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The Collegium: Politics of Separation of Power

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ABSTRACT

The paper aims to critically analyze the judiciary and its separation from the legislature and the executive. It attempts to bring to light the unconscious bias of judges because of being a part of civil society. It dissects the history of the collegium through Constitutional Assembly debates, several landmark judgements whilst contextualizing the same in the present political system. In addition to this, the paper also elucidates on the impact of the Emergency on the Collegium system and how the Executive assumed great power over the same.

Keywords: Separation of Power, Judicial Independence, Collegium politics, Executive power, Emergency.

I. INTRODUCTION

In any democratic country, it is imperative that institutions interact with one another. This means that in any given situation, an institution cannot function in a vacuum. The judiciary is not an exception to this, they too are influenced by the political climate and the on-going social movements in the country². As Benjamin Cardozo emphasized, the “socio-economic background and upbringing of a person appointed as a judge could influence the discharge of his functions”³, this exists solely because they are a part of society⁴. However, this is subconsciously done and there is no active effort made by the judiciary, more specifically the judges, to include their political bias in their judgements⁵.

One of the key features of the judiciary is that it is the only independent body of the three organs

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² S.P. Gupta v Union of India, *The First Judges' Case*, (1981) Supp SCC 67, “Judiciary cannot stand aloof and apart from the mainstream of society.”

³ Justice (Retd) B.N. Srikrishna, *Judicial Independence*, CHOUDHRY ET. AL, OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 387 (2016).

⁴ see Sumit Baudh, *Invisibility of "Other" Dalits and Silence in the Law*, 40 UH 222, 228-229 (2017). Society, more specifically common sense, influences the way one interacts with the law and other institutions around them. One's identity plays an exponential role in the way they understand the law and the law views them. For example, Kiran (a disabled transgender SC/ST) law looks at him differently, i.e., as someone with multiple identities, as compared to someone who is from a dominant group. This shapes one understanding, rather unconsciously.

⁵ S. P. Gupta v. Union of India., (1981) Supp. SCC 67, Bhagwati J, “freedom from prejudices acquired and nourished by the class to which the Judges belong...”

of the government, i.e., legislative and executive⁶. The aim of this is to ensure that they are not influenced by the ones in power (mostly the decisions of the executive) and enjoy complete freedom while making a judgement. As Justice Krishna Iyer states, the duty of the judiciary (“the Judge”) is to uphold the “founding faiths and fighting creeds of the nation so set forth”, the need to be separate and unaffected by “socio-economic pressure”, or that by the executive⁷. The aim, through this paper, is to understand the independence of the judiciary (if any) and the developments that have been brought about in the same.

To understand the history of the role of the Chief Justice, it is imperative to understand that the discussions regarding political influence in the same were greatly debated in the Constituent Assembly Debates. In fact, Ambedkar stated that the power given to Judges (in terms of consultation) did not amount to them having complete control in the selection process⁸. The need is to have a mechanism wherein the judiciary remained independent, but their power is kept in check (so that one person does not have ultimate power).

II. WHERE DOES THE POWER START AND WHERE DOES IT END?

In *Union of India v Sankalchand Himmatlal Sheth*⁹, the question before the court was understanding the importance of the word ‘consultation’ present in Article 124¹⁰ and 217¹¹. The decision that the court came to, in accordance to Justice Chandrachud’s opinion, was that the word ‘consult’ merely meant a discussion or “conference of two or more persons” wherein the final solution was just, correct, or even “satisfactory”¹². It was specified by Chandrachud J that the solutions given to the Government by the Chief Justice will take precedence over any other decision¹³. The judiciary came to the conclusion that the consultation with the Chief Justice was of utmost important and is central to the separation of power¹⁴ (to ensure that the judiciary performs its duties “without fear”¹⁵).

This brings in the question of the collegium and whether or not it is separate from political

⁶ Horizontal structuring. Montesquieu’s understanding of power paves the way for the protection of liberty of the individual, focusing on the fact that if the judicial and executive powers are vested in one body, it will lead to a tyrannical force.

⁷ Justice B.N., *supra* note 3, at 387 “[I]n a dynamic democracy, with goals of transformation set by the Constitution, the Judge, committed to uphold the founding faiths and fighting creeds of the nation so set forth, has to act heedless of executive hubris, socio-economic pressure, and die-hard obscurantism.”

⁸ CAD vol VIII, 258 (24th May 1949).

⁹ (1977) 4 SCC 193

¹⁰ INDIA CONST. art 124

¹¹ INDIA CONST. art 217

¹² *Union of India v Sankalchand Himmatlal Sheth*, (1977) 4 SCC 193 (39)

¹³ *Id.* (41)

¹⁴ INDIA CONST. art 50, “Separation of the judiciary from the executive”

¹⁵ INDIA CONST., sch 3, It specifies the oath affirmations for Judges (Supreme Court and High Court).

influence. In the *Second Judges' Case*¹⁶, the decision of *S.P. Gupta*¹⁷ was reversed and it was affirmed that in terms of appointment of judges in the higher court, the Judiciary should have a say instead of the Executive. The idea was such that the Chief Justice, along with their “consultees in the superior judiciary” who are to select the next Chief Justice (while consulting the Executive)¹⁸. The idea of the collegium, as it stands today, is a system that is based on primacy of judges¹⁹ and was established through this case.

