judicial Appointments Commission Act, 2014, is declared unconstitutional and void; on the ground of being volatile of the "basic structure" of the Constitution. The "collegium system" is declared to be operative; and to consider introduction of appropriate measures, if any, for an improved working of the "collegiums system",

This year, Constitution Day was observed with a hot constitutional debate among senior leaders of both branches of Government for control over the matter and not necessarily think about the people's opinion. Since struck down of the National Judicial Appointments Commission (NJAC) and

replacement of the judicial collegiums, Supreme Court judges have repeatedly blamed the centre for overburdening courts by delaying appointments, for which the judiciary is equally responsible. Civil society received slightly greater attention in the NJAC, but the narrow framing of civil society's role, and the suggested mode of appointment of these eminent persons, came with its own set of problems.

Ultimately the collegiums system is prevailing in Indian Judiciary, all may not well with it and they need to have transparent to ideas and things while exercising their discretionary power so that bona fide consideration may take at the time of appointing the judges. Such appointment becomes perfect selection process that can improve the independent character of our Judiciary which will be able to play a more positive role in addressing the overall issue of judicial reforms.

## II. RESEARCH METHODOLOGY

In these recent years the tussle between executive and judiciary is forefront of the public attention regarding the power over the appointment and transfer of the judges of higher Judiciary. Therefore this problem is selected for study.

Present study is based on doctrinal method of research. Information's are collected from secondary sources and selected information are discussed, analyzed and interpreted in this study.

#### OBJECTIVES OF THE STUDY

- The objective of present study is
- ✓ To analyses the legal aspect of National Judicial Appointment Commission in India.

#### III. WORKING OF THE INDEPENDENCE OF JUDICIARY

The federal principle of Government of India Act 1935 established Federal Court in India to decide constitutional matters. The directives provided under Article 50 of our Constitution is an offshoot of famous doctrine of Separation of Powers enunciated by German cardinal Montesquieu that aimed at a personal separation of powers. Thus, he said that when legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. Again, there is no liberty if the judicial power is not separated from the legislative and executive powers. There would be an end of everything if the same man or the same body exercises those three powers”

On January 28, 1950, at 9.50 am, the Supreme Court of India was inaugurated by then President Rajendra Prasad, in the Presence of first Chief Justice of India Harilal Kania, along with other Justices, Attorney General Setalvad and Advocate Generals of different States. They were much conscious of some apprehensions about the institution and were aware of the following statement of Alladi Krishnaswamy Ayyar made in the Constituent Assembly: “The doctrine of independence is not to be raised to the level of a dogma so as to enable the judiciary to function as a kind of super-legislature or super-executive”

In their address, they explained to the country the role of their newly born Court intended to play. They were eager to make the institution 'noble and great'. Attorney General Setalvad said, “The task before us all is the building of a nation alive to its national and international duties, consisting of a strong central authority and federal units, each possessed of ample power for the diverse uses of a progressive people. In the attainment of this noble end, we hope and trust that this Court will play a great and singular role and establish itself in the consciousness of the Indian People.”

In this reference Justice V.R. Krishna Iyer observed that “The Court cannot run the Government nor the Administration indulge in abuse of or non-use of power and get away with it. Even the Legislature has limitations and must comply with the parameters prescribed by the Constitution; and when they are breached, the court steps in to correct. The essence of judicial review, which is a basic feature of the Constitution, is a Constitutional fundamental.” The Constitutional Adviser Shri B.N. Rau warned that "arming the Supreme Court with vast powers" given in the Constituent Assembly was also present to their minds.

Now, if we look to the actual practice we find that rigid personal separation is impossibility. No constitution of the world can claim to have been based on rigid personal separation. Indian judiciary, coupled with the expansion of its traditional standing and other rules, heralds the precipitous expansion of the Supreme Court's constitutional doctrine. The Indian judiciary is insulated from vibrant checks and balances. Its "political" insulation arises from its ability to determine its own composition, and the inability of the political establishment to effectively remove allegedly tainted members of the judiciary.

#### IV. JUDICIAL APPROACH: RELATING TO THE CONTROVERSY

The Supreme Court not less than five occasions has examined the controversy, which are presently dealing with, through Constitution Benches.

