

NATIONAL JUDICIAL APPOINTMENTS COMMISSION, THE NEED TO REVISIT IT

Aringada Chacko Philip, Faculty of Law, SOEL, Tamilnadu Dr. Ambedkar Law University

& Practising advocate, Supreme Court of India.

Abstract

The basic structure of our constitution is democratic and even the parliament is not authorised to amend such democratic authority. In a democratic process, no authority can exist, not being answerable to anybody. Hence it has no right to enjoy unaccountable and unbridled powers. The political authority is answerable to the people through elections. It is at these crossroads the NJAC Act, 2014 stands. It is told that the power corrupts and the absolute power corrupts absolutely. Nepotism and corruption became the hallmark of our judicial system, which is supposed to be the last asylum for the common man against executive excesses. Further, registration of FIR against the judges is not possible! Supremacy to the views of judges in the selection and transfer of judges is bound to be corrected. Under the banner of the depoliticising judiciary, such supremacy is brought in. If such a logic goes in, there are other institutions as well, like, CAG, Election Commission, CVC, the Speaker, and even the President of India, who are supposed to function without political inclinations. Any organ of democracy, which are not accountable to the sovereign, 'we the people', in a chain of responsibilities are ultimately undemocratic, tyrannical and the seat of absolute corruption. The instant article gives a glimpse into such a complex issue in most simple language.

NATIONAL JUDICIAL APPOINTMENTS COMMISSION, THE NEED TO REVISIT.

The basic structure of our constitution is democratic and even the parliament is not authorised to amend such democratic authority, and at least the Supreme Court of India under the guise of interpreting the constitution, and hence amending the constitution is ultra vires the Supreme Court! That too making the entire judiciary, not answerable to ‘We the People of India’¹, who is the sovereign power in all means. Any amendment made to the Constitution of India by the Supreme Court is null void ab-initio. Even if the same is achieved through the banner of interpreting the constitution, the result shall be the same.

Every institution is functioning through human beings, who by very nature are likely to err in its decision making or execution of its authority. There is no human being on the surface of the earth, who is infallible. Even the once considered infallibility of the Pope is not absolute in modern times. It can be a meaningful functioning, only if proper checks and balances are established among the institutions especially the system is of a democratic republic with a written constitution. Every power shall be accountable to another. And such chain of accountability shall ultimately culminate with the people at large, who are the sovereign decision-makers and judges. The political authority is answerable to the people of India through the electoral process. In a democratic process, no authority can exist, not being answerable to anybody. Every worldly power shall be accountable. The only unaccountable power is divine power. Under no stretch of imagination, it is possible to understand that the judiciary enjoys divine powers, even though some pretends so! Hence it has no right to enjoy unaccountable and unbridled powers. It shall be remembered that ‘Be you never so high, the Law is above you’². The law of equity says: ‘Lex non a rege est violanda’³, which means:- ‘The law must not be violated even by the King’.

The political authority is answerable to the people through elections. In a democratic process, no authority can exist, not being answerable to anybody. If at all it exists, it is

¹ INDIA CONST. Preamble.

² Lord Denning, Oxford Essential Quotations (4 ed.), Edited by Susan Ratcliffe, Oxford University Press, Current Online Version: 2016, eISBN: 9780191826719

³S.S.Peloubet, A Collection of Legal Maxims in Law and Equity, George S. Diossy, New York, 1880, Page 150, Line No.1226

undemocratic and the aberration needs to be corrected. It is at this crossroads the NJAC Act,2014⁴ stands. The Constitutional Amendment Act,2014⁵ envisages so.

