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APPOINTMENT OF JUDGES IN INDIA THROUGH COLLEGIUM SYSTEM: A CRITICAL PERSPECTIVE

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Abstract

Tracing the history of appointment process before India's independence, we can ascertain that Crown under the government of India Act 1919 and Act 1935, enjoyed the paramount discretion in the appointment of judges. Subsequent to India's independence and with the abolition of Privy Council Act, there was an end to the broad jurisdiction of Privy Council and the same got vested in the federal court. The Supreme Court of India was established on 26 January, 1950, which is now the highest court of competent jurisdiction. The High Court appointments, were also subjects of vigorous debate in the Constituent Assembly. The main issue before the Assembly was to incorporate a mechanism which would guarantee independence of judiciary. If we go through the debates of the assembly, we would find that the debates culminated in giving power of appointment to the executive. However, since the drafters were acquainted with the fact that giving unrestricted discretion to the executive in the matter of judicial appointment had been a nightmare for Britishers, therefore checks and balances are required, if at all the discretion has to be given to the executive. This would ensure that judges, in Nehru's words, would be *"people who can stand up against the executive government and whoever may come in their way*". It was decided by the constituent assembly that promoting legislature's role in appointment would only make it an object of political bargain. A viable option highlighted was that legislative role in the appointments should be minimized to commensurate level

and the president would appoint judges in consultation with the Chief Justice of India. The Constituent Assembly agreed on a system by which the President would appoint judges, albeit after mandatorily consulting the Chief Justice of India. The Chief Justice of India was entrusted with this constitutional role, since he could provide the necessary apolitical antidote to politically motivated selections by the executive, if they were mooted.

1- The Federal Court of India was a judicial body, established in India in 1937 under the provisions of the *Government of India Act 1935*, with original, appellate and advisory jurisdiction. It functioned until 1950, when the Supreme Court of India was established. The seat of the Federal Court was at Delhi. There was a right of appeal to the Judicial Committee of the Privy Council in London from the Federal Court of India.

2- Constituent Assembly Debate Vol. VIII, 246-247 (24™ May 1949).

However, Ambedkar himself, speaking in the Assembly, was careful to stress that 'consultation did not amount to a veto being exercised by the Chief Justice of India, since that would result in an un-trammeled power being vested in a single person, a constitutionally unwise precedent. Thus, the constituent assembly in a way tried to maintain balance in the process of judicial appointment by involving multiple authorities in aforesaid process that a mutual checks and balance would operate.

<u>Appointment of Supreme Court and High Court Judges in India</u>

Appointment of judges to the Supreme Court of India and High Courts is provided for in Article 124(2) and Article 217(1) of the Constitution, respectively. These articles, provide that power of appointment for a Supreme Court judge vests with the President, in consultation with the Chief Justice of India. In the case of appointments at the concerned High Court, it is in consultation with the Governor of the concerned state, Chief Justice of the concerned High Court and also Chief Justice of India.

Keeping in mind the vulnerable position of judiciary in the matters of appointments, the Supreme Court delivered two landmark decisions, for clarifying the notion of the consultative process for appointment of judges under Article 217(1) and regarding transfers under Article 222. The court held judicial independence to be part of the basic structure of the Constitution. Specifically, in *S.P. Gupta* v. *Union of India* (The First Judge's Case), the majority held, that 'while judicial independence did not require the view of the Chief Justice of India. In the matter of appointments to be determinative, nonetheless consultation with him would have to be full and effective and his opinion should not ordinarily be departed from. The power of the executive in appointing judges was accordingly circumscribed although it continued to have the last word on who would be appointed.'

