Law & Policy BRIEF

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THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION: A HALF HEARTED ENDEAVOUR

Vol. I | Issue 7 | July 2015

This issue of the Law & Policy Brief enumerates the manifold ways in which the National Judicial Appointments Commission Act, 2014 and the Constitution (Ninety-Ninth) Amendment Act, 2014 have vested disproportionate powers in the executive to appoint judges. The National Judicial Appointments Commission (NJAC) was meant to create a balance between the executive and the judiciary in the process of appointments to the High Courts and the Supreme Court. However, the balance has been tilted significantly in favor of the executive, giving it excessive control over the appointment process.

The collegium system, by which appointments were made to the High Courts and the Supreme Court, has been overhauled. This system governed the process of judicial appointments for approximately 20 years. It came into being as a result of a series of cases known as the Three Judges' cases. Over the course of these cases, the executive's power over appointments was effectively removed. Executive primacy gave way to a 'collegium' constituting the Chief Justice of India (CJI) and four of the senior most Supreme Court judges which exercised a virtual fiat over the appointment of High Court and Supreme Court judges. However this system came to be criticized on the grounds of lack of accountability and transparency. The chorus of complaints spurred the government to dismantle the collegium system via passage of two pieces of legislation: the National Judicial Appointments NJAC Act, 2014 (the Act) and the Constitution (Ninety-Ninth) Amendment Act, 2014 (the Amendment Act).

Unfortunately, through the creation of the NJAC, the executive has regained disproportionate power over the appointments process. It has done so in the following ways: (i) power over criteria of appointment; (ii) power via ease of constitutional amendment; (iii) power over investigations; (iv) power over eminent persons; (v) lack of transparency; (vi) power to request reconsideration of National Judicial Appointment Commission recommendations, and (vii) power over quorum.

Power over Criteria of Appointment

This power is heavily skewed in the executive's favor, rendering nugatory the role played by the judiciary under the NJAC scheme. As explained below, this alarming reversal has been effectuated by provisions in Sections 5 and 6 of the Act subjecting the NJACs actions to executive approval.

Firstly, Section 5(2) of the Act says, in part, that "[T]he Commission [referring to the NJAC] shall, on the basis of ability, merit and *any other criteria* of suitability as may be *specified by regulations*, recommend the name for appointment as a Judge of the Supreme Court…" (Emphasis supplied). Section 6(3) of the Act contains similar language for High Court judges. That is because as per Section 12(1) of the Act, any regulation framed by the NJAC has to be in line with the rules made by the central government. In this way, the executive retains substantial control over the criteria by which judges will be appointed.

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Secondly, the provision that "any other criteria" may be employed to appoint Supreme Court and High Court judges alters longstanding constitutional provisions that predate even the collegium system. Article 124(3) of the Constitution explicitly provides the minimum criteria for appointment of judges. Now the NJAC, subject to the whim of the executive, will be adding to the constitutionally prescribed criteria for appointment of judges. Such a procedure enables the executive to bypass the scrutiny of the law making process to effect constitutional changes in a subterranean manner.

In sharp contrast to the Indian scenario, the Judicial Appointments Commission (JAC) constituted under the much lauded UK Constitutional Reform Act, 2005 has almost complete freedom to frame its own rules.

Power via Ease of Constitutional Amendment

The claim emanating from supporters of the new framework is that the three Supreme Court judges serving on the NJAC will not buckle under executive pressure. However, Section 3 of the Amendment Act explicitly states that "[P]arliament may, by law, regulate the procedure for the appointment of…Judges of the Supreme Court and…Judges of High Courts." The NJAC framework, therefore, cushions the executive from a strong judicial presence on the NJAC by making the entire edifice of the NJAC hostage to the will of Parliament. Parliament can slash the number of judges serving on the NJAC, strip them of veto power and institute any number of other changes, all through the mechanism of ordinary law.

This is despite the fact that the Constitution provides in Article 368, that any change to the provisions relating to the union judiciary (under which the NJAC falls) must satisfy onerous procedural hurdles that far exceed those imposed by ordinary law. Ordinary law requires only a simple majority in Parliament whereas an amendment to the Constitution requires an absolute majority in Parliament and ratification by half the states. In effect, Section 3 of the Amendment Act changes not just the process by which judges are appointed but also the process by which the Constitution can be amended.

Dependency on the Executive for Investigations

Executive control over the process of investigations has created problems in the past for the judiciary in its vetting of candidates for judicial appointment. A former Supreme Court judge has stated that reliance on the executive to conduct investigations into the backgrounds of candidates has led to the creation of doctored dossiers. Indeed, such a problem will not go away under the new system of appointments as the NJAC lacks its own independent investigatory agency. As a result, adverse reports by the government against candidates deemed unworthy will dent the independence of the NJAC.