It is told that the power corrupts and the absolute power corrupts absolutely⁶. That's what we have seen for the last two decades in our judicial system. Nepotism and corruption became the hallmark of our judicial system, which is supposed to be the last asylum for the common man against executive excesses. When the executive gets corrupted, the common man looks upon the judiciary for solace. But, here it is the chain which became mad, to borrow an old expression. There are instances where moneybags were delivered to the residence of judges! There were instances where the judges and their kith and kin amassed wealth far in excess of their known source of income. There were sexual harassment charges raised against some. The 'uncle judge syndrome'⁷ is prevalent all over India, whereby the close relatives of serving judges are appearing in the same court and arrange for orders! Even the corporate lawyers are being elevated to the judiciary who sit upon judging the same corporate's litigations! Even worse the nepotism has grown to the extent of 'progeny judges syndrome', whereby the judges are being selected and appointed from the sons of former judges or senior advocates. A look into the official websites of the respective High Courts and Supreme Court of India reveals very stunning truths⁸. Around two-thirds of the appointments, except those filled up by promotions from the lower judiciary are pooled from the kith and kin of serving/retired judges and that of senior advocates. It's a sharing business, where the vacancies are shared among the stakeholders, which are securing the said positions for their own "progenies". What India needs is a democratic judiciary, rather than a progeny, adjustment judiciary. A list of judges, who are such progenies is evidently available on the various High Court websites. The said list is not exhaustive, but only discloses the tip of an iceberg.

⁴ The National Judicial Appointments Commission Act, 2014, Act No. 40 of 2014, Acts of Parliament, 2014 (India).

⁵ Constitution (Ninety-Ninth Amendment) Act, 2014, Gazette of India., Wikipedia (May. 14, 2021, 18:23 PM), <http://www.egazette.nic.in/WriteReadData/2015/163428.pdf>

⁶ John Emerich Edward Dalberg Acton, Letter to Archbishop Mandell Creighton, dated Apr. 5, 1887, Wikipedia, (May. 13, 2021, 16:17 PM), <https://history.hanover.edu/courses/excerpts/165acton.html>

⁷ The Law Commission of India, 230th Report, Reforms In The Judiciary - Some Suggestions, Law Commission of India, (May. 15, 2021, 15:43 PM), <http://lawcommissionofindia.nic.in/reports/report230.pdf>

⁸ The cover story, Outlook, 19th Sep. 2016.

And further, registration of FIR against the judges are not possible due to the administrative directive by the Supreme Court of India⁹. Here the 'Kings of Justice' pretends to be above law! If all these are meant by 'independence of the judiciary', the people of India cannot stand as mere spectators to such blatant misuse of power, which is derived and delegated from the people at large. When the judges are proved to be corrupt, they are transferred! A great deal! Transferring and spreading the corruption from one part to the other part of the nation! Transferring and spreading the cancerous cells from one part to the other part of the body is not treatment at all. It needs to be addressed meaningfully. If amputation is required, it shall resort to even such remedy, even though painful, in the interest of the nation, which is paramount.

The ultimate power, without being responsible or accountable to anybody is the one enjoyed by the judiciary as of today. The judiciary is a sacrosanct institution. I write this with utmost respect and reverence to such a dignified institution. But at the hands of some counted numbers of aberrations, such a sacrosanct institution cannot be demeaned. The nation as a whole and every citizen of India is looking upon the parliament to correct the temporary aberration caused to the prestigious and respectful institution. And hence was the eventual 99th Constitution (Amendment) Act,2014¹⁰ and NJAC Act,2014¹¹.

It is but natural that those who enjoy the unjust authority and unaccountable freedom will surely fight tooth and nail to protect the status quo. Anybody who will dare to challenge the authority will be hooted down or maybe termed as the usurper of power. It is suggested that the NJAC Act,2014¹² should have been prepared after taking the opinion from Bar Associations and eminent lawyers. It is out of sheer ignorance; such a suggestion is put forward. The judiciary is not the private affairs of Bar Associations and some selected legal firms and senior advocates. It belongs to the entire nation, the 1.29 billion people, to be precise. The parliament of India is the elected body that reflects the hope and aspirations of the nation as a whole and represents the resolve of 1290 million people.

⁹ K. Veeraswami vs Union Of India And Others, 1991 SCR (3) 189, 1991 SCC (3) 655, (INDIA).