However, the aforesaid decision which was based on the literal interpretation of the constitutional provisions for the appointment and transfer of judges, was widely criticized on the ground that it substantially failed to guarantee judicial independence. As per the academicians, lawyers and political commentators, the aforesaid decision

3- Article 124(2) reads: 'Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold

office until he attains the age of sixty live years: Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted..,'

4- Article 217(1) reads: 'Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court...'

gave precedence to the executive in the appointment of judges and unequivocally failed to provide adequate safeguards. Acting on these widely held fears and perceived executive overreach in appointments, the Supreme Court in the case of Supreme Court *Advocates-on-Record Association* v. *Union of India* ('SCAORA/ The Second Judge's Case') substantially overruled the First Judges' Case and fundamentally altered the nature of the appointments process. As a result judicial collegium was established which comprises the Chief Justice of India and the senior-most judges of the Supreme Court, as the central body for appointment. However, the primary power for appointment vests with the Chief Justice of India, as being the constitutional head of the judiciary.

The Supreme Court while giving the aforesaid decision endorsed the view, laid down by the Law Commission of India, three decades earlier, that the judiciary itself without executive interference was best placed to determine its own composition.

Since it was not clear as to how the judicial collegium so established would actually perform, therefore in an advisory opinion in Special Reference No. 1 of 1998 ('The Third Judge's Case') the Supreme Court unanimously clarified its earlier decision. According to this ruling, the Chief Justice of India would have to consult his four senior- most colleagues for Supreme Court appointments and his two senior-most colleagues, for appointments in the High Court. Before making its opinion, the collegium shall consider the recommendations of the Chief Justice of the High Court and consult any other High Court judges and judges from the Supreme Court who may be conversant with that High Court. It was emphasized that the Chief Justice of the High Court while forming his opinion was required to consult his two senior-most colleagues.

There was no rationale behind the establishment of the collegium system except to choose amongst several, the best available judicial talent in the country for the higher judiciary, in keeping with the need for the independence of the judiciary. Though nominally the formal warrant of appointment would continue to be issued by the President, these decisions ensured that the substantive power lay in the hands of the judicial collegium. It is this process laid down by *The Third Judges Case* that governs judicial appointments today. However, owing to several questionable selections, the lack of transparency of proceedings and the limited accountability for decisions taken, this process of judicial appointments has created substantial public resentment. It is in this backdrop that reforms in the present system are urgently required in order to restore the confidence of public in the judiciary as an independent arbiter of disputes.

5- For a summary of problems of the collegium system, *see* TR Andhyarujina, *Appointment of Judges by Collegium of Judges* THE HINDU (New Delhi 18 Dec., 2009). *Available at*: http://beta.thehindu.com/opinion/op-ed/article66672.ece, (last visited 13 March 2017).

<u>Political Interference in Appointment Process</u>

In the history of independent India, it happened thrice that while making the appointment of the Chief Justice of India, the senior-most judge of the Supreme Court was by-passed to make someone else as the Chief Justice of India.These three instances were immensely contentious for different reasons.

The first case of 'supersession' took place in the year 1943 when Justice Patrick Spens was

appointed as the Chief Justice of India in preference to the senior-most judge on the Bench, Justice Srinivasa Varadachariar (then Acting Chief Justice).The alleged supersession was based on one of the most disapproved grounds that Justice Srinivasa Varadachariar was an Indian, as British legal fraternity did not want an Indian as a Chief Justice of India. The condition deteriorated further, when Justice Iyengar promptly retired. However, things become normal when finally Justice Harilal J. Kania was finally appointed as the Chief Justice of India, first in the Federal Court and then in the Supreme Court of India.

The second case of 'supersession' related to three judges, which came up before the landmark judgement of the Supreme Court of India in *Kesavananda Bharati* v. *State of Kerala.* The then Prime Minister of India, Mrs. Indira Gandhi appointed Justice A.N. Ray as the Chief Justice of India superseding three senior-most judges of the Supreme Court namely, Justice Shelat, and the other two judges, Justices AN Grover and K.S. Hegde. In protest these judges resigned.

