JUDICIAL APPOINTMENTS - AN EXCUSE FOR ARBITRARY ACTION?

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In an attempt to understand the nature of administrative law, what is conceivably most essential to judge is the arbitrariness with which discretion is conferred or exercised. While students of administrative law aim to evaluate the correctness of a decision, ensuring a sense of accountability from the legislative or executive authority, it is interesting to note that scholastic opinion in this regard also extends itself to the realm of judicial arbitrariness and accountability.[1]

Perhaps, the most blatant example of the Judiciary usurping powers from the Executive is the appointment of judges to posts in the Indian Judiciary. It is interesting to note that in three important cases- *S.P. Gupta v. Union of India*,[2] *Supreme Court Advocates on Record Association v. Union of India*[3] and *In re: Presidential Reference*[4] - the Honourable Bench of the Apex Court of India has chosen to exhibit a fine instance of interpretation of Constitutional provisions to assert the independence of the Judiciary. Unfortunately, however, the interpretation though logical, is a seemingly glaring manifestation of the "exchange of Executive arbitrariness with judicial arbitrariness"[5]. "The selection process is a dubious secrecy confined to a few Supreme Court judges, keeping the people, the Bar, the academia, and the Cabinet without a voice in the choice of those whose pronouncements bind every person."[6] It is in line with this string of decisions that one must venture to examine the case of *Union of India v. Kali Dass Batish and another*[7].

It is to be noted that the issues considered in this case do not aim to deal with the complexity of arbitrary exercise of power by the Judiciary, such has been dealt with by the Honourable Bench in the present case in their attempt to justify the judgment thus decreed.

I. THE CASE: A RUNDOWN OF THE PARTICULARS

In the present case, the Department of Personnel and Training by an order laid down directions for the selection of a Judicial Member by a committee to comprise of a

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1 Baxi, U., "Introduction", I.P. Massey, ADMINISTRATIVE LAW, 6th ed. 2005, XIII- XLI.

2 AIR 1982 SC 149.

3 AIR 1994 SC 268.

4 AIR 1999 SC 1.

5 Baxi, U., "Introduction", I.P. Massey, ADMINISTRATIVE LAW, 6th ed. 2005, XXXV.

6 Iyer, V.R.K., "Opinion: Law and justice in an independent nation", THE HINDU, September 21st 2006, http://www.hinduonnet.com/2006/09/21/stories/2006092103171100.htm as accessed on 6th October, 2006.

7 AIR 2006 SC 789.

sitting Judge of the Supreme Court and other members as specified by the Order.

Accordingly a list of short-listed candidates (including the names of Respondent 1 and 2) was sent by Justice Patnaik to the other members of the Committee for their opinion. On an examination of the Intelligence Bureau report,[8] the Director (Ministry of Personnel) and the Joint Secretary (Ministry of Personnel and Training) awarded the first Respondent in the present case the benefit of the doubt since the candidate had been recommended by the Selection Committee headed by a Judge of the Supreme Court and additionally, held that none of the observations in the report reflected adversely on the Respondent. On the other hand, the Secretary (Personnel) underscored the poor performance of the candidate and therefore, did not recommend the appointment of the candidate. These reports were subsequently forwarded by the Intelligence Bureau to the Chief Justice of India for his effective consultation. On the receipt of the above mentioned, the Chief Justice recommended to the President the appointment of all the candidates except Respondents 1 and 2. This was petitioned against by the Respondents by way of writs in the Jharkhand and Himachal Pradesh High Courts.

While the Jharkhand High Court dismissed the petition by the Second Respondent, the Himachal Pradesh High Court recommended a reconsideration of the appointment of the first respondent. This was appealed against by the Union of India and clubbed with the Civil Revision Petition filed by the second respondent.

The Supreme Court held that the two Respondents did not have basis for demanding the appointment on the following grounds:

- The respondents did not have a guaranteed right to be appointed if their names were included in the list.
- Further they agreed that the integrity and previous political affiliations of such candidates had necessarily to be checked since the post was one of immense importance.
- The High Court of Himachal Pradesh erred in holding the Central Government in the wrong since the recommendation of the Chief Justice was of the nature of effective consultation.

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8 As per established procedure, the Intelligence Bureau reported findings of the antecedent records of the candidates wherein the following observations were made as regards Respondent 1-

§ Average calibre of the Respondent as an advocate;

§ His past political records as a member of the BJP showed incidents of misbehaviour;

§ The Respondent was transferred by Justice Khurana who was unhappy with his presentation of cases in the Court. Vide AIR 2006 SC 789 at Paras 5-6.

- The Supreme Court was (in a very strongly worded statement) also abhorred by the allegations of the Himachal Pradesh High Court that implied that the Chief Justice had made a substantive or procedural error.
- There was no *mala fide* on the face of the facts, and thus there was no merit in that contention.