¹⁰ Ibid

¹¹ Ibid

¹² Supra

If the collegiums system is flawed but workable, it needs to be amended. The aberration needs to be corrected. And we shall not jump to conclusion that the new system as contemplated by NJAC Act,2014¹³ is unworkable. There are a plethora of imaginary situations raised to question the workability of the said Act. Even when the present system of collegiums was put in place, no such plethora of questions was raised to question it's workability. The legislative body cannot envisage and answer all the imaginative situations which may arise in due course of time when such an Act is put to practice. But the functional democracy has an inherent power to tide over such crises as and when it arises. We have a dynamic parliamentary legislative system to address such situations. But under the aegis of imaginative situations, a legislative Act cannot be prejudiced or prejudged.

Supremacy to the views of judges in the selection and transfer of judges is bound to be corrected. Under the banner of the depoliticising judiciary, such supremacy is brought in. If such a logic goes in, there are other institutions as well, like, CAG, Election Commission, CVC, the Speaker, and even the President of India, who are supposed to function without political inclinations. If these judgments are a precedent or are a ratio decidenti (Judges¹⁴, ²¹⁵ & ³¹⁶ cases) then these institutions shall also start Appointing their respective successors leaving the executive at lurch. All those who presently occupying these offices shall be allowed to appoint their progenies as their successors in their office to make it apolitical! What will be the resultant democracy and republic!? Any organ of democracy, which are not accountable to the sovereign, 'we the people', in a chain of responsibilities are ultimately undemocratic, tyrannical and the seat of absolute corruption. To make it a functional democracy, we need to make every organ answerable to the people through the polity. It is the single event of superseding the seniority in the appointment of CJI by the Indira Gandhi government in the 1970s which are on and off quoted to declare that the judicial independence is compromised. When the Indira Government made such

¹³ Ibid

¹⁴ S.P. Gupta vs. Union of India & Anr. , 1982 AIR 149, 1982(2)SCR 365, 1981 Suppl. SCC 87, 1981(4) SCALE 1975, (INDIA).

¹⁵ Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441, (INDIA).

¹⁶ Reference by The President of India Under Article 143(1) Of The ... vs Unknown, AIR 1999 SC 1, RLW 1999 (1) SC 168, 1998 (5) SCALE 629, 1998 Supp 2 SCR 400, (INDIA).

manipulation, it was ultimately made to be answerable. In the subsequent election, people could make the ultimate verdict (1977). That is the dance of democracy. In such a vibrant and functional democracy, when the polity faults, the people can correct it through the ballot. But all these two decades when the judicial authority faulted, the people were made a mere spectator to such constitutional violations and undemocratic practices. The oligarchs enjoyed the fruits of unquestionable power and authority, even usurping into every aspect of executive and legislative authorities. We have seen a plethora of judgments, which encroached the line of separation of powers! Many of them have violated the fundamental rights of have-nots! But the people of India, the supposed to be sovereign, could not make the system accountable to anybody.

We have seen the Supreme Court by virtue of Judges 1, 2 & 3 cases¹⁷, the building of the constitution is destroyed for being the faulty plumbing. Under the guise of interpreting the laws, the judiciary shan't venture into making laws. Lest the Judiciary is empowered to amend the constitution of India. Article 368 empowers the parliament of India to amend the Constitution, which reads as follows:-

"368. [(1) Notwithstanding anything in this Constitution, Parliament may in the exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.]

3[(2)] An amendment of this Constitution may be initiated only by the introduction of a Act,2014 for the purpose in either House of Parliament, and when the Act,2014 is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting,

4[it shall be presented to the President who shall give his assent to the Act,2014 and thereupon] the Constitution shall stand amended in accordance with the terms of the Act,2014:

Provided that if such amendment seeks to make any change in—article

¹⁷ Supra

54, article 55, article 73, article 162 or article 241, or Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or any of the Lists in the Seventh Schedule, or the representation of States in Parliament, or the provisions of this article, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Act, 2014 making provision for such amendment is presented to the President for assent.

[(3) Nothing in article 13 shall apply to any amendment made under this article.]

[(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article [whether before or after the commencement of section 55 of the Constitution (Forty Second Amendment) Act, 1976] shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.]”

