The Need for a National Judicial Commission — Critique of the NJC Bill 1990

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The Executive, the Legislature and the Judiciary are the main functionaries in the modern state. It is essential that these organs function harmoniously yet independently. Although there is a need for the system of mutual checks and balances, any excessive interference by one organ will hinder the smooth functioning of the other.

It is of utmost importance to have an independent judiciary, particularly an independent higher judiciary as it is often only through this mechanism that excesses of the other two organs are checked and the maintenance of the Rule of law is ensured.

There has been frequent criticism that there is a threat to the independence of the judiciary due to the power wielded by the Executive through the technique of appointment, transfer and removal.

Departure from the norm of appointing the senior most judge as the Chief Justice on certain occasions, non-consensual transfer of High Court Judges, the conduct of a few members of the higher Judiciary themselves, charges of corruption made against them, have all led to the inevitable effect of undermining the confidence of the citizens in this institution.

To prevent abuse of the judicial process, it is essential that the personnel to man the system are of the highest calibre, character and integrity.

In the words of the 14th Report of the Law Commission of India — "Not only should the judge have experience but he should also be a competent administrator capable of handling complex matters that may arise from time to time, a shrewd judge of men and personalities, a person of sturdy independence and towering personality, who would on the occasion arising be a watch dog of the independence of the judiciary".[1]

Perhaps this description would befit all our judges had it not been for the glaring fact that some of them had and have been appointed on considerations other than merit.

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[1] 14th Report of the Law Commission of India (1957), p. 39.

The Law Commission which had reviewed the functioning of the judiciary from 1957-1980 had observed "...Some of the members of the Bar appointed to the Bench did not occupy the front rank in the profession, either in the matter of legal equipment or of the volume of their practice at the Bar. A number of more capable and deserving persons appear to have been ignored for reasons that can stem only from political or commercial or similar grounds..."[2]

As regards such appointments, M. C. Setalvad had observed — "The selection of a person on considerations other than merit would have far reaching repercussions. Such a judge would naturally not receive from members of the Bar, who would be no strangers to his capacity, the full measure of co-operation which is needed for the proper administration of justice, nor would a judge so appointed generally have that amount of confidence in himself which alone can contribute to the efficient discharge of his duties. These circumstances are bound to affect adversely the quantity and quality of work turned out by such a judge..."[3]

Although the Constitution prescribes that the President should consult the Chief Justice of India before appointment of judges, this is no safeguard because in practice the mode adopted for appointment is one wherein the name proposed by the Chief Justice is forwarded to the Minister for Law and Justice and when the Minister is in agreement with the proposal, it is forwarded to the Prime Minister and on his approval, the President issues a formal warrant of appointment. Thus, the President acts only in accordance with the advice tendered by the Council of Ministers. The procedure for appointment of a judge of the High Court is similar. (There have been cases when the name for the appointment has been proposed by the Chief Minister in the first instance).

The present system of appointment has often resulted in delay in filling up vacancies. The total control by the Executive may also be gauged from the procedure for removal. A notice of motion for removal of a Judge of the Supreme Court is to be given either by 100 members of the Lok Sabha or by 50 members of the Rajya Sabha and if such a motion is accepted, then the misbehaviour of the judge will have to be enquired into by a Committee consisting of three members, one chosen from among the judges of the Supreme Court, one chosen from among the Chief Justices of the High Courts and another chosen by either the Speaker of the Lok Sabha or the Chairman of the Rajya Sabha, from among distinguished jurists. Only after the committee finds proof of misbehaviour, the motion pending in Parliament is taken up for voting and upon such voting, the President shall remove the judge.

This cumbersome procedure analogous to impeachment makes it all the more difficult to root out any puppet of the Executive from the system.

Considering the vices of the present system, it is imperative that an alternative mechanism be devised which will ensure that only competent and efficient personnel are appointed and which will safeguard the independence of the judiciary.

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[2] 121st Law Commission of India Report (1987), pp. 34-35.

[3] *Supra* n. 1, p. 70.

A search for a suitable alternative necessitates an examination of the system of appointment in other countries. In most countries, appointment of judges is either by election or nomination.

The former process can be totally ruled out considering the level of literacy in our country and the unfortunate fact that dirty politics permeate every sphere where elections are held.

In the latter category, the most impressive is the process for appointment in Missouri, U.S.A., which is described as the Missouri Plan, wherein a Missouri Appellate Commission consisting of the Chief Justice of the Supreme Court, three lawyers elected by the State Bar (one from each of the three courts of Appeal) and three citizens, who are not members of the Bar, appointed by the Governor from each of the three appellate districts, select the appointees. The governor of Missouri has to choose one among the three members selected by the Commission and appoint him/her until the next general election. After this probationary period, the appointee must be approved by the electorate.

The Commission has a 6 year term. None of the members of the Commission are permitted to hold either Public Office or an official position in a Political Party.

Such a system will definitely ensure, or at least minimise to a great extent the possibility of any Executive hold over the Judiciary.

Since the 70's the idea of having such a system in India has been mooted.

