

THE 'COLLEGIUM CONUNDRUM': ANALYSING THE DYNAMIC BETWEEN JUDICIAL INDEPENDENCE AND TRANSPARENCY THROUGH NJAC, BILL

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Abstract

The article aims to understand the debate around the National Judicial Appointments Commission (NJAC) Bill, 2014 by delving into the analysis of the subtle dynamic which exists between Transparency and Independence of the Judiciary. The article discusses the need for bringing in greater transparency in the existing structure, which would enable the efficient functioning of the Judiciary. Further, the possible repercussions of overarching interference by the Executive and the Legislature, in the functioning of the Judiciary, under the clock of 'transparency' are also discussed. Finally, the article concludes by suggesting possible solutions which would establish both a transparent system, as well as preserve the sacrosanct Independence of the Judiciary.

Keywords: National Judicial Appointments Commission (NJAC); Transparency; Independence of the Judiciary; Separation of Powers; Democracy

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INTRODUCTION

The National Judicial Appointments Commission aims to establish a body for the appointments and transfers of judges to the High Courts and the Supreme Court of India¹. The conception of this policy was a result of a long drawn debate over the opaque structure that previously existed for the appointments and transfers of judges. The ‘collegium’ system, as it was colloquially referred, allowed the supremacy of the Judiciary in the appointments over that of the Executive². Hence, the system snowballed into becoming an ‘imperium in imperio’ - an empire within an empire, creating a ‘super-structure’, which lacked transparency and accountability³.

The NJAC Bill read with the 121st Amendment Act⁴, established a constitutionally recognised body-the National Judicial Appointments Commission, which would henceforth make such appointments and transfers. This Commission would consist of six members- the Chief Justice of India, two senior-most judges of the Supreme Court, the Union Law Minister and two eminent persons who would be selected by a committee comprising of the Prime Minister, the Chief Justice of India, Leader of the opposition party (or Leader of the largest single opposition party)⁵. After years of consistent dialogue over the need for transparency in the Judiciary, the formation of the Commission was primarily to institute this character. Despite the compelling debate that led to the policy change, a closer look at the Bill reveals cracks.

DISCUSSION

The higher courts in the India judicial system have over the years, through their proactive approach, become the protectors of the rights of the people⁶. The Supreme Court has shown remarkable Judicial Activism in cases relating to human rights, environmental issues and even corruption concerns⁷. Through its judicious directives, the Supreme Court has not only

¹ The National Judicial Appointments Commission Act, 2014; GAZETTE OF INDIA-Act No. 40 of 2014

² Sidharth Sharma, *What an independent judiciary is all about*, Business Line, October 3, 2014

³ Krishnadas Rajagopal, 1993 verdict upset ‘equilibrium’ of powers: Centre, The Hindu (New Delhi), May 6, 2015

⁴ The Constitution (One Hundred and Twenty-First Amendment) Bill, 2014, Lok Sabha, Bill No. 97-C of 2014

⁵ The National Judicial Appointments Commission Act, 2014; GAZETTE OF INDIA-Act No. 40 of 2014

⁶ Indira Jaising, *National Judicial Appointments Commission: A Critique*, Economic and Political Weekly, August 30, 2014, 17.

⁷ K.G. Balakrishnan, Chief Justice of India, Address at the Trinity College Dublin-Ireland, Judicial Activism under The Indian Constitution (October 14, 2009)

tied legislative loose ends, but has also become an authority on Affirmative Action. Hence, the Independence of the Judiciary has become imperative, both in theory and practice.

The major point of contention put forth by the critics of the NJAC is that the Bill encroaches on the Judicial Independence without fulfilling its primary objective of Transparency. The Bill contains several loopholes, which include- not defining the criteria for selection of the ‘eminent persons’, the power of veto-which disallows a recommendation if disputed by two members, the provision to override the appointment of the senior most judge as the Chief Justice, will not only allow wide interpretation thus leaving greater scope for arbitrariness, but will also violate the “basic structure⁸” of the Constitution⁹. The policy’s ambiguous provisions allow for the Executive to tread over the territory of the Judiciary, thereby violating the doctrine of Separation of Powers¹⁰, and ripping the tapestry of ‘check and balances’ so intricately knit by the Constitution of India.

It is necessary to analyse the concept of the Independence of Judiciary through the ‘Transparent’ glass and understand whether an ill-defined appointment process lacking transparency would hinder the independent functioning of the judiciary. A paper by David L. Weiden on the subject of understanding judicial politicization by analysing the Judicial Decision Making theory argues that in the judicial decision making process, subtle ‘informal’ norms in the appointment of the judiciary, play a greater role in determining the level of politicization of the Judiciary than the formal selection mechanisms¹¹. Extrapolating the inference from the argument, to the current mechanism established under the NJAC, it can be stated that such ‘informal’ norms would stem from the undefined provisions in the Bill. The paper further goes on to argue that such politicization of courts not only causes the judges to decide cases based on ideological leanings but further has an insidious influence on the process of Judicial Activism in courts.