Following are the occasions:

- ✓ *Samsher Singh v. State of Punjab, (1974) 2 SCC 831* –In this case the word “Consultation” was evolved and such consultation with the highest dignitary i.e. the Chief Justice of India, will and should be accepted by the Government of India, in matters relatable to the appointment and transfer. In case, it was not so accepted, the Court would have an opportunity to examine any other extraneous circumstances. The term “consultation” expressed in Articles 124 and 217 as conferring primacy to the opinion tendered by the Chief Justice. That begins the tussle between executive and judiciary.
- ✓ *Union of India v. Sankalchand Himatlal Sheth (1977) 4 SCC 193*- In the Sankalchand Himatlal Sheth case, with reference to Article 222 reiterated the conclusion drawn in the Samsher Singh case.
- ✓ *S.P. Gupta v. Union of India, 1981 Supp SCC 87* – The solitary departure from the above interpretation, was recorded by this Court in the First Judges case, wherein it came to be concluded, that the meaning of the term “consultation” could not be understood as “concurrence”. It was held, that the opinion tendered by the Chief Justice of India, would not be binding on the executive. The function of appointment of Judges to the higher judiciary was described as an executive function, and it was held by the majority, that the ultimate power of appointment, unquestionably rested with the President.
- ✓ *Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441* – The opinion expressed by this Court in the First Judges case, was re-examined in the Second Judges case, which led to setting aside the judgment rendered in the First Judges case, expressed its opinion in consonance with the judgments rendered in the Samsher Singh case and the Sankalchand Himatlal Sheth case. This Court expressly concluded, in the Second Judges case that the term “consultation” expressed in Articles 124, 217 and 222 had to be read as vesting primacy with the opinion expressed by the Chief Justice of India.
- ✓ *Re: Special Reference No.1 of 1998, (1998) 7 SCC 739* – The above position came to be reconsidered in the Third

Judges case, wherein the then learned Attorney General for India, made a statement, that the Union of India was not seeking a review, or reconsideration of the judgment in the Second Judges case, and the Union of India had accepted the said judgment. It is therefore apparent, that the judiciary would have primacy in matters regulated by Articles 124, 217 and 222, was conceded, by the Union of India, in the Third Judges case. The Union of India repeatedly prays for relook and reconsideration of the Second and Third judges case. But the judiciary, in Supreme Court Advocates-on-Record -Association and another vs. Union of India (writ petition (civil) no.13 of 2015 concluded that the prayer for a review of the Second and Third Judges cases in the matter of appointment and transfer of Judges of the higher judiciary could not be accepted.

The judgment in second judges 'case was decided only on the views of the government and Advocates on record and a few others, without giving notice to the public at large. In the instant case, the public at large ought to be afforded an opportunity to be heard; at least the major political parties and the case should be referred to Constitutional Bench. Rejecting the Centre's argument, Justice Goel noted that "the will of the people is the Constitution while the Parliament represents the will of the majority at a given point of time which is subordinate to the Constitution". The Central government has criticised it saying it has created an imperium in imperio within the Supreme Court.

If the implementation of the NJAC is not rethinking, it may lead to a situation where the Supreme Court tomorrow will be packed with sons and sons-in-law of former Judges. There are at least three Chief Justices of High Courts who are sons of former Judges of the Supreme Court, they could be appointed as Judges of the Supreme Court. But few of them are competent and deserving to be appointed."

The creation of insulated judicial dynasties, where a reported 70% of all sitting high court judges come from the same 132 families, has made "climbing the ladder" practically impossible for others, especially women and people from marginalized groups who do not have access to the same networks of privilege.

#### V. NATIONAL JUDICIAL APPOINTMENT COMMISSION: A LEGAL ANALYSIS

Our founding father showed great respect to the Judiciary and accept almost all the recommendations made by its Chief Justices from time to time regarding the appointments and transfer of judges. In the year 1993, the scenario was changed by the case of Supreme Court Bar Association vs. Union of India (1993 4sc 441) where the Justice J.S. Verma himself was disillusioned about the working of the collegium system.

A National Commission to review the working of the of NDA government led by then prime minister Atal Behari Vajpayee was set up on 22<sup>nd</sup> February 2000 for suggesting possible amendments to the constitution of India, recommended a NJAC for the appointment and transfer of the judges of higher Judiciary. Subsequently the NJAC bill was drafted and passed and also struck down in 2015. There was a

lot of debate in favour and against the provision of the NJAC. The NJAC consists of six members viz; Chief Justice of India (chairman), two senior most judges of Supreme Court, two eminent persons, and minister of law and justice of India. The word "eminent persons" in the NJAC are doubtful and not reflect the ability to select suitable person for higher judiciary. Another matter that created suspense among the judiciary is the veto of two members, which may result in stalling appointment on the one hand and bargaining on the other hand. Such character of the NJAC would not maintain the independency of Judiciary.

Section 13 of the NJAC Act 2014 provides parliamentary approval for modification of the rules and regulations that would be framed by the NJAC. The parliament could not transfer a constitutional power to a statute. Appointment of judges is a participatory constitutional function. It is not, obviously a role played by a sole authority exercising supreme power and right. The word 'consultation' with the CJI of India is nothing but a realization that he is the best or equipped person to know and assess the adequacy and efficacy for appointment.