Control over "Eminent Persons"

No definition of eminent persons: No definition of "eminent persons" is provided in the Act or the NJAC Amendment Act. The Law Minister says that criteria of eminent persons can be discussed "at the meeting of the selection committee" where "everybody can suggest [the] norms." However, the Attorney General, during the course of hearings in the Supreme Court, pointed out that Parliament would frame rules concerning eminent persons.

Eminent persons defined in other Acts: The statements issued by the Law Minister and Attorney General run counter to the recommendations of the 64th report of the Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice. In this report on the NJAC, the Committee recommended that "the fields of eminence [for eminent persons]…be specified" in legislation and not in rules or regulations. Senior Advocate Arvind Datar asserts that 65 out of 70 Acts which contain provisions relating to eminent persons specifically enumerate qualifications/criteria for eminent persons. For instance, the Biological Diversity Act, 2002 states that the chairperson of the National Biodiversity Authority "…shall be an eminent person having adequate knowledge and experience in the conservation and sustainable use of biological diversity…".

Fear of reprisal: Eminent persons may fear reprisal for going against the wishes of the executive given that they don't enjoy the security of pay of Supreme Court and High Court judges. As per Articles 125(2) and 221(2) of the Constitution, salaries cannot be "varied to the disadvantage of the Judges." Control over pay is one of a constellation of factors that may stymie the NJAC from acting independently of executive influence. Furthermore, the eminent persons may be dissuaded from going against the government by the consideration that other plum posts may be on offer for them at the end of their tenure on the NJAC. This may well prove to be an alluring incentive for the eminent persons to join hands with the Law Minister to form a pro-executive block on the NJAC. Also, High Court judges may be wary of falling afoul of the executive by giving adverse decisions against the government in the knowledge that their appointment to the Supreme Court may be scuttled by the pro-executive block on the NJAC.

Executive control over appointment of eminent persons: An argument has been made that the NJAC will not become a tool of executive manipulation given that the Law Minister will be the only government representative on the Commission. However, this overlooks the manner by which the two eminent persons designated to be on the

panel will be selected. The Prime Minister and the Leader of Opposition in the Lok Sabha can outvote the CJI to choose eminent persons who will be more partial to the executive. Lest one dismiss the possibility of the Prime Minister and the Leader of the Opposition joining hands, it should be noted that the twin laws establishing the NJAC were passed with overwhelming support of the opposition in Parliament. So it is misleading to assert that there is only one member of the executive serving on the NJAC. While this is technically correct, the process of appointment of eminent persons virtually ensures that the Law Minister has two allies to circumvent the will of the judges.

Recusal of Chief Justice of India: The will of judges will be diluted in another way. When it comes to the appointment of the CJI, the senior-most judge in line for the position will have to recuse him/herself from deliberations of the NJAC. It will be left largely to the non-judicial members, now a majority on the NJAC, to determine the meaning of the term 'fit' under Section 5(1) of the Act when considering whether to appoint the senior-most Supreme Court judge as the CJI. 'Fit' is a nebulous term for which no criteria are provided in the Act.

Post-retirement sinecures: In addition, High court judges seeking appointment to the Supreme Court will not be the only ones seeking to curry favor with the executive. Even Supreme Court judges seeking post-retirement sinecures will not wish to pose difficulties for the government of the day. The existence of such an incentive structure belies the assumption that all judges on the Commission will vote as one unit – some judges may well be willing to toe the government line. So the already extensive power that the executive enjoys over post-retirement postings for judges should not be compounded by the grant of additional executive influence over appointments of judges.

Removal of eminent persons: Another point of concern is that there is no provision to remove eminent persons before the completion of their three year tenure, should there be a need to do so. In the course of ongoing hearings on the constitutional validity of the NJAC, the Supreme Court has voiced a concern that the Act lacks any procedure to remove eminent persons on for instance, corruption charges. Though the Attorney General has said that the selection committee will have power to remove such persons, there is no specific provision in the Act to do this.

The statement of the Attorney General is quite revealing about the mindset of those involved in the creation of the new NJAC structure. It is very surprising that no thought has been given to the need for an ombudsman, as in the UK JAC framework. Once again we see that the rhetoric of anti-corruption is not matched by concrete action taken in the Act to combat corruption. The selection committee comprises three extremely prominent and busy citizens – the Prime Minister, the Leader of the Opposition and the CJI. It is extremely unlikely that these three individuals will have sufficient time to meaningfully examine charges against eminent persons.