S. P. Sathe in his book on ‘Judicial Activism in India: Transgressing Borders and Enforcing Limits’ emphasizes on the importance of Judicial Activism in Indian courts. He states the concept is practiced exclusively in the higher Judiciary with the objective of protecting the rights of the vulnerable sections as well as for compensating political circumstances which

⁸ Keshavananda Bharati v. State of Kerala, AIR 1973 SC 1461

⁹ Suhrith Parthasarathy, *Safeguarding judicial autonomy*, The Hindu, August 25, 2014

¹⁰ Indira Nehru Gandhi (Smt.) vs Raj Narain & Anr, 1975 SCC (2) 159

¹¹ David L. Weiden, *Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia*, Political Research Quarterly, June, 2011, 335-347

limit the Executive and Legislature¹². He further goes on to stress the role of Judicial Activism as a counter for Majoritarianism in democracies¹³. These arguments stand particularly relevant in the current socio-political scenario existing in India. Hence, instituting a new model for the appointments and transfers of judges, without making it sufficiently transparent, not only negates the long advocacy efforts but imposes graver threats to crucial institutions in a democracy.

Digressing from the analysis of the 'transparency-independence' dynamic from the perspective of the NJAC Bill, it is also necessary to analyse whether establishing an overtly transparent system, by a directive of the Legislature, being implemented by the Executive, would hinder the independence of the Judiciary. The doctrine of Separation of Powers which has been recognized as a part of the basic structure of the Constitution¹⁴ demarcates functions between the three organs of the State. The doctrine, as practiced in India, provides a system of 'checks and balances' which allows mutual scrutiny by the organs on their exercise of powers. Therefore, the system provides for actions of the Executive to be reviewed by the Judiciary and vice-versa. It is a sine-quo-non for a well-functioning democracy, that such prescribed scrutiny does not become overarching and restrictive¹⁵. Therefore, though transparency is a welcome step, excessive interference of the Executive or the Legislature, is unwarranted.

CONCLUSION

There was an undoubted need for changing the existing system of appointment of judges to the higher courts. The Supreme Court has also recognised the excessively opaque functioning of the old collegiums system and recommended the establishment of a new process for the appointment and transfer of judges¹⁶. The NJAC Bill unfortunately establishes another 'collegium' with no transparency and more ambiguity. The 'old wine in a new bottle' trick not only devalues the efforts of the civil society, which has incessantly advocated

¹² S. P. Sathe, *Judicial Activism in India Transgressing Borders and Enforcing Limits* 278-81, Oxford University Press (2003)

¹³ S. P. Sathe, *Judicial Activism in India Transgressing Borders and Enforcing Limits* 278-81, Oxford University Press (2003)

¹⁴ *Indira Nehru Gandhi (Smt.) vs Raj Narain & Anr*, 1975 SCC (2) 159

¹⁵ Nidhi Singh, Anurag Vijay, *Separation of Powers: Constitutional Plan and Practice*, International Journal of Scientific and Research Publications, November 2013, Volume 3, Issue 11

¹⁶ Prashant Bhushan, *Scuttling Inconvenient Judicial Appointments*, Economic and Political Weekly, July 12, 2014, 13.

transparency, but has larger implications on the functioning of a major institution in a democracy. The primary intention of bringing in such legislation was to establish transparent mechanisms allowing competent interpretation of laws¹⁷. Establishing loose systems which leave wide scope for arbitrary interpretations becomes a much greater threat as currently there are no strong procedures for Judicial Accountability in India. The Judicial Standards and Accountability Bill, 2010 lies lapsed in the Parliament¹⁸, and a lack of transparency coupled with unaccountability is a fatal combination for a democracy.

The recommendations submitted by Justice M.N.Venkatachaliah and Justice B.R. Krishna Iyer¹⁹ for the formation of National Judicial Commission was that there should be a five-member committee which would consist of one 'eminent person'. Such a composition with well-defined criteria for deciding an 'eminent person' would have ensured both transparency and independence of the judiciary. Non-subjective criterion such as acquiring specialized knowledge, having stipulated years of experience in a particular field and possessing prescribed qualifications could be taken into consideration while determining such 'eminent persons'²⁰. Going a step further, there can be steps taken to establish a comprehensive system which would also ensure accountability of the judges. An independent investigatory agency and a three member body could be instituted for investigating charges against judges and for trying such cases respectively²¹.

The Constitutional validity of the NJAC Bill is currently under consideration with the Supreme Court of India. The Supreme Court has always maintained that striking down of legislation on the grounds on violation of the Constitution should be a "measure of last resort". Hence, a few interpretative remedies can be put forth by the court for a more transparent functioning of the NJAC without compromising the Independence of Judiciary²². Defining the scope for the selection of the 'eminent persons', allowing the Chief Justice of India greater power in the appointment of at least one eminent person-where the person can only be appointed to the Commission if the CJI concurs with such recommendations, revealing the reasons for non-appointment and transfer of judges and allowing a greater say

¹⁷ Nirmalendu Bikash Rakshit, *Judicial Appointments*, Economic and Political Weekly, July 3, 2004, 2959.

¹⁸ The Judicial Standards and Accountability Bill, 2010

¹⁹ Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law And Justice, Report No. 64, Rajya Sabha, 2013

²⁰ Arvind P. Datar, *A fatally flawed Commission*, The Hindu, August 17, 2014

²¹ Prashant Bhushan, *Securing Judicial Accountability: Towards an Independent Commission*, Economic and Political Weekly, October 27, 2007, 14.

²² Chintan Chandrachud, *Interpretive remedies in NJAC case*, The Hindu, July 31, 2015

of the judges in the veto power by disallowing an appointment only if one of the judges veto's it. The Supreme Court, through its decision, can prevent the debate around the NJAC from becoming merely a turf war between the Executive and the Judiciary. A transparent Commission which does not interfere with Judicial Independence will strengthen democratic structures in India.