The Road Ahead

Judicial Appointments – Global Best Practices

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Vice-president Jagdeep Dhankar's views on the role of Judiciary generated a lively debate in our argumentative democracy. He raised two issues: the basic features doctrine enunciated by the Supreme Court, essentially limiting the Parliament's powers of amending the Constitution; and the Supreme Court's collegium having a decisive say in the appointment of judges of high courts and Supreme Court. I will defer the discussion on basic features to a later column; let us examine the appointments to higher courts now.

Often, our public discourse is based on our current favourites in politics, and adhoc approach to vital issues. We tend to view our problems and emerging challenges in making our democracy work in isolation. It would be more productive if our debates are linked to first principles of democracy. We also tend to think of ourselves as the only democracy on planet earth, ignoring the institutions, experience and practices of other functioning and successful democracies.

Let us examine first principles. Democracy is a system of government by the whole population or all the eligible members of a state, typically through elected representatives (Oxford Languages). Democracy does not mean tyranny of elected governments; we do need checks and balances to protect the citizens' liberties and to insulate vital long- term decisions form the vagaries of populist impulses or partisan politics. Therefore rule of law

equally applicable to all, transparency, and independent, effective, accountable institutions like the courts, election commission, CAG, finance commission, reserve bank etc are necessary to run a sound democracy. However, all democratic institutions should trace their legitimacy either directly from the people's mandate, or indirectly from those who are elected to legislate and govern. A constitutional or statutory authority should function independently; but it should derive its legitimacy by being appointed by a democratically elected body, and being accountable to the legislature or another legitimately appointed body. A democratic institution, in the garb of independent functioning, cannot usurp the power of appointing itself.

Let us now look at how other experienced, mature, successful functioning democracies appoint the higher judiciary. The experience of the US, UK, Canada, France and Germany would be a useful guide for any democracy. We can also examine the practices in emerging democracies like South Africa.

In the US, appointments to the Supreme Court, the thirteen Courts of Appeals and the 94 District courts are all made by the President with the consent of the US Senate, the elected upper chamber of the federal legislature. Public hearings and transparent voting process in the senate are integral parts of federal judicial appointments. Similarly, the Courts of last resort in the 50 states (State Supreme Courts) are appointed either by election, or by the State Governor or the legislature, most often with the help of a commission. In 21 of the 50 states these judges are elected directly by the people. In 23 states they are appointed by the governors

with the help of a nominating commission. These commissions vary in composition and role, but most are non-partisan, composed of lawyers and non-lawyers, appointed by a combination of public and private officials. For instance**,** the New York State Commission on Judicial Nominations has 12 members, 4 each appointed by the Governor, the Chief Judge of the Court of Appeals, and the Legislature. There are rules to ensure that the Commission members are drawn from across the political spectrum. The Commission submits a list of nominees to the Governor, and the Governor appoints a judge from the list. The appointee must be confirmed by the state Senate.

The judicial Appointments Commission of England and Wales has 15 members – six lay members, one of whom is the chairperson, five judicial members, and four lawyers and others. The chair is appointed by a panel of cabinet ministers; other lay members are appointed by a panel of the chairperson, a person nominated by government and the chief justice. The Commission will identify and submit to the Minister the recommendations for appointment. The Minister can reject a name, or ask a name to be reconsidered. Rejected name cannot be considered again, and a person reiterated upon reconsideration should be appointed.

In Canada, the judges of Supreme Court are selected by the Prime Minister in consultation with the Minister of Justice. For Federal Court appointments, there is a Judicial Advisory Committee of seven members comprising three lawyers, a judge and three lay persons. All seven members are appointed by the Minister of Justice, three directly, and four from lists of nominees. The recommendations of the Committee are not

binding, but by convention, only those recommended are appointed. Similar procedure is followed in respect of appointments at the provincial level.

Similarly in France there is a 12- member constitutional body (Council) comprising the President, Minister, three prominent citizens nominated by the President, and six judges and a prosecutor elected by their colleagues. The Council selects candidates and submits recommendations to the President, who by tradition always appoints a judge proposed by the Council.

In Germany, Federal Constitutional Court's judges are elected by both houses of Parliament. Other federal judges are selected by a Committee comprising of the Federal Minister of Justice and 32 members – 16 state ministers of justice and 16 members nominated by Federal Parliament. The recommendations of the Committee are binding.

In South Africa a Commission of 23 members comprising three judges, five lawyers, six members of Parliament, four from provinces by voting, four nominees of the President and the Minister of Justice. The Commission presents a list for Supreme Court; the President may appoint any one on the list, and has a right to reject the list once. In case of the chief justice and deputy chief justice, the President can ignore the recommendations. All other judges in other courts must be appointed on the advice of the Commission.

Both the democratic principle and the practice in all functioning democracies clearly establish that the Supreme Court cannot usurp Judicial appointments.

At the request of Foundation for Democratic Reforms, three eminent jurists – Justices Venkatachalaiah (former CJI), J S Verma (former CJI who wrote the judgment creating the collegium system), and V R Krishna Iyer – examined the issue and recommended NJAC with the Vice-president, Prime Minister or his nominee, and CJI and two senior most puisne judges. The NJAC Act provided for the PM, three judges and two eminent persons chosen by PM, CJI and Leader of Opposition.

Denying democratic legitimacy to the higher judiciary is wrong. However, we need harmony. Given the revulsion of politics and mistrust of governments widely prevalent in our society, collegium system, however undemocratic, will stand for the time being. But it will erode the Court's credibility in the long-term. Meanwhile, until constitutionalism prevails, we have to live with the collegium system. We have practiged it for three decades; another decade or two will not matter much. But a healthy debate must go on; and all organs of state should learn to act with restraint and mutual respect. Or else, people's mistrust of democracy and our justice system may deepen, undermining liberty and self-governance.

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