II. ACCEPTABLE DECREE, SKEWED LOGIC: JUDGING THE JUDGES

Appropriate exercise of administrative discretion, as has been aptly stated by the Supreme Court, must not only be done, *but must also be seen to be done*[9]. In the present case it is interesting to note that while the Apex Court has ultimately reached a decision that is seemingly right, the logic behind this decision has been skewed by the observations of the Bench.

It must be highlighted that there have been several decisions in other spheres wherein high-ranking authorities have made decisions based solely on their whims and fancies[10] and in each of these cases, the Judiciary has checked the exercise of power by such authority. Arguably, the Chief Justice of India has various levels of recommendation and reports on which his decision of appointment of judicial members is based. Unfortunately, while members of the Selection Committee are bound to give reasoning for the recommendation of the candidate, the Chief Justice by way of effective consultation has (in effect) the power to override any such recommendation without any articulation of the logic behind such decision.

In the matter of entitlements, it must be noticed that when one person is chosen over the other – as in the case above – there must be a belief that one person fulfils the objective of that post better than the other candidate. Here, the officials who forwarded their recommendations backed their opinion with reasons in writing; thereby ensuring that the opinion thus arrived at was not arbitrary. The same however cannot be said about the final decision of appointment taken by the Chief Justice of India.

Additionally, it must be emphasized that in the Administrative Tribunal Act, 1985, the

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9 *J. Mohapatra & Co. v. State of Orissa*, AIR 1984 SC 1572 at para (per Madon, J.)

10 *Rameshwar Prasad v. Union of India, AIR 2006 SC 980.* In the present case, both the High Court of Bihar and the Supreme Court held that the Governor's report could not be based on conjectures appearing in newspapers and that Emergency could not be imposed on such *whims and fancies*. Similarly in the case of *Special Land Acquisition Officer v. G.C. Paramraj*, ILR 1991(2) Karnataka 1109, the District Judge held that no officer was entitled to act on his own *whims and fancies* even if the Statute authorising his action does not specify guidelines. Also, in the case of *Union of India & Anr v. Mohan Pal,* AIR 2002 SC 2001, the Court in reference to the removal of casual labour, instructed that even if the labour were not permanent employees, none of them could be removed at the *whims and fancies* of the employer.

relevant provision[11] that provides for qualifications for the members to be appointed to the Tribunal, in no way deters such impending appointment on account of prior political affiliations or any of the other objections raised by members of the Selection Committee.[12]

Perhaps, in line with the opinion expressed in precedents decreed[13] (including the present), the Benches of the Honourable Courts in our country repeatedly reiterate that people in high places entrusted with power and discretion, are incapable of misusing the same.[14] *Kali Dass Batish*'s case goes even further to state that "even assuming that the Secretary of the concerned department of the Government of India had not apprised himself of all necessary facts, one cannot assume or impute to a high constitutional authority, like the Chief Justice of India, such procedural or substantive error."[15]

III. Appointments: Precariously Treading The Line Between Independence And Arbitrariness

What is perhaps more interesting is that in placing the case in the line of cases of Judge's appointments, the judgment falls in perfect sync with the stance that the Judiciary has sought to resort to. When scrutinized in the larger perspective, it is evident that the Judiciary has (as far as has been possible) tried to assert its independence and further, the correctness of such decision taken by one of its members. For instance, in the cases of the appointment of Judges to the Supreme Court and High Court, authority was legitimately conferred on the President (in effect, the Executive) through the paramount parchment of the nation- the Constitution. An unfortunate turn in the activist role of the Judiciary led to the interpretation of the aforementioned relevant provision by Benches of the Apex Court in a way so as to seize the control of any lawful exercise of Executive power on the ground of undue political interference.[16]

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11 Section 6: Administrative Tribunal Act, 1985.

12 In the opinion of the researcher, previous political affiliations are a strange inclusion as a ground of disqualification since several Supreme Court Judges, most notably Justice Krishna Iyer, have even been Ministers in the Central Government. Further in the present judgment itself, the only mention made of the political record of Respondent 1 was by the Joint Secretary (AT & A), Ministry of Personnel and Training who ultimately recommended the candidate's name. Interestingly, the noting made by such member merely stated, "Shri Batish has strong political affiliations and was a contender for the Shimla AC seat in 1982 and 1985 from BJP;" *Union of India v. Kali Dass Batish*, AIR 2006 SC 789 at para 5.

13 *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

14 While the researcher does not allege, in the present case, that there is such abuse of the power by any authority, a nagging resentment is expressed as to the colonial hangover of the maxim *'The King can do no wrong'*.

15 *Union of India v. Kali Dass Batish & Anr.*, AIR 2006 SC 789 at Para 17.