The *Second Judges' case*²⁰ highlighted the primacy of the Chief Justice, accompanied with the two senior most judges, stating that it is them who represent the opinion of the judiciary as a whole. The objective of the collegium was clear, to appoint those who are the most capable of handling the position (this was not solely based on seniority but also merit²¹). However, the question before the court in *Special Reference No 1 of 1998*²², was the composition of the collegium²³. Also known as the *Third Judges' Case*²⁴, the court decided to increase the members in the collegium from two to four senior-most Judges of the Supreme Court for Supreme Court appointments and two senior-most Judges for High Court appointments, who will have control over its functioning²⁵.

Several questions were raised by the people due to the Judiciary being *too* separate, i.e., lacking transparency, no accountability, and questionable selections. This led to the Ninety-ninth Amendment, which was with regards to National Judicial Appointments Commission Act 2014²⁶. The idea was to create a system wherein the executive would also have a say in the appointment of judges. In fact, Article 124A (proposed amendment) sought to create a “six-

¹⁶ Supreme Court Advocates-on-Record Association v Union of India, (1993) 4 SCC 441.

¹⁷ (1981) Supp. SCC 87, it was decided that the term consultation in Article 212, 222, and 124(1) meant that the Chief Justice had to consult with the two most senior judges before sending in their opinion (who is to be appointed). The idea behind this was such that the Chief Justice along with the senior judges could merely provide an opinion but the power finally rested with the Central Government to appoint whoever they thought was fit. This meant that the judiciary did not have primacy.

¹⁸ Justice B.N., *supra* note 2, at 390.

¹⁹ Gautam Bhatia, *The Sole Route to an Independent Judiciary?: The Primacy of Judges in Appointment*, in APPOINTMENT OF JUDGES TO THE SUPREME COURT OF INDIA: TRANSPARENCY, ACCOUNTABILITY, AND INDEPENDENCE 135 (Arghya Sengupta, 2017)

²⁰ (1993) 4 SCC 441.

²¹ Justice B.N., *supra* note 3, at 390

²² (1998) 7 SCC 739

²³ It was also made clear that the appointment of judges was now solely based on off of the decisions of the collegium of the Supreme Court.

²⁴ (1998) 7 SCC 739

²⁵ Arghya Sengupta, *Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry*, INDIAN J. CONST. L 99, 107 (2012), “Additionally, the senior-most judge of the Supreme Court acquainted with the High Court from which the potential candidate hailed (for Supreme Court appointments) and to which High Court the candidate was proposed (for High Court appointments) would have to be consulted. Further, the Chief Justice of the High Court too, in forming his opinion, would have to consult his two senior-most colleagues.”

²⁶ Which gave rise to the *Fourth Judges' Case* [(2016) 5 SCC 1] wherein several judges challenged the constitutionality of the said amendment.

member National Judicial Appointments Commission (NJAC) of which only half the members were to be judges.²⁷”

A study of this shows us the importance of the collegium (who are the ones who have the final say) when appointing judges of the High Court and the Supreme Court²⁸. The *Third Judges’ Case*²⁹ made it concrete that judicial primacy with regard to the was a primary feature of the independence of the judiciary, thereby, a part of the Basic Structure of the Constitution³⁰. What the Ninety-ninth Amendment did was eliminate the collegium³¹ since it gave extensive power to the executive. The court decided to strike this amendment down as violating the Basic Structure Doctrine³².

III. HISTORY OF APPOINTMENT

To understand the decision of the judges in the aforementioned cases, the historical context is essential to come deduce what the collegium was planning to do. The appointment of judges was greatly affected during the Emergency under Indira Gandhi³³. The aim of the collegium was to eliminate political influence in any way shape or form. The striking down of the Ninety-ninth amendment is testament to the Judiciary’s separation from the other bodies. This separation should not only be from the executive, which is a separate and visible body, but also from other forms of power that might influence the decisions of the judges³⁴. What this means is that a Judge in themselves should be independent from any sort of influence which in turn will lead to an “impartial adjudication”³⁵ from the Judiciary.

Judicial independence is an essential to adjudicate without political influence³⁶. When the

²⁷ Justice B.N., *supra* note 3, at 392

²⁸ Gautam, *supra* note 19, at 135, “the judiciary makes the initial selection, and has the final or ultimate voice, in the appointments of judges to the High Court and the Supreme Court”.

²⁹ (1998) 7 SCC 739

³⁰ Justice B.N., *supra* note 3, at 391, The Supreme Court delivered a judgement wherein this was struck down stating that the collegium is a system that works on participation and hence it would be wrong to call it a system giving excessive power to the judges. Moreover, it is imperative that the Judiciary is separate from the executive and acts as an independent body. The majority opinion rested on the fact the amendment would be violative of the constitution as it would blur the line between the executive and the judiciary.