The motivation of Mrs. Gandhi for this supersession wasn't hard to find. For the reason of power dynamics, as a matter of fact executive's tussle with judiciary started. In the midst of this tussle, the Court had struck down Article 329-A clause (4) of the Constitution as being unconstitutional, Mrs. Gandhi wanted to assert her supremacy over the judiciary. In such matters brought before the court, Justice Ray was one of the judge who had consistently found the Government's arguments favourable in such cases.

The third, and possibly most infamous case of supersession happened during the height of Emergency period, when Mrs. Gandhi was less than appreciative of Justice HR

06- A convention was that, the senior-most judge of the Supreme Court should be made the Chief Justice of India.

07- *Available at*: http://www.iira.in/uploads/41832.9430598611 full paper Akshav%20Purohit.pdt, (last visited 13 March 2017).

08- *Available at*: http://supremecourtofindia.nic.in/iudges/rcii/01hikania.htm. (last visited 13 March 2017).

Khanna's daring dissent in *ADM Jabalpur case*. Indubitably, Justice Khanna resigned on being surpassed, as Justice MH Beg was made the Chief Justice of India.

When it all happened, there was nothing apparent on the face of record which could put a check on the supersession of judges in India but by the virtue of the Right to Information Act, 2005 and further jurisprudence evolved by the Delhi High Court, it is possible to put check on the supersession of judges. Declaring the office of Chief Justice of India as '*public authority* ', opened a pandora box. It is expected, that in future there may be many issues raised before higher judiciary relating to the procedure adopted also for the transfer of judges.

Cases as an example of Judicial Corruption

Corruption is a very severe allegation on the judiciary, but there are instances in the last 30 years or so, whereby we have seen several cases from Justice Ramaswami to Justice Soumitra Sen. In a case, Justice Shamit Mukherjee, a sitting judge of the Delhi High Court, was arrested in 2003 by the Central Bureau of Investigation (CBI) for his alleged involvement in a multi-crore land deal. He was believed to have traded a judgment for money. Justice V.N. Khare, who was then, the Chief Justice of India, recalls;

'When I saw what was gathered in the raids, I thought it was a very serious matter. So, I asked the then Chief Justice of Delhi High Court, to accept Shamit Mukherjee's resignation. Subsequently, Justice Mukherjee resigned, and their-upon was taken into custody. However, later he got successful in getting interim bail on the medical grounds. Meanwhile, his arrest kicked up a debate on judicial ethics.'

In yet another case, the Supreme Court had recommended the transfer of four High Court judges to enable the Central Bureau of investigation (hereinafter CBI) to conduct a free and fair investigation into the Uttar Pradesh Provident fund scam. The Apex court collegium headed by Chief Justice of India, K.G. Balakrishnan, has sought the transfer of

three Allahabad High Court judges, Sushil Harkoli, Tarun Aggarwal and R Mishra and Justice J.S. Rawat from Uttarakhand High Court. After the CBI probe was ordered, the Apex court had asked the CBI to file the status report in three months, but did not pass any specific order relating to the probe against the sitting judges.

The in-house probe mechanism for judges of the Apex court and high court suggests that if the committee finds that there is substance in the allegations that are contained in the complaint and the misconduct disclosed in the allegations is such, that it calls for initiation of proceedings for removal of the judges, the Chief Justice of India should advise the concerned judge to resign or seek voluntary retirement. If the judge expresses his unwillingness to resign or seek voluntary retirement, the Chief Justice of India will advise the concerned Chief Justice of High Court not to allocate judicial work to the tainted judge.

09- 1976 S.C.R. 172.

10- *Secretary General, Supreme Court of India* v. *Subhash Chandra Agarwal* A.I.R. 2010 Del. 159.