The process of appointments is the core of aspect of independence of judiciary. It is to be noted that even if three judges in the NJAC wanted to appoint an advocate as a judge, the power could no longer be exercised unless they secure an agreement from a fourth non-judge member in the NJAC. He said the Union law minister along with one or two eminent persons could always veto a recommendation made by the CJI and two other judges. If the executive wants to have NJAC the eminent persons to be nominated to the NJAC should not be given voting rights.

The Judiciary is unhappy to the participation of general public through eminent persons in the appointment of judges because the other constitutional functionary such as CAG, Chief Election Commissioner etc is free from such participation. Article 50 leads to the conclusion that Executive should have no vote in the appointment process but only a full opportunity of providing the consulter with all relevant information about the legal knowledge, freedom from fear, operation of any prejudice in favour of or hostile to one or the other litigants. If a judicial commission has to be created, its composition, eligibility criteria and matter of appointment will have to be laid down in the Constitution itself. The framers of the Constitution never intended that the appointment could be subjected to ordinary laws or delegated legislation.

On the other hand, another aspect of the NJAC is that it was struck down only because of that these enactments violate the basic structure of the constitution. But, in fact the Amendment Act protect the basic structure of the constitution by providing only one member to represent the executive and three members from the judiciary, which are enough to influence the other member. They have also veto power to disapprove certain name if they think not fit and proper. The joint venture of all the constitutional functionaries will help to left out the concept of 'primacy' between the executive and judiciary. The NJAC makes an attempt to abolish such 'primacy'. It provides for a qualitatively better and broad concept of consultation than the consultation within the four corners of collegium system. Such act of executive indicates their intention to protect the independency of judiciary and not

to means to select judges arbitrarily without any sense of accountability using the power of primacy. Executive has repeatedly pounced that they are accountable to Parliament. If the executive made a bad appointment to the judiciary, Parliament can haul it up and the Supreme Court can examine the validity of the appointment. However, when the collegium makes a bad appointment, there is no accountability.

Media also play an adore role for their loyalty cultivation. It is these astonishing developments through which Shifting Scales invites us to better understand our Court of today.

## VI. SUGGESTIONS

Throughout this study I would like to put some suggestion for improvement of present case. These are:

- ✓ After the struck down of the NJAC it should be the responsibility of the Government to provide new paramount for healthy relationship between the executive and Judiciary. Give and take relationship should be developed as soon as possible.
- ✓ The collegium system is not bad but it is some time subject to doubtful. Its object should to select best person based on legal merit and ability for the higher Judiciary. There should be actual and significant reforms in the content and operation of the collegium system.
- ✓ The framer of the constitution had never indicated to give absolute discretion to the CJI as angle authority in the matter of appointment. So, there should remain some power with the executive also to check the abuse of power whenever necessary.
- ✓ Article 124A, as amended, is still fully loaded in favour of the high judiciary. Three out of the six members are Judges. In that sense it is failing to meet to be just and democratic. But the Parliament has in its wisdom enacted so and if there is a complaint, the forum is to generate public opinion and seek greater democracy.
- ✓ Collegium system also suffers from various stigmas such as lack of accountability and transparency. This is need of hour to constitute a body which is independent of both the executive and Judiciary to strengthened and not dilute the democratic nature of the country.

## VII. CONCLUDING OBSERVATION

Judiciary is the third organ of the State and most important one due to the nature of its work. The doctrine of separation of powers clearly outlines the responsibilities and powers of three organ of government. India's judiciary is both independent and integrate. Independence implies the judiciary has the power to review acts, has initiated investigations and made many popular decisions which have retained hopes of masses. For example basic structure of Constitution. Judiciary has the power to appoint its own staff and prescribe the terms

of its service. There should be sufficient checks on its freedom in certain areas so as to avoid clash with legislature and executive. The judiciary should evolve more transparency procedures to ensure the judiciary gives enough confidence to the bar and the people.

However, recently we have seen judges accepting roles like Governor after retirement, the National Judicial Appointment Commission, etc. which have raised question mark over the independence of judiciary. To ensure that judiciary remains independent is in the interest of our society, apart from the existing provisions, we can ensure that judges do NOT engage themselves in any government service or private job after retirement, except in committees and commissions duly appointed by the government like National Human Rights Commission. The collegium system is law declared by the Supreme Court under Article 141 and has been accepted as binding. It is a matter of greater responsibility. NJAC cannot be justified by comparing it with the best practices in various countries a detail studied about the method of judges appointment in 182 country is equally required.

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