THE JUDICIAL APPOINTMENTS CONUNDRUM

BY: SAURABH SINHA

The appointment of judges to the higher judiciary has been going on through the collegium method at present. The last Memorandum of Procedure (MoP) over which the government and the judiciary seemed to have agreed a few months back later proved to be a damp squib. The Court had earlier in October, 2015 quashed the National Judicial Appointments Commission Act.

Since the procedure agreed upon was not closed in a watertight compartment with possibility of leakages, contentious issues were bound to rake up again with bleak chances of an amicable settlement breaking the decades old deadlock.

This is because of the inherent flaws in both the systems of appointments viz. the collegium and the now quashed NJAC or even the executive having a say in the appointments process with a heavy

Dis-balance between opaqueness and independence. Even while the government is deliberating on a new MoP, the Supreme Court, in order to ensure transparency, recently decided to upload collegium meetings decisions on its website. Though, this is a welcome first step, it will not completely serve its purpose. What the Supreme Court has decided is to provide the details of its decisions regarding recommendation of a particular person for elevation to the bench and the reasons thereof. It will include all relevant particulars of the candidate to be elevated. However, the initial and moot question of selection process still remains unanswered. What the Supreme Court is doing is providing information regarding reasons for its decisions with no option of questioning the reason.

There is no better option to select a candidate for a particular job than by conducting an examination for a particular post. It may be in the form of a written test or interview or only the latter as per the nature of requirement of the post. The main thrust here therefore, will be to highlight the third alternative as it ensures the greatest level of transparency and fairness

The MoP, even if it had worked out successfully, was bound to create future confrontations as the collegium was vested with the supreme powers with the government only being given an advisory role under the garb of reaching an amicable solution. The rejection or selection of a candidate on the ground of national security or otherwise has thus become the sole prerogative of the collegium and vulnerable to personal predilections.

The veil of opaqueness remains with the larger question of competence and suitability to the particular role with a pragmatic selection process remaining unanswered.

In this scenario the best course of action would be to contemplate any other alternative which would become a much better substitute to the other two.

Before embarking on a journey to discover this procedure, it would be wise to closely scrutinise the present system of selection of judges across all levels of hierarchy. A lot has been written on the appointments process and the collegium controversy since the time it arose, hence I would not delve into the First and Second Judges case[1] but a little explanation about the recruitment of judges would suffice.

THE SELECTION PRODCDURE

Under the Indian Judicial System, there are three ways in which one can become a judge. Appointments to the post of civil judges[2] is done by the Public Service Commission of the

[1] The reference about the cases have been made many times in the newspapers and many readers might be well aware
[2] Officers other than District Judges

respective state, under Article 234 of the Constitution after conducting an examination and is made by the Governor after consultation with the High Court.

Appointments to the post of District Judges also known as the Higher Judicial Service (HJS) is also made by the Governor of such persons who have been advocates of not less than seven years standing and the examination in this case is conducted by the High Court under Article 233 of the Constitution.

Appointment of persons as High Court Judges is done under Article 217 (2) of such persons who have held a judicial office for not less than ten years or has been an advocate of a High Court for not less than ten years.

It is pertinent to mention that the controversy regarding appointment of judges has always been with respect to the higher courts who are directly elevated to High Courts or Supreme Court, the names of whom are recommended by the Chief Justice of the state or the Supreme Court Collegium. It has been a bone of contention since it is generally not known what has been the selection criteria for recommending the names and to what extent and how the merit is measured and plays a role. The judges of the subordinate judiciary are selected by a reasonably fair selection process and hence there are lesser number of questions being raised with respect to their selection.

Since elevation of judges from the District Courts also known as subordinate courts is initially done through a multi-level examination, with a reasonably fair selection process, the notification for which is done/made in newspapers, there is not much controversy with respect to these.

The elevation of persons as High Court Judges is in the ratio of 65:35 i.e. 65 percent from the Bar and 35 percent from the service which includes judges appointed both under article/s 233 and 234 (the ratio might vary in some states).

To resolve this anomaly the Constitution was amended in 1977 to provide for the creation of an All India Judicial Service under Article 312 (1) of the Constitution. The judges to be selected under this article were to be recruited through an All India Examination to be conducted by the Union Public Service Commission (UPSC). It would have been similar to the Civil Services Examination (IAS) conducted by the UPSC for recruitment to the executive branch of the Government.

However, after more than four decades of the Constitutional amendment, the service has not seen the light of the day. Since the creation of the service would also require concurrence of the states, it was another roadblock in its creation as many of the States had expressed certain apprehensions.

THE ROADBLOCKS

To allay the fears, the Law Commission of India, in 1986, submitted its 116th report on the creation of an All India Judicial Service to the government effectively dealing with all the apprehensions which would have been an impediment in its creation. Amongst the objections, the foremost was the fear of erosion of control of the High Court over the subordinate courts as the candidates would be recruited through an All India Examination. The Law Commission set aside the apprehension by clarifying that after clearing the All India Examination, the candidates would be posted in the states and hence would be fully under the control of the High Court's under Article 235.

