

JEJUNE JURISPRUDENCE OF JUICIAL APPOINTMENTS BY A HIGHEST RULING OF A HIGH BENCH

An innovative instrumentality for nomination of appointees to the higher judiciary by a pro tem collegiums composed of the senior-most Supreme Court judges: An egregious fabrication, a functioning anarchy. A frank, sad, but respectful reflection is that a high-powered appointing authority has been hijacked from the Prime Minister by a Constitution Bench. This has led to an odd imbroglio in Judicial Appointment Jurisprudence. Pursuant of the sensitive, transparent truth, however subversive and unconventional, is the only object of this essay.

Craft must have clothes, but truth loves to go naked
(Thomas Fuller)

Every authentic democracy is run by a hallowed trinity of high instrumentalities with constitutional credentials, each circumscribed in its limited supremacy but in search of happy institutional harmony and operational discipline. The Judiciary corrects the Executive when in error, excess or arbitrariness,

without fear or favour. The Legislature, enjoys a law-making function and national inquest obligation, but, when it acts beyond constitutional contours or restraints, the Court has the authority to control or quash, the ultimate test being the mandates of the *suprema lex*. Subject to this judicial check, the House is sovereign. But when the High Bench itself breaches legal bounds or breaks out of fundamentals, only a larger bench or constitutional amendment can set matters right or save the nation from 'robed' arbitrariness. So plenary is the judiciary in its final authority to decide on many matters, on disputes between States and on issues of constitutional law. Therefore, the power to appoint the members to this lofty office is of critical moment and supreme significance. Paramounty is paramouncy and savours of superlative stature in the case of the Supreme Court as an instrumentality. So, who appoints the judges, invigilates their behaviour and performance and determines their destiny in cases of proved delinquency holds the Everest of State Power. An occult forensic trinity, a novel collegium of the Apex Court judges accidentally senior, a robed mystery good on the Bench but marginally qualified as selecting agency sans investigative professionalism, sans guidelines and where to look for

information on character, antecedents, bar practice, legal scholarship and methods of interrogation and written tests and what not, sans training in professional parameters for judge selection will never fill the bill. What a cult is such a modus? To be a judge is not a substitute for versatile genius. It violates all noesis and commonsense to empower a lay Collegium which has no constitutional foundation except a self-serving ruling. The court is under the Constitution and not over it and cannot invent institutions and vest Constitutional authority on itself by a Bench majority.

A bizarre war waged between two great instrumentalities of the Republic (the Executive and the Judiciary) has plunged the nation in a political power polemic leading to chaos, pathos and bathos. Imagine a constitutional quandary perplexing the relations between the top echelons of the Apex Judiciary and the tall holders of Executive Authority! Never in the past anywhere in the democratic world has the high judiciary been empowered to make the final choice of the members of the superior courts, wresting this power completely from the Executive. Why this volte-face? What is the rationale for this coup de main revolting against precedents and plain constitutional provisions? What has

worked so long without scandalizing the System has provoked a reversal?

A specious ratiocination has prevailed with a nine-judge Bench which has ruled, based on a paper-thin five....four majority, that the Independence of the Judiciary is a sacred (superstitious) constitutional principle and that this inviolable doctrine will be breached if the Executive wields the power to appoint judges. That is the discovery of the court which held that a Collegium of the highest judiciary shall exercise this great power all by itself. Who gave the Court this supreme power, almost the highest under the Constitution especially when the issue had specifically been raised in the Constituent Assembly and Dr. Ambedkar, the architect of the Drafting Committee had categorically clarified that this power would not be parted with in favour of the Chief Justice who would be consulted but whose concurrence would not be made imperative? In this background it may not be unreasonable to contend that the Supreme Court has usurped from the Cabinet what does not belong to it. Is the independence of the judiciary rendered vulnerable by the Highest Executive becoming the appointing authority? No, perhaps with rare exceptions.

The appointment of the higher judiciary since the days of Nehru has invariably mean with the knowledge and largely with the approval of the Chief Justice. A certain political element perhaps has infiltrated into the selection which is unfortunate. But to hold that the appointees were chosen mainly out of political or communal considerations or other extraneous factors is an exaggeration and an absurd accusation. Were Justices Rajamannar, Chagla, Subbaravu Hidayathulla or Gajendra Gadkar—any number of instances can be cited. Were not many of them aggressively independent, non-communal, secular and models of erudition and impartiality?

I myself was once the Home Minister in the Kerala Government run by the Communist Party of India and was chosen for judgeship by Madam Indira Gandhi, Leader of the Congress Party (which had opposed and overthrown the then Leftist Kerala Government).

History has on record the classic instance of President Eisenhower the then great leader of Republican Party of USA and President of USA having appointed the celebrated Earl Warren who was Governor of California as a Republican Chief to be the Chief Justice of the U.S Supreme Court. This unique Chief Justice

created history by becoming the most progressive judicial protagonist and Leftist wonder to the disappointment of President Eisenhower. Chief Justice Earl Warren was absolutely independent, extraordinarily radical and gloriously advanced in values. Every judge anywhere in the world must read and re-read the episode relating to Earl Warren which I quote:

An anonymous message was sent to Earl Warren when he assumed charge as Chief Justice in the then prevailing oppressive climate of Macarthy's Witch-Hunt - "Too many timid men have kept silent in the face of roving persecutions by the Senate. I submit it is your duty as a citizen of this country to add your voice of protest against the morauding bands ambushing our freedoms". Earl Warren referring to this letter stated in public that his mission was "Where there is injustice we should correct it, where there is poverty, we should stamp it out, where there is violence, we should punish it and where there is neglect, we should provide care".