Lack of Transparency

Defenders of the NJAC argue that it will be more transparent than the collegium system. They argue, for instance, that application of the Right to Information Act will promote transparency in the NJAC's functioning. However, the rhetoric of transparency rings hollow, because of the lack of transparency characterizing the application process.

No comprehensive application process: This is appalling given the criticism directed at the collegium system for failing to incorporate an accountable and transparent application process. The framers of the NJAC should have made a concerted effort to overcome the transparency deficit plaguing the collegium system. It is glaringly apparent that they have failed to incorporate even the baseline requirements of an open and competitive application process such as advertising of vacancies and publication of reports explaining the rationale behind selections made.

Ex-officio body: Moreover, it is quite unlikely that changes along these lines will be incorporated. This is because the NJAC is an ex-officio body composed of judges and a cabinet minister with pressing time commitments that will constrain them from engaging in a thorough and transparent evaluation of approximately 100 candidates for judicial office every year.

The UK JAC system: On the other hand, the updated UK system for appointment of judges is open and transparent. A similar course of action pursued in India would have entrenched transparency in the process and insulated it from political manipulation. The government, however, has only succeeded in subjecting the appointments process to more executive manipulation and less transparency.

Lack of clarity surrounding the term 'merit': Furthermore, the executive will be better able to manipulate the appointments process given that the meaning of the term 'merit' is vague and unclear.[1] As mentioned earlier, 'merit' has not been defined in the Act. If the government had been serious about promoting transparency, it would have broken down the concept of merit into its constituent elements. It has been argued by constitutional law scholars that “disaggregated” enumeration of the term 'merit', promotes much needed public confidence in the judicial appointment process as candidates are

assessed according to a common set of standards. Unfortunately, such a resounding measure of transparency has been eschewed by the framers of the NJAC.

Meaning of the term 'merit': The lack of clarity regarding the term 'merit' is a cause of concern, for as Geoffrey Davies, former Judge of the Queensland Court of Appeal, has said "[n]o word is more used or abused in this context [the criteria for judicial appointment] than 'merit'". In order to reduce the potential for abuse, elaboration of the term merit in the Act along the following lines would have been helpful: merit constitutes "…legal excellence, a demonstrated capacity for industry and a temperament suited to the performance of the judicial function, knowledge of the law, intellectual capacity and experience; the capacity to 'stage manage' proceedings in the courtroom; facility with complex fact situations and arguments; and the ability to write judgments."

Recommendations not binding on the Executive

It is important to point out that the executive only has to accept the ruling of the NJAC in the event of a unanimous stand of the NJAC. In effect, for judges to veto a candidate favored by the government, two votes are needed, but for the Law Minister to veto a candidate disfavored by the executive only his/her vote is needed for a veto. This is a system that is skewed in favor of the government.

Let us assume that a candidate comes up for selection, and that he has irked the government of the day for some reason. The veto provision makes it sound like two votes are needed to effect a veto. But in reality, if the government is opposed to the candidature, just the Law Minister's vote against the candidate is sufficient to disqualify him/her. That is because the government has the right to request the NJAC to reconsider its decision and is only obligated to accept the NJACs recomm-endation upon reconsideration if the NJAC votes unanimously. A unanimous vote cannot occur in the face of the Law Minister's opposition. So the government's power to reject a candidate with the support of a lone member of the NJAC (the Law Minister) is camouflaged as a 'request' for reconsideration.

Power over Quorum

NJAC quorum subject to executive approval: The quorum for a meeting of the NJAC is as yet unknown. Section 10(2) of the Act provides that "[t]he Commission shall…observe such rules of procedure… (including the quorum at its meeting), as it may specify by regulations." This provision makes it look like the NJAC will be deciding the quorum. However, this is not actually the case. Such an assertion overlooks the fact that while the NJAC can pass regulations to determine its quorum, it does not enjoy a free hand. As mentioned earlier, any regulations made by the NJAC must be in conformity with rules framed by the executive. In this way, the NJACs authority over quorum is limited by the will of the government of the day.

Conclusion

The NJAC should have preserved the independence of the judiciary from an overweening executive while ensuring judicial accountability in the appointments process. In failing to achieve these objectives, it has succumbed to the infirmities plaguing the two preceding systems of judicial appointments. In the wake of several clashes between the executive and the judiciary in the 1970s, it was felt that the initial procedure of appointments outlined in the constitution bequeathed too much power to the executive. More recently, it has been felt that the revised procedure of appointments articulated in the 1990s gives the judiciary too much power over appointments. The NJAC framework tries but fails to realize a balance between the executive and the judiciary. ■

[1] Ideas and quotations in this and the following sub-sections are taken from: Simon Evans and John Williams, *Appointing Australian judges: A New Model,* 30 Sydney L. Rev. 295 (2008).

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