The second apprehension of language for writing judgments or understanding the deposition of witnesses as the selected candidates might not be allotted their home cadre was dealt by establishing the link between a judge and a witness/client through the lawyer who would deal with the language problem as he would very well be conversant with the local language of the

state. The Commission further stated that learning the local language of the State by the candidate may not be that difficult.

There have also been apprehensions from many quarters regarding bleak future promotion prospects of judges selected under Article 234 if an All India Judicial Service is created. To deal with this, drawing an analogy of the judicial services with those of the executive branch of the government would lead us to a better understanding and outcome.

THE SERVICE COMPARISON

Recruitment to various civil posts for the executive branch of the government[3] is done through Civil Services Examination which is held both at the Central and State level. The State level examination is conducted by the Public Service Commission of the State while the Central Civil Services Examination (IAS) is conducted by the Union Public Service Commission[4]. A candidate possessing the prescribed minimum qualifications for any post can appear for both the Central and State Civil Services Examination. Many candidates make unsuccessful attempt to pass the litmus test of the UPSC, but qualify the State Civil Services examination with a good rank. This does not however, puts a permanent brake on their prospects of becoming an IAS as each state service has a certain amount of quota for their officers[5] for getting entry into the Central Civil Services.

Those qualifying the UPSC directly, undergo a rigorous training and many of them have become the steel pillars of the nation proving their competence and merit both during the selection and while in service leaving no stone unturned to become the best policy planners.

Speaking comparatively, the judicial service examination should also be held both at the central and the state level akin to the Civil Services Examination. The state level examination

[3] Also referred to as the bureaucracy
[4] Recruitment to both types of services done under Article 320 of the Constitution
[5] Top rank holders

should continue under article 234 and direct recruitment through UPSC should be made by creating an All India Judicial Service under Article 312.

Even if the fears of the judges of the subordinate judiciary[6] is taken on its face value to be true, on a deeper analysis of the entire situation, it can reasonably be concluded that the promotion prospects are already dented to a certain extent by judges selected under Article 233 by the High Court after seven years of practice. The selected judges under this article are directly appointed as Additional District Judges (ADJ) and have a brighter chances of being elevated to the High Court than those starting their career as Civil Judges. Most of the judges selected under article 234 retire as District Judges or Additional District Judges[7]. On a critical thinking thus, it can safely be stated inferred the Higher Judicial Service is just a pseudonym for All India Judicial Service.

Moreover, the primary task of the High Court is of Justice Dispensation. It is already overburdened with the burgeoning number of cases and also has to deal with other administrative work. If the task of conducting examination is also handed over to it, other more important works are bound to suffer. A more practical approach would be to transfer this task to the UPSC which is a specialised body mainly created for the purpose of recruitment and also known for its credibility, competence and selection of candidates on merit and transparency by conducting various types of examination across all spheres of human activity. When each High Court already selects judges for the Higher Judicial Service, it is beyond comprehension why this cannot be combined to form a unified national cadre.

The reforms in the selection process should thus include:

1. Strike down article 233 of the Constitution and create an All India Judicial Service under article 312. Article 234 should remain.

[6] Promotion prospects being hampered because of the creation of an All India Judicial Service
[7] Unless selected at a very early age or belonging to a very small state where the cadre strength is not too huge

2. Dispense with the requirement of seven years of practice for appearing in All India Judicial Service, instead provide post selection training of two years similar to IAS.

It further needs to be clarified that those appearing for Higher Judicial Service Exam should not be barred from appearing for All India Judicial Service Exam (AIJS). At present they appear in the examination conducted by the High Court, the only change needed is to transfer this power[8] from High Court to UPSC that would usher in a new era of judicial selection. The candidates qualifying AIJS should be posted as ADJ's only. After serving in the subordinate courts for a certain number of years[9], they should be considered for elevation to the High Court.

For elevation of a District Judge to High Court, the name should not be sent by the High Court committee but instead an interview should be conducted by the Union Public Service Commission based on the number of experience of the suitable candidate as a judge and the Annual Confidential Report (ACR) of the past three years. This will ensure better transparency in the service.

Elevation of the Chief Justice of a High Court or a High Court Judge to Supreme Court should also be done through Union Public Service Commission by conducting an interview and recommendations sent to the President.

Just as an Annual Confidential Report (ACR) is prepared for judges of the subordinate court, on the same pattern Annual Confidential Report of the judges of the High Court should be prepared by the Chief Justice of the High Court. The ACR for the Chief Justice of the High Court and other Supreme Court Judges should be made by the Chief Justice of India. This will ensure better regulation and control of the judiciary. At present the High Court has administrative control over the subordinate courts under Article 235 of the Constitution but

[8] Conduct of Examination
[9] Five to six

the Supreme Court has no control or regulation over the High Courts in the country. Suitable amendments in the Constitution should be made to ensure the mechanism.