British judges by and large have commanded the confidence of the people for integrity and ability has anyone imputed partiality to Lord Atkin, Lord Scarman, or Lord Denning Who have won the admiration of jurists in the English speaking world Chief Justice Marshall of the USA was politically chosen but is regarded as perhaps the greatest Chief Justice of the US. President Nixon lost his case at the hands of the judges whom he had himself appointed. It is outrageous to dismiss, as a casualty

judicial independence on the score that the Prime Minister had a decisive voice in appointing them. The ruling in AIR 1965 SC 745 is in my humble view a grave error, a grievous blunder with all respect to the great judges in the majority who thought so exaltingly about judicial Independence. This doctrine of Independence as a ground for seizing the authority to nominate members for the High Bench is a baloney.

Independence of the Judiciary is a great guarantee and shall be transcendently kept beyond the sole power of either the Cabinet or the Apex Court. So it is an imperative that an independent council of Commission shall be created to advise the Rashtrapati on the selection and appointment of high judicial echelons. What the basic structure of this sensitive and superlative organ will be discussed later.

Decades ago a berserk crisis arose between the Allahabad High Court and the U.P. Assembly with both great institutions issuing warrants of arrest against one another and the issue was constitutional. A grave legal disaster could have happened but history avoided it. How was it averted? Legality wins over tension only when humanity springs to heights of vision. At that critical time we had a grand statesman at the top

of the Executive Sri. Jawaharlal Nehru; at the top of the Judiciary we had Justice Gajendra Gadkar vide Special reference No.1 of 1964.

The Indian nation has a perennial genius to rise to the occasion whenever confronted by a seemingly inscrutable dilemma. Dear Dr. Manmohan, Dear Chief Justice Balakrishnan, India expects its noble holders of high officers to rise and resolve every national crisis. You too are placed in a historic context. Yes, we can. You are not mere individual with pomp of office but symbols of paramount instrumentalities. The problem is not personnel but national. Your stature is too high to be a caricature let in the nation down over a power struggle and institutional rivalries. We shall over come, because India, that is Bharat is too majestic to surrender before vanities and futilities. Our vision and mission, as a nation, is supreme.

The Constitution, in the wisdom of its Founding Fathers has vested the power of appointment of the judges of the High Courts and Supreme Court in the President of India. The President, governed by the longstanding Conventions of Westminster vest in the Council of Ministers (vide Shamsheer Singh's case).

I was scandalized by the majority verdict based on the cult of Independence. Judges should certainly be free from Executive pressure or pleasure or temptation to amass a treasure by resort to any social or economic measure to win the goodwill of the proprietariate or theological high priests. Their social philosophy and economic ideology may sharply vary from the Preamble to the Constitution. Allergy to socialism, affection for communalism, attachment to causes of equality and democracy and such like values vary from judge to judge but most of them have a class consciousness which unwittingly affects their interpretation of laws and understanding of facts. Prof. Griffith in his book "The Politics of the Judiciary" has argued clearly that Independence and impartiality have serious limitation vis a vis the higher judiciary. Even Winston Churchill once said in Parliament:

.....where class issues are involved, it is impossible to pretend that the courts command the same degree of general confidence. On the contrary, they do not, and a very large number of our population have been led to the opinion that they are, unconsciously, no doubt, biassed.

'Where are your impartial Judges? They all move in the same circle as the employers, and they are all educated and nursed in the same ideas as the employers. How can a labour man or a trade unionist

get impartial justice?’ (Lord Justice Scrutton in an address delivered to the University of Cambridge Law Society on 18 November 1920 (1 Cambridge Law Journal p.8)

I emphatically plead for an Appointment Commission free from the Executive and also from the Judiciary although the Chief Justice of India may be formally the Chair Person.

In a democracy even the judiciary must share a people-oriented dimension even at this stage of appointment. In the USA where the President nominates the Senate Judiciary Subcommittee exposes the nominee to democratic criticism without inhibition and untravelling every angle of the candidate's class antecedent character and other socio-economic factors relevant to his role as potential judge of the Supreme Court. In the British jurisdiction the Lord Chancellor used to choose judges after due enquiry. This lead given rise to criticism of partiality plus plus but now a remarkable transformation in the appointment of judges has come into effect. The Lord Chancellor has virtually withdrawn from the selection process and even from his judicial role. On the contrary, a council has come into existence which take in a few Law Lords, a few lay persons of outstanding public life and yet others who make the selecting

agency composite public-spirited and eliminating any controlling voice of the Executive and the Judiciary. Judges have large powers and must therefore be accountable as trustees to the people in the discharge of their duties. Even their appointments must have a democratic dimension. One may recall, in conclusion, an old Roman adage: "Whatever touches us all should be decided by all".

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