ISAS Brief

No. 397 – 20 October 2015

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The Judicial Appointments Debate in India: the need for integrity and transparency

The latest ruling by the Supreme Court of India against the government's project of the National Judicial Appointments Commission has further stirred a public discourse on the best means to have the best judges. Seeing the polarised debate on the independence of judiciary versus the supremacy of parliament as a false dichotomy, the author suggests that the best touchstone is the transparency of each constitutional institution.

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India's Constitution has laid down the method of appointment of the Chief Justice of India, and judges of the country's Supreme Court and the High Courts at the State-level. The Constitution specifies that the President shall make these appointments after consulting the Chief Justice of India (CJI) and the judges of the Supreme Court and the High Courts as the President may deem necessary. This process of appointment has been examined and reinterpreted by the Supreme Court many times between 1982 and 1999. However from 1993, in a process

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mandated by the Supreme Court, a collegium of judges, comprising the CJI and four of the most-senior judges of the Supreme Court, have made recommendations to the President for the appointment of judges. Such recommendations were more or less binding on the government of the day. All that the government could do was to merely seek a reconsideration of the recommendations made by a collegium. And if the collegium were to unanimously reiterate its earlier recommendation, the appointment would have to be made accordingly.

The National Democratic Alliance (NDA) Government had sought to change this process and introduced a constitutional amendment bill, the National Judicial Appointments Commission (NJAC) Bill. This Bill sought to replace the collegium system with an independent commission called the NJAC. The NJAC comprised (i) the CJI (ii) two other most-senior judges of the Supreme Court, (iii) the Union Law Minister, and (iv) two eminent persons to be nominated by the Prime Minister, the CJI and the Leader of Opposition in the Lok Sabha, the powerful Lower House of Parliament. This amendment was passed by both Houses of Parliament and received the assent of the President. No sooner had the assent been granted, a spate of Public Interest Petitions (PILs) were filed in the Court challenging the amendment.

Many commissions and bodies have faulted the working of the collegium system of appointment of judges. Some of the choices of judges that have been made through this procedure have attracted a great deal of adverse attention. It was in this context that the amendment was introduced. Besides being passed by both Houses of Parliament, twenty State legislatures have also passed this amendment. This is an indicator of the level of disagreement between the executive and the judiciary on the process of selection.

The PILs on the setting up of the NJAC were heard by a five-judge bench of the Supreme Court. The Court has now delivered a 1,000-page judgement on the issue. The Court has held that any involvement of the executive in the appointment of judges impinges on the independence of the judiciary. The NJAC has been seen by the Court as an infringement of the principle of separation of powers between the executive and the judiciary, which is a basic feature of the Constitution. The judgement states that the collegium, said to have lacked transparency and promoted nepotism, will be "fine-tuned" to obviate such criticism in the future. The verdict has further observed that the presence of the Law Minister in the panel will impinge on the principle of independence of the judiciary. The minister’s presence, along with the prime minister’s say in the selection of two eminent persons, who could veto any decision,

would be a retrograde step. The Court has also observed that it would be "disastrous" to include persons with undefined qualifications in the selection panel.

The verdict has sparked a whole barrage of opinions on both sides. There are of course some ardent viewpoints too. Some senior political functionaries have seen this verdict as "a setback to parliamentary sovereignty". On the other hand, the other set of opinions faults the collegium system of selection as being opaque and as lacking in transparency. In fact, India is the only country where judges get to select judges. This system is very different from that which prevails in other democracies such as United Kingdom, the United States of America or Canada. In each of these countries, the legislature or eminent persons outside the judiciary constitute the selection system. That process seems to have worked to the satisfaction of the judiciary, the executive and the public at large in those countries with strong and deeply democratic traditions.

Much can be said about the merits and demerits of each system. In an ideal system, where there is trust and faith among each pillar of democracy, there would have been no scope for any disagreement. However, the track-record of both institutions – the executive and the judiciary in India – leaves much to be debated. The executive is invariably a major litigant in quite a few cases coming up before the courts. There have also been open accusations of the government attempting to place on the bench judges who have been alleged to be "pliable". On the other hand, the collegium is seen as opaque and a bit of an “old boys’ club”. It has also thrown up appointments whose credibility has been questioned. Some appointments have indeed undermined the people's faith in the judiciary. In fact, among the five judges on the bench itself, one judge has argued for the acceptance of the NJAC. He has faulted the collegium system as being the exclusive domain of the judiciary, and argued that the executive and civil society must have a say in the matter. He has added that it has no accountability and there have been instances where it has failed. This judge goes on to observe that the Court cannot claim to be the sole protector of the people's rights and has referred to the instances where the Supreme Court had failed to live up to the citizens' expectations in preserving liberties. The judge has specifically drawn attention to the awkward situation created in the appointment of Justice P D Dinakaran and a Madras High Court judge. Another judge on this bench had earlier made observations on the functioning of the collegium and had stated that “deserving persons had been ignored wholly for subjective reasons, social and other national realities were overlooked, certain appointments purposely delayed so as to benefit or to deny such benefits to the less patronised..". This is a serious indictment of the court by its own.

The judgement has started a very serious debate. Such a debate seems essential too. The issue, I believe, is not so much that of the independence of judiciary or the setback to the supremacy of parliament. In fact, if either of these institutions had been functioning along the lines expected of them, the need for either to seek protection of its 'independence' or 'supremacy' would never have arisen. Credibility gets established by deeds and performance, not by self-proclamations. Institutions craft their own credibility – it is in their accountability. It is in their transparent functioning. It is by the trust that they generate from the public. Neither the NJAC system will redeem the people's faith in the parliament or executive, nor will the collegium system absolve the judiciary of the kind of observations it has been subjected to. What matters is the sheer display of each institution's 'above the board' performance. The people are the true and ultimate judges of the performance of democratic institutions. Whilst 'independence' and 'supremacy' will be the basis of arguments advanced by the respective bodies, it is they themselves who can earn the people's trust by their own performance. The NJAC can do it. The collegium can do it. Systems are merely structures. The integrity and credibility of persons who operate the systems make the difference.

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