WHO WILL WATCH THE WATCHMEN: COMMENTS ON THE THIRD JUDGES APPOINTMENTS CASE

Written by ***Isha Ahlawat***

5th Year BA LLB Student, Jindal Global Law School, Sonipat, India

AN INDEPENDENT AND TRANSPARENT JUDICIARY: THE SINE QUA NON OF A HEALTHY DEMOCRACY

As Amy Coney Barrett's Senate confirmation hearings aired on CNN a few years ago, it was difficult to decide whether to pity the Americans for the political quagmire that their judicial appointments have become or to admire them for the bold, democratic and transparent fashion in which they conduct the process to nominate individuals to serve in the highest court of the land. An independent judiciary is the crucible in which foundations of a free, democratic, and just society are forged. The drafters of the Indian Constitution were acutely conscious of this and devoted considerable time and thought to the matter. Several ideas were floated. The Sapru Committee proposed that judges should be appointed by the head of the state in consultation with the Chief Justice of the Supreme Court or High Court concerned.[i] The Ad Hoc Committee of the Union Constitution, aiming to limit the President's discretion, suggested two methods.[ii] One suggestion was that the President could nominate a judge, after consultation with the Chief Justice, and the nomination will have to be confirmed by a panel comprising of law officers of the Union, Members of Parliament and Chief Justices of High Court.[iii] The second suggestion stated that three persons (one of whom was appointed by the President in consultation with the Chief Justice) could make recommendations and then the procedure stated previously shall follow.[iv]

Eventually, it was laid down in Articles 124 and 217 of the Constitution that the President would appoint judges to the Supreme Court after consulting people who are *ex- hypothesis* qualified to advise on the issue, such as judges of the Supreme Court and High Court. High Court judges were to be appointed after consultation with the Chief Justice of India and the Governor of the State. Along with this, the customary rule of promoting the senior most judge

to the position of Chief Justice prevailed as well. Then, in 1955, the Fourteenth Law Commission Report on legal reforms headed by M.C. Setalvad discovered widespread grievances and encountered severe criticisms pertaining to the selection process of judges. Among other things, it recommended that merit alone must form the basis of appointment of judges and not considerations of seniority, religion, or community. All was well, till Indira Gandhi rose to power and the executive and judiciary were placed in sharp conflict. Twice- in 1973 and 1976- the executive broke the custom of appointing the senior most judge as the Chief Justice and both times the move was met with resignations from the Supreme Court.

In *S.P. Gupta v Union of India*[v] (The First Judges case), the court held that the executive held primacy in the matter of judicial appointments and transfers. The President could override the opinion of other judges and his decision was not subject to judicial review. Later, *Supreme Court Advocates on Record Association v Union of India*[vi] (Second Judges case), a nine- judge bench took a diametrically opposite view and established the collegium system. The word 'consultation' was held to mean 'concurrence' or 'consent' and no judge could henceforth be appointed unless it was in conformity with the opinion of the Chief Justice.[vii] Through this seminal judgement, the court abandoned a literal interpretation of Articles 124 and 217 and undertook a *structuralist* interpretation of the Constitution by severely limiting the executive's influence on transfers and appointments.

THE THIRD JUDGES CASE- ISSUES AND INTERPRETATION

In Re: Special Reference on Judicial Appointment [1998] or, the Third Judges Case, came before the Supreme Court at a time of deep political instability in the country. Two general elections were held within the span of three years and the Prime Minister had changed four times. At the same time, dissatisfaction was brewing in the Bar regarding the manner of appointment of judges to the Apex Court. Amidst all this, the then CJI, MM Punchhi, recommended the name of three judges to President K. R. Narayanan for appointment to the Supreme Court. Due to the precedent laid down in the Second Judges case[viii], the CJI's recommendation was binding. The President responded by requesting the Supreme Court for an advisory opinion under Article 143 of the Constitution on several questions of law pertaining to the collegium system of appointment The primary issues raised concerned the nature of

consultations between the CJI and other judges, the scope of judicial review in transfer and appointment of judges and the relevancy of seniority in making appointments to the Supreme Court.

All nine judges involved gave a unanimous judgement authored by S.P. Bharucha, J. The number of judges the CJI was required to consult was increased. The collegium was to have five judges rather than three, as decided previously. It was clarified that even if the next CJI was not among the four senior-most judges in the court, he would nonetheless be a part of the collegium. Furthermore, the President's discretion in deciding the appointments was curtailed if there arose a difference of opinion between him and the CJI. This was a significant departure from the Second Judges case where the President could accept or reject the recommendation if other judges in the collegium disagreed with the opinion of the CJI. Now, the President had to mandatorily refuse the CJI's recommendation if it went against the views of three or more judges of the collegium. Moreover, the emphasis on seniority while making appointments to the Apex Court was watered down. Henceforth, criteria like merit or enhancing regional representation could be grounds for appointing judges regardless of seniority. The court also limited judicial review of the appointments only to those instances where the decision-making collegium was not duly constituted, the views of the relevant judge was not sought, or the judge appointed was not eligible for the position.