Presently the minimum and maximum age for appearing in Higher Judicial Service Examination is 35 and 45 years respectively. This should be reduced to 25 and 35 years and should be kept the same both for judges selected under Article 234 and 312. The UPSC might, however, restrict the number of attempts to five or six similar to the Civil Services Examination. Selection of judges through AIJS at a very young age through a rigorous selection process by the UPSC would enthuse the candidates with a fresh vigour and they might turn out to be better and competent judges.

Legal and intellectual experience, knowledge and agility must of course be requisites for judicial service. However, these qualities are not the preserve of the independent bar as opposed to the solicitors' branch of the profession or even litigation practice per se.[10]

The present 65:35 ratio of elevation to the High Court should be varied a little. Of the total strength in the subordinate Courts 50 percent seats for elevation to High Court Judges should be reserved for candidates selected through AIJS, 30-40 percent quota for promotion to the AIJS cadre should be reserved for candidates selected as Civil Judges under Article 234 and the remaining 10-20 percent should be from members of the Bar under Article 217 (2) or selection through the Bar should be done away with in which case the above mentioned figures might vary.

THE INDEPENDENCE CONTROVERSY

Another reason for striking down the NJAC Act by the Supreme Court was on grounds of curtailment of independence of the judiciary, as a broad based commission with

[10] The Judiciary: Why Diversity and Merit Matter: Shami Chakrabarti CBE as mentioned in Judicial Appointments Balancing Independence, Accountability and Legitimacy. Pg. 72

representation from the executive would seriously compromise and erode the independence of the institution.

This gives further strength to the demand for creation of an All India Judicial Service. Like all other constitutional bodies and functionaries, the UPSC is an independent institution free from any kind of interference during the selection process for recruitment to various posts. Its members are known for integrity and the candidates selected for various examinations are solely on the basis of merit in the most transparent manner without any credence to biasness or sycophancy.

During the past many decades the UPSC hardly has seen fingers pointed out at it on account of the above mentioned attributes. If selection through the Bar is done away with and all candidates are selected solely on the basis of examination, it would make judicial services more attractive to many bright aspirants who presently look for other avenues and career options after completing law, as selection through AIJS would give them an opportunity to reach up to the Supreme Court. At present the judges selected though HJS exam mostly retire from the High Court and in rare instances get a chance to reach the Apex Court.

The more talented the individual, the wider and more attractive his alternatives. The quality of recruits and their performance after appointment have always been exceptionally sensitive to intangible factors whose impact is not immediately obvious and which are not easily regulated by law.[11]

Although the present controversy with respect to erosion of independence of the Judiciary is talked about only with respect to the High Courts and Supreme Court, independence with respect to judiciary as an institution should be looked across all levels of hierarchy. Generally

[11] The Constitutional Reform Act 2005- Jonathan Sumption OBE QC as mentioned in Judicial Appointments Balancing Independence, Accountability and Legitimacy. Pg. 42

the term judicial institution imports independence from the other two branches of the government[12] of the institution as a whole.

As mentioned and explained earlier the selection process of the judges of the subordinate courts is different[13] from the higher courts[14] where the judges are selected mostly from the Bar. The moot points for deliberations are the following:

1. There cannot be different modes of selection process of judges at different levels of hierarchy. Even if there is, it cannot be a ground for questioning the independence.
2. It cannot be said that only the High Courts and Supreme Court are independent and the judges of the subordinate judiciary face interference in their day to day working from other branches of the government. The judicial institution should be seen as a whole when the question of independence arises and different levels of hierarchy cannot be segregated for determining independence.
3. No one has ever raised doubts about the independence of subordinate courts.

The executive and the judiciary tried to reach an amicable solution for appointments of judges to the Higher Courts. But due to the lacunas and inherent weakness even in the agreed procedure, with the prospects of future confrontations bound to arise, the deadlock remained. The push for a purer separation of powers and the corresponding removal of judicial appointments from the hands of the executive was understandable and appropriate in the context of enhanced role of the judiciary. However, this removal of the executive and it is a

[12] The legislature and the executive
[13] Selection through an examination
[14] High Courts and Supreme Court

vacuum that has, in large part, been filled by the judiciary itself. We have, in effect, "gone from one extreme to the other".[15] Future tug of war cannot altogether be ruled out.

A better alternative and a completely new selection procedure within the constitutional parameters as explained above appears the only plausible solution to break any future deadlock and find a permanent solution to the perennial problem. The only thing needed is the political will to implement the same.

[15] Lady Hale, evidence before the Constitution Committee, Autumn 2011 as mentioned in Guarding the guardians? Towards an independent, accountable and diverse senior judiciary: Professor Alan Paterson and Chris Paterson OBE, pg. 31