

Not on merit alone

ARGUMENTS TO PICK A CHIEF JUSTICE PURELY ON MERIT ARE FALLACIOUS BECAUSE SUCH MERIT COULD OFTEN TRANSLATE TO PLIABILITY, ARGUES FAIZAN MUSTAFA

“There was widespread public concern that judges were being appointed through cronyism and secret soundings”, said Lord Justice Toulson about the government picked judges in Britain. If Judges owe their appointment to government, they cannot be relied upon to deliver impartial, detached and quality decisions. India’s new law and constitutional amendment once assented to by the President would be tested on the touchstone of independence of judiciary i.e. a cherished right of citizen and not a private right of judges themselves.

Justice Markandey Katju has argued that seniority should be ignored in the appointment of Chief Justice of India (CJI) as it is ‘merit’ and not ‘seniority’, which should matter most. He in fact wants to give too much power to the new government including the power to appoint a person directly as CJI. Conceding unlimited power to government poses huge challenge to constitutionalism i.e. the idea of limited government. His suggestion of government appointing new CJI in a week’s time or so only on ‘merit’ ignoring seniority is surprising as the new Bill is not yet law and even the new law does not give this right to government. In view of his earlier ultra-secular views, his conviction and faith in the impartiality, objectivity and fairness of the new government is intriguing.

India’s past experience of government appointing CJI on ‘merit’ has not been great. It is an

open secret that in past due to the courtesy of government several pliant and submissive judges did make it to the highest court. Justice Tulzapurkar, a widely respected retired judge of the Supreme Court, had observed that “sycophantic Chief Justices” were a threat to the independence of the judiciary because they could easily pack the court or withdraw cases from one bench to another. Indeed nothing impacts the outcome of cases more than the constitution of benches.

In a modern democratic society, it is no longer acceptable for judicial appointments to be in the hands of the executive. Government is the biggest litigator in our country and therefore their say in judicial appointments is a cause of concern and does give birth to many apprehensions.

Every other day judiciary is called upon to adjudicate on the lawfulness of governmental actions. Thus the appointments system must be, and must be seen to be, independent of government. It must be transparent. It must be accountable. And it must inspire public confidence ... of course the fundamental principle in appointing judges is and must remain selection on ‘merit’. But it is dangerous to believe that government would always correctly and fairly decide on ‘merit’. Having appointed judges on merit, seniority should remain the sole yardstick for elevation as Chief Justice. The possibility of getting pro-government judges under the new law is already very much real. Of course pro-government judges even in other democracies are not a new phenomenon. Justice Wills in *Lee vs. Bude* had observed: “we sit here as the servants of the Queen and Parliament.” But then supremacy of the Parliament and not constitution is the first principle of British law. Even in United States there is heightened focus on ideology, which leaves the impression with the public that

judges are not independent and impartial, but ideological and partisan. Judges are either republican or democrat or conservative or liberal. Politics plays a crucial role in judicial appointments and Presidents do succeed in getting judges of certain stripe appointed.

With the assertion of a particular ideology by RSS and other leaders and complete silence from the otherwise vocal Prime Minister on these outbursts, the new dispensation on judicial appointments poses dangers of its own such as the senior-most judge may be overlooked for chief justiceship if he/she is not ‘considered fit’ by the newly constituted commission or if Justice Katju’s suggestion is accepted by the government. The argument that neither constitution nor any law says anything about seniority in CJI’s appointment is misleading. Where in the constitution do you find that the leader of majority party in Lok Sabha is to be appointed as Prime Minister?

What to say of new government, even before the birth of the republic, Pandit Jawaharlal Nehru explicitly elaborated government’s view on the subject on 10 September, 1949 in the Constituent Assembly: “Within limits no judge and no Supreme Court can make itself a third chamber. No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament. If we go wrong here and there, it can point it out, but in the ultimate analysis where, the future of the community is concerned, no judiciary can come in the way. And if it comes in the way ultimately the whole constitution is a creature of Parliament.” He went on to observe on the possibility of picking up pro-government judges: “If courts proved obstructive, one method of overcoming hurdle is... the executive which is the appointing authority of judges begin to appoint

judges of its own liking for getting decisions in its own favor.” His daughter gave full effect to this policy.

Few decades later on 12 May 1973, M. Kumaramangalam, Mrs. Gandhi’s cabinet colleague, in a speech in Parliament defended the appointment of Chief Justice of India (A.N. Ray who had superseded three senior most judges) when he had the audacity to argue: “We had to take into account what was a judge’s basic outlook on life... was it not right to take all these aspects into consideration? Was it not right to think in terms of more suitable relationship between the court and the government? ...In appointing a person as Chief Justice, I think we have to take into consideration his

basic outlook, his attitude to life and his politics.” This is how government decides suitability or so called ‘merit’.

Justice Ray was indeed a truly loyal which means meritorious judge. In the *Bank Nationalization case*, where as many ten judges went against the government, he was the lone dissenter. Similarly Justice Ray also supported the government with his dissent in the famous *privy purses case*. The government did face widespread criticism. Former Chief Justice Hidayatullah observed: “appointment of C.J. A.N. Ray was an appointment not of creating forward looking judges but judges looking forward to the office of Chief Justice.”



Several other judges of the apex court were similarly elevated because of their relationships with the political masters and pro-government stand. Justice D. G. Palekar was appointed because the then law minister personally knew him and was confidant of his support to the government. Kumaramangalam played a leading role in the elevation of Justice Mathew. Indira Gandhi herself handpicked Justice M. H. Beg and subsequently on ‘merit’ he was appointed as CJI. Justice S.N. Dwivedi was appointed because he was the close relative of H.N. Bahuguna. Both of them were appointed in spite of serious reservations of Chief Justice Sikri. Under the new system also judges can be appointed in spite of opposition of Chief Justice of India. S.S. Ray, another minister of Indira Gandhi was instrumental in the appointment of Justice A.K. Mukherjea. S.S. Ray conveyed to him Mrs. Gandhi’s message that ‘you must come to Delhi to help me (Prime Minister).’

But the silver lining was that no one ever doubted the competence or so called ‘merit’ of these judges picked up by the government. All of them were high profile and really great judges in their own right. But they were elevated not on the basis of their ‘merit’ but with the understanding and hope that they would support the government in crucial matters. In last four decades there has been a marked deterioration in the political class. Politicians do have appointment powers in respect of most offices and consistently ‘merit’ has been the first casualty. Trust deficit is highest when it comes to giving say to politicians. Is Justice Katju listening?

The writer is Vice-Chancellor, NALSAR University of Law, Hyderabad.