THE THIRD JUDGES CASE, TWO DECADES ON

A judgement speaks as much through its silences as it does through the written word. For a court that rarely misses the opportunity to borrow from foreign opinions, it is conspicuously mum in the Third Judges case on any discussion or analysis of how judicial appointments are made in other jurisdictions. The judgement does not discuss the ever- present problems of vacancies or procrastination in judicial appointments that afflict the dispensation of justice in this country. It is also silent on how the consultations of the collegium would be conducted, whether minutes of the meeting would be made public or what standards of assessment would apply while evaluating potential candidates. Despite giving considerable space to *merit* and *seniority*, no mention is made of promoting inclusivity and diversity in the judiciary. This particularly damning when contextualized with the fact that at the time this case was decided,

equality jurisprudence was fairly advanced and social justice as well as equality of status and opportunity had been declared to be basic features of the constitution.[ix] It should come as no surprise then that even in this day and age, the representation of women in the higher judiciary continues to be appalling. Several High Courts do not have a single woman judge and perhaps no High Court in India has woman judges exceeding single digit numbers.[x] Furthermore, much of the higher judiciary remains the bastion of the forward castes and classes and no remedial measures to correct the state of affairs seem to be forthcoming.

The collegium system lacks transparency and therefore creates an environment that is conducive to nepotism and favoritism. More than twenty years down the line, the collegium system has come to be criticized for creating an "*imperium in imperio"* within the Supreme Court.[xi] Even Justice J S Verma, who was a part of the panel of judges who delivered the *Second Judges* judgement in 1993, expressed his displeasure at the verdict many years later, having witnessed the shortcomings of the system.[xii]

A BETTER WAY FORWARD?

Any critique of the decision in the Third Judges case would necessarily involve a critique of the collegium system. Since independence, from a passive interpreter and enforcer of the law, the Supreme Court has gone on to progressively take up a more activist role and even forayed into law making, (which has sometimes been attacked as judicial overreach). However, the court's ever-expanding power has not been met with a consequent rise in accountability or transparency. To remedy this, it is not necessary that one has to take the route of National Judicial Appointments Commission. A solution can be found by restructuring and changing the collegium as it exists presently.

The Third Judges case could have made it mandatory to release a full public record of the deliberations made during the collegium's proceedings, which would then be subject to judicial review- similar to the process followed by the Judicial Service Commission in South Africa. The judgement could have also taken a leaf out of American judicial appointments and mandated that all recommendations of the collegium would undergo public hearings undertaken by a Judicial Committee. The purpose of the hearings would be to ascertain the candidate's political views and whether the candidate possesses any incriminating record. This

is important since far too often, judges have been appointed to senior posts when they have been facing charges of misappropriation, corruption, and even sexual assault. Alternatively, an impartial commission could be set up, that would look into complaints made against judicial officers.

The Judicial Committee would be appointed by the Houses of Parliament and would comprise of Members of Parliament (from both the ruling coalition and the opposition benches), eminent Jurists, prominent members of the Bar/ or Advocates on Record Association and Chief Justices of the High Court. The committee will not have the power to recommend judges but could reject the recommendations of the collegium if the candidates seriously fall short of the standard of integrity expected out of an incumbent occupying judicial position. The final say in recommending the judges would rest with the collegium *and* the President. The independence of judiciary is important, but the doctrine of separation of powers, as propounded by Montesquieu, does not advocate for any single branch of the state to completely insulate itself (as the collegium system in the Third Judges case does). To prevent the tyranny of any single branch, it is advisable that instead of being entirely distinct from one another, the executive, legislative and judiciary have limited overlap in jurisdiction and authority in some areas.[xiii]

An even more radical change would be to expand the set of individuals who can suggest judges to the courts of record. Any judicial officer in the country can suggest an eminent professor of law, judge or litigator to the collegium who can then evaluate and accept or reject the candidate for further committee hearings. It should be binding on the collegium to encourage diversity in appointments similar to the practice followed by the Judicial Appointment Committee in Britain. Further, criteria such as the candidate is "appropriately qualified" and "fit and proper" can be employed in the evaluation of candidates (as is followed in South Africa).

ENDNOTES

[i] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford Clarendon Press, 1966) p 176.
[ii] Harsh Gagrani, 'Appointment or Disappointment: Problem and Perspective to the Appointment of Judges in the Indian Judiciary' (2010) NLIU LR 43, 44.
[iii] ibid.
[iv] ibid.
[v] AIR 1982 SC 149.
[vi] (1993) 4 SCC 441.
[vii] Working Paper No.1/2014, Recasting the Judicial Appointments Debate: Constitutional Amendment (120th Amendment) Bill, 2013 and Judicial Appointments Commissioner Bill, 2013, Centre for Law and Policy Research.
[viii] (n 3).
[ix] Indra Sawhney v Union of India and Others AIR 1993 SC 477.
[x] India Justice Report: Ranking States on Police, Judiciary, Prisons & Legal Aid (2019) <https://www.tatatrusts.org/upload/pdf/overall-report-single.pdf> accessed 7 November 2019, p 68.
[xi] Ajay Thakur, 'Appointment of Supreme Court Judges in India & Necessary Judicial Reforms' (*IP Leaders Blog*, 1 March 2017) <https://blog.ipleaders.in/appointment-of-supreme-court-judges-in-india/> accessed 7 November 2020.
[xii] ibid.
[xiii] James Madison, Federalist No. 47, 1778.