The Law Commission[4] in 1977 had recommended that a High Level Panel consisting of the Chief Justice of India, Minister for Law and Justice and three persons each of whom has been the Chief Justice or a Judge of the Supreme Court, be set up to ensure dispassionate scrutiny and to eliminate extraneous considerations in the matter of appointment to the Supreme Judiciary. Prior to this, in 1973 a Resolution of the Bar Council of India declared that the appointment of High Court Judges should be made on the recommendations of a Committee consisting of three senior most judges of the High Court, including the Chief Justice and two senior Advocates nominated for that purpose by the High Court Bar Association.

In the *Judges' Transfer* case, Bhagwati J. had observed — "There must be a collegium to make recommendations to the President, in regard to the appointment of a Supreme Court or a High Court Judge. The recommending authority should be more broad based and there should be consultation with wider interests. If the collegium is composed of persons who are expected to have knowledge of the persons who may be fit for appointment on the Bench and have qualities required for appointment and this last requirement is absolutely essential — it would go

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[4] S. P. Gupta v. Union of India, AIR 1982 SC 149.

a long way towards securing the right kind of judges, who would be truly independent and who would invest the judicial process with significance and meaning for the deprived and exploited sections of our society".[5]

The National Judicial Commission — An Insight

In 1987, the setting up of a National Judicial Services Commission (NJSC) was recommended by the Law Commission in its 121st Report. It prescribed that the Commission must be a body of experts drawn from various interest groups in close touch with the administration of justice such as judges, lawyers, law academics and litigants and include the Chief Justice of India, the three senior most judges of the Supreme Court, three Chief Justices of High Courts according to their seniority, Minister for Law and Justice and an outstanding legal academic. Litigants were not included as in the opinion of the Law Commission, it is not advisable in the present state of affairs to provide any representation for them.

The main function of the NJSC would be to select and recommend persons for being appointed to the superior judiciary on the basis of certain criteria, which it would devise.

Following this recommendation, the Constitution (67th Amendment) Bill, 1990 was recently introduced in the Lok Sabha with its declared object as — "to obviate the criticism of arbitrariness of the Executive in such appointments and transfers and also to make such appointments without any delay."

The proposed amendment seeks to transfer the power of appointment to the National Judicial Commission (NJC) — a body to be constituted by an order of the President.

For making recommendations to the President as to the appointment of a judge of the Supreme Court (other than the Chief Justice of India), a Chief Justice of the High Court and the transfer of a judge from one High Court to any other High Court, the NJC is to consist of the Chief Justice of India and two other judges of the Supreme Court next to the Chief Justice in seniority.

The composition of the NJC for making recommendations as to the appointment of a judge of a High Court is to be different consisting of the Chief Justice of India,, the Chief Minister of the concerned State (or if a proclamation under Article 365 is in operation in that State, the Governor of the State), a judge of the Supreme Court next to the Chief Justice in seniority, the Chief Justice of the High Court, a judge of the High Court next in the order of seniority.

The Bill provides that where the recommendations of the NJC are not accepted, reasons shall be recorded in writing but further explains that the President shall

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[5] *Supra* n. 1

not have the power to appoint any person as a judge unless his/her name is recommended by the NJC for such appointment.

It provides that the procedure to be followed by the NJC in the transaction of its business shall be such as the President may in consultation with the Chief Justice of India determine.

The NJC Bill — Its Drawbacks

Although the introduction of the Bill is a welcome step towards ensuring the independence of the judiciary it has certain shortcomings.

The Bill seeks to confer only the power of appointment and transfer of judges on the NJC. It is essential that the power of removal also be vested with the NJC because retention of the present procedure would still leave the Executive with a substantive measure of control.

The composition of the NJC as proposed in the Bill does not include members of the Bar. The inclusion of two members of the Bar Council of India for appointments to the Supreme Court and in the case of appointments to the High Courts, two members of the State Bar Association, elected by these bodies for a 3 year term and also two eminent legal academicians to be nominated by the Chief Justice of India would ensure the representation of all groups closely connected with the administration of justice on the NJC.

On the other hand, for the appointments to the High Court, the Bill proposes that the Commission should consist of the Chief Minister of the concerned state also. The Chief Minister or any other member of the Executive should necessarily be kept out of the NJC as it is intended to be an expert body.

The Bill provides for an option to the President to disregard the recommendations of the NJC subject to the condition that the reasons for the same be recorded in writing. This provision should not be included as the recommendations of the NJC are made only after careful scrutiny.

Considering the nature of the functions to be performed by the NJC, it is essential that the procedure for the performance of its functions and criteria for selection be evolved by the NJC itself and should not be determined by the President in consultation with the NJC, as the Bill provides now. Further, these criteria should be uniformly followed.

There is an apprehension that by ousting Executive Control over the Judiciary, the constitutional mechanism of checks and balances would fail. This is not logically tenable because the action of NJC when exercising Executive powers of appointment, transfer and removal shall be subject to judicial review. All in all, the NJC is a right step in entrenching a "free and independent judiciary" in our Constitutional scheme.