³¹ *Id.*, at 392, The amendment replaced Article 124 and the word ‘consultation’ with the NJAC, “Further, it provides that Parliament may, by law, regulate the procedure for appointment of Judges and empower the National Judicial Appointments Commission to lay down procedure by regulation for the discharge of its functions, manner of selection of persons for appointment and such other matters as may be considered necessary.”

³² Supreme Court Advocates-on-Record Association v Union of India, AIR 1994 SC 268

³³ Justice B.N., *supra* note 3, at 394, “this system was a reaction to the political dominance over the appointments process of Supreme Court judges that came about during Indira Gandhi’s term as Prime Minister.”

³⁴ *Id.*, “Judicial independence must be guaranteed, not only against any attempt to directly influence the outcome of litigation, but also against more subtle ways of putting pressure on the judiciary. This is why constitutions usually guarantee the impossibility of removal of judges and often a sufficient salary, to mention only a few devices.”

³⁵ Arghya, *supra* note 25, at 107

³⁶ However, separating oneself from the environment in which ones lives in is impossible. Hence, there exists

Constituent Assembly granted power to the President (along with the Council of Ministers) to ensure that the judges are appointed, what they did was make it clear that it was inherently an “executive function”³⁷. The seemingly ‘apolitical’ sphere in fact requires the assent of the Executive, the introduction of ‘consulting’ the Chief Justice was to ensure that the Judiciary also had power in deciding how it functions (and also to ensure that the Executive does not usurp the power of the Judiciary)³⁸.

The tussle between the Judiciary and the Executive is an on-going debate, it started post-independence. As seen during the Emergency, when the Executive appoints judges, it does so keeping its own interest in mind. What this means is that the ideologies of the appointed judges is such that it congruent with the ideas of the party in charge³⁹. Therefore, it was decided that the Chief Justice needed to have some freedom in order to decide the appointment of judges.

The 14th Law Commission Report lead to the belief that the Judiciary is supposed to be a non-politicized zone where the videos of the Chief Justice (in terms of appointment) was seen to be a neutral standpoint, away from the political influence⁴⁰. However, to state that the Judiciary is bound by the Executive would be wrong. In the *Second Judges’ case*⁴¹ it was seen that the Chief Justice has immense power in the appointment process, so much so that the checks and balances process by the Executive failed exponentially. As Arghya Sengupta states, the executive control was replaced by the judicial control “without setting out an appropriate process by which checks and balances could be implemented was thus a key failing of this decision and its attempt to secure judicial independence in the appointments process.”⁴²

The power of the collegium is such that the exercises supremacy over the appointments, so much so that the Executive merely acts a ‘puppet’ that merely accepts the decisions of the collegium⁴³. What this does is eliminate the possibility of the Judiciary being questioned (thereby having no accountability, a concept that was explain by Bhagwati J in the *First Judges’ case*), the lack of check and balances also “renders public questioning of the executive in relation to judicial appointments futile as the executive inevitably pleads helplessness.”⁴⁴

political influence in the ways that often skip the eye.

³⁷ Arghya, *supra* note 25, at 116

³⁸ *Id.*

³⁹ Arghya, *supra* note 25, at 117 “governmental quest for a ‘committed judiciary’, appointing judges on the basis of their social and political philosophy as determined by the executive, thus conclusively resulted in the view that any executive role in the appointments process would lead to an automatic erosion of judicial independence. “

⁴⁰ Law Commission of India, ‘Reform of Judicial Administration’ (14th Report 1958) 34.

⁴¹ (1993) 4 SCC 441.

⁴² Arghya, *supra* note 25.

⁴³ *Id.*, at 124, Any objections to the decision of the collegium can be overridden by them. The role of the executive is marginal, and the decisions of the collegium is what is widely accepted.

⁴⁴ *Id.*

IV. CREATION OF SEPARATE POLITICS

It is commendable that the Supreme Court is able to stand independent from influence, especially from the Ninety-ninth Amendment. However, the Judiciary (even though they are separate from political influence) has a system of its own, which obstructs one to question the institution. For example, the appointment of Judges in situations wherein there have been reports against them⁴⁵ is clearly against the decision made in the *Third Judges' case*⁴⁶. This goes to show the tools provided, i.e., judicial reviews, are also ineffective in checking the power of the collegium. Moreover, the 'politics' that goes on within the collegium also cannot be questioned and checked by the public. The independence of the judiciary is not merely limited to the influence of overt political power but also from undercurrents of political influence. Owing to the lack of transparency and accountability, it only begs the questions if the judiciary is truly independent.

⁴⁵ Arghya, *supra* note 25, at 125, "The tendency of the judiciary in this case, which challenged the decision of the Chief Justice of India to appoint Justice Ashok Kumar to the Madras High Court despite adverse reports against him and without consultation with the collegium in clear violation of The Third Judges' Case... relative inefficacy of judicial review as a means of checking the power of the collegium."

⁴⁶ (1998) 7 SCC 739.