16 *S.P. Gupta v. Union of India*, AIR 1982 SC 149; *Supreme Court Advocates on Record Association v. Union of India*, AIR 1994 SC 268; *In re: Presidential Reference*, AIR 1999 SC 1.

Scholastic opinion also lends a hand to the strengthening belief that judicial independence first and foremost 'refers to the existence of judges who are not manipulated for political gain.'[17] While it is entirely possible that such interference was ongoing in the appointment of the judges in India, it is far more unreasonable for a lay person, as well as for us (students of administrative law) to reconcile the exchange of Executive authority with one that is judicial. It is noteworthy in the situation at hand that peer recommendation, though desirable for the fact of better understanding of a candidate's aptitude, can also lead to a situation of *quid pro quo* (especially in the appointment to the Supreme Court).

The Supreme Court has held it "unthinkable that in a democracy governed by the rule of law, the Executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the Executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement."[18]

In placing *Union of India v. Kali Dass Batish* within the numerous judgments as regards appointment, it is undeniable that the scope of judicial authority with respect to appointments has only widened. Yet a subtle difference is also evident. In the case of appointment of judges to the High Court or Supreme Court, the power has been given (through judicial pronouncement) to the collegiums of judges and the Chief Justice for effective consultation.

However, as can be observed in the given case, the Executive by issuing an order has (of its own volition) handed the power of effective appointment to the Chief Justice himself. Perhaps, an aspect to worry about- as the abdication of powers of the legislative in favour of the Executive, is probably as precarious as the abdication of Executive powers in favour of the Judiciary.[19] What is in effect being questioned by the researcher, is no way reflective of the integrity of the Judges, but is a basic question of infallibility of individuals that all of us, as human beings, are prone to.

IV. JUDGING ONE'S OWN CAUSE

Considerable interest may arise in the given set of circumstances with the champions

17 Larkins, C., "Judicial independence and democratization: A theoretical and conceptual Analysis", 44 AMJCL 605, 609.

18 *Ramana Dayaram Shetty v. International Airport Authority of India and Ors.*, AIR 1979 SC 1628 at Para 10 (per Bhagwati J.). Reiterated in *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180 at Para 41.

19 Senior Advocate of the Supreme Court, Abhishek Singhvi in context of judicial appointments has rightly said, "A lot can be said about the dangers inherent in substituting absolute Executive authority with absolute Chief Justice authority." Singhvi, A., "Independence of Judiciary and Judging the Judges", JUDGING THE JUDGES, Mahesh, K., and Bhattacharya, B., Ed.(s), 124.

of natural justice themselves abrogating one of its fundamental principles. No man must be a judge in his own cause – this principle of natural justice applies equally to the exercise of quasi-judicial and administrative action.[20]

In barefaced abandonment, the researcher would like to point out that the three Judge Bench that has delivered the judgment in the present case, conspicuously comprises of the Chief Justice of India himself. While it is also pointed out that the decision to not appoint the two respondents was taken by the predecessor of Hon'ble Chief Justice Y.K. Sabharwal, an argument can definitely be made out protesting the validity of this decree with respect to future repercussions.[21]

When the Judiciary has exhibited complete intolerance even in cases where a person judging his own cause retires from making such a decision[22], conceivably the Supreme Court may benefit from the reconsideration of this decision at least on the basis of the Chief Justice's presence on the Bench (if not on the grounds of usurping powers of the Executive, or possible abuse of discretion).

V. CONCLUDING REMARKS

Once again it must be reiterated that there is no ultimate fault with the decision reached by the Judiciary in this case. However, when contextually understood, the procedure as well as the reasoning behind the decree is what a critic of the Courts and students of administrative law must worry about.

At core, the dynamics of power and accountability in every decision of administrative discretion must be reconciled with. In this decision, the conferral of power though legitimate is extremely contentious and the levels of accountability from the Chief Justice himself, as per the judgment itself, are minimal. It must be understood, that any justification given as to the decision in this case must be necessarily grounded on discretion, rationally conferred – with an eye on prospective decisions taken by such authority. The conferral of discretion, even if legitimate, cannot be an invitation for the authority to do as it pleases.

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20 This has been recognised time and again as one of the most essential principles of natural justice by all judicial authorities including the Hon'ble Supreme Court in cases such as *J. Mohapatra & Co. v. State of Orissa,* AIR 1984 SC 1572 (per Madon, J.).

21 The researcher finds it difficult to believe that the Chief Justice would decree any decision by his predecessor as arbitrary or founded on irrelevant considerations as any such pronouncement could curb the existent powers conferred on both the present and future Chief Justices of the nation as well as most importantly, raise questions as to the legitimacy of their decisions.

22 *A.K. Kraipak v. Union of India*, AIR 1970 SC 150; *J. Mohapatra & Co. v. State of Orissa*, AIR 1984 SC 1572.

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