There is another argument, which says the entire judicial spectrum as of now is appointed through the collegiums system of appointments and if the system is bad, those who are appointed through the same method also shall be bad, or else, shall leave the system. It may be open to each individual to decide their fate. Nobody prevents anybody from putting their papers. But for argument's sake, if this logic is accepted, then, the same should have been applicable while deciding the judges 1, 2 & 3 cases¹⁸. Those who were the product of executive appointments declare that the said form of appointments is unconstitutional! What an irony! The best way for them would have been to put in their papers and say that the system through which they were appointed was wrong! It could have been moral courage! Even when enjoying the benefit of a given system, the beneficiaries declared that the given system is illegal, without any rhyme or reasoning. In the name of 'independence of the judiciary,' the new mechanism cannot be opposed.

¹⁸ *ibid*

The independence of the judiciary cannot be subservient to the selected members of the bar as well as the bench. The judiciary belongs to the entire nation and not the private property of a selected few. The appointments, promotion and transfers are the public affair and not the drawing-room affair of certain counted peoples, better not to name them. The judiciary needs to be liberated out of such vested interests and truly make it an independent one to serve the purpose of the nation. Rather, we need to restore the independence of the judiciary.

Again, it was learned that the Supreme Court was sitting on the issue of judging the constitutional validity of the given Act and the Constitutional Amendment Act,2014. Once again, the Supreme Court was violating the principles of natural justice. It is said that: 'In proprii cuus nemo judex'¹⁹ or 'Nemo debet esse judex in proprii causa'²⁰ which means, no one should be a judge in his own cause. Hence the Supreme Court was clearly violating the given principles of natural justice when it sat on to decide the appointments to itself. Further, the Supreme Court should not have embarked upon the law-making powers of the parliament. If it ventures so, it will be the death knell of democracy in India. Under the doctrine of separation of powers, the parliament, which has three parts²¹ are only empowered to make the law. The judiciary shall restrain itself to the role of interpreting the law and respect the doctrine of separation of powers. The 'supremacy' and 'independence' of the judiciary is a misnomer in a democratically governed nation and what the constitutional philosophy envisages is the 'separation of powers'.

The new NJAC Act,2014 is criticised for being moved in haste without adequate consultations. Two decades of consultations and discussions are being considered inadequate and do it mean that the entire century shall be spent on discussing the issue? When the judges-3 case²² subverted the constitutional provision, without due process of amendment, such an argument was not placed at all. The appointments to the judiciary are not the judicial affair. If anybody believes so, it is totally under misimpression and total ignorance. The appointment to the judiciary, the promotions and the transfers are national affairs. The entire nation is interested in its outcome.

¹⁹ R v Sussex Justices, ex parte McCarthy , ([1924] 1 KB 256, [1923] All ER Rep 233), (UNITED KINGDOM)

²⁰ Maxims of Law from Bouvier's 1856 Law Dictionary, 12 Co. 113.

²¹ INDIA CONST.Art.79.

²² Ibid

Some criticise that the NJAC Act,2014 should have been referred to select committee. When the government doesn't want to commit, it committees! At least now we have a government, which wants to commit to the cause of people, elected by the people, constituted of the people. The more the process is delayed by forming or referring to committees, the more the aristocratic judiciary will be protected, which if measured by any yardstick is the continuation of undemocratic and unconstitutional mechanism.

The requirement of knowledge of law for eminent persons as members of the National Judicial Appointments Commission is another question. If all the members are from the same faculty, then where is the validity of different opinions? To judge the integrity or suitability of a person, the requirement of legal knowledge is not essential. It is not essential to check out a corrupt. The three legal professionals, along with the law minister are competent enough to judge the professional knowledge of a candidate. Two eminent persons are the representatives of the people of India, who are looking out for social visionaries as judges, which runs beyond the realm of mere legal knowledge. We had many visionary judges, all of whom were appointed by the political executive.

Surely the 'Ache Din' for the selected few in the judicial echelons could have been over if the said National Judicial Appointments Commission was allowed to function. It is the "Ache Din" for the people of India. All these past two decades, the nation was regretting the constitutional amendment made by the Supreme Court by way of Judges- 2 &3 judgment²³. The judiciary belongs to the nation and it's people, not to the selected elite alone. There is an emergent need to restore it to 'we the people'.

²³ Ibid