National Judicial Appointment Commission

The Constitution (99th) Amendment Act, 2014 was created to give constitutional status to National Judicial Appointment Commission. National Judicial Appointments Commission Act, 2014 was also created to completely change the whole procedure for the appointment of Judges in High Court and the Supreme Court. After the two Acts come into force, on that basis a Judge would be appointed on the recommendation of the National Judicial Appointments Commission. The National Judicial Appointments Commission comprises of the Chief Justice of India, two senior most judges of the Supreme Court, the Union Law Minister, two eminent persons nominated by committee, consisting of the Prime Minister, the Chief Justice of India, the Leader of Opposition in Lok Sabha (in case there is no such leader the leader of the single largest opposition Party). The Commission is assigned to recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justice of High Courts and Judges of High Courts and also to recommend transfer of Chief Justice and Judges of High Courts from one High Court to another. The procedure laid down in the National Judicial Appointments Commission Act, 2014, stipulates that the Central Government shall make a reference to the National Judicial Appointment Commission, six months before the date of vacancy arising on account of completion of the tenure of a judge of the Supreme Court or a High Court. The National Judicial Appointments Commission Act, 2014 also requires that only senior-most judge of the Supreme Court, and a person who is considered fit on the basis of his ability, merit and suitability shall be appointed as the Chief Justice of India. A Judge of a High Court shall be recommended for appointment as Chief Justice, after considering his inter-se seniority, ability, merit and suitability. The Commission may select persons who are eligible under Article 217 (2) of the Constitution of India and forward the name of such persons to the Chief Justice

of the High Court for his views. Condition prior to sending the names and before seeking opinion of the Governor is, that the Chief Justice shall consult two senior-most Judges of the High Court. The views of the Governor and the Chief Minister of the State should he sought by the Commission before making a

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11- The 99th Amendment of the Constitution of India inserted Article 124A, 124B, 124C and 224A and amended Article 127, 128, 217, 222, 231.

12- Section 4, National Judicial Appointment Commission Act, 2014.

recommendation. If two members disagree in respect of a person, the same shall not be recommended. Now on the basis of above discussion, it is quite clear that collegium was a failure because of the lack of transparency and fairness, hence the need was to create such a body, which would provide good judges to come forward for the proper administration of justice. The National Judicial Appointments Commission is a suitable choice in this regard, because it is submitted by the Attorney General of India that the National Judicial Appointments Commission is subject to the right to information Act. The Right to Information Act, enables the citizens to get information about the working of the judicial system under the National Judicial Appointments Commission Act. This resultantly will bring transparency and accountability in the administration of justice by the judiciary. In the case of *Supreme Court Bar Association v. Union of India*. The National Judicial Appointment Commission was declared as unconstitutional by the Constitutional bench of the Supreme Court. Declaring that the judiciary cannot risk being caught in a 'web of indebtedness' towards the government the Supreme Court, rejected the National Judicial Appointments Commission (NJAC) Act and the 99th Constitutional Amendment, which sought to give politicians and civil society a final say in the appointment of judges to the highest courts. It is difficult to hold that the wisdom of appointing judges can be shared with also with the political-executive. In India, the organic development of civil society, has not, as yet sufficiently evolved. The expectation from the judiciary, to safeguard the rights of the citizens of this country can only be ensured, by keeping judiciary absolutely insulated and independent from the other organs of governance. Ironically, NJAC was struck down by the ration of 4:1.

Criticism of Collegium System

It has been observed that the collegium system in India is suffering from various anomalies. The integrity of the procedure followed in the appointment, transfer and supersession of judges of the higher judiciary has always been questioned and doubted.

The 20 year old collegium system has been severely criticized even by Supreme Court, who were members of the collegium. The main allegation is that there is total lack of transparency. Members of the Supreme Court collegium have also been accused of exploiting their power to appoint their close relatives or particular lawyers as High Court judges. Proximity, personal animosity has resulted in the delay or denial of appointments to the Supreme Court.

In the case of an appointment of Justice Kannadasan as a judge of the Madras High Court, on first occasion the file was sent back by the President but second time when collegium reiterated it, he was made judge. The collegium in the instance mentioned below, was headed by Chief Justice K.G. Balakrishnan, Justice S.H. Kapadia. Justice Tarun Chatterjee and Justice R.V. Raveendran, who had recommended the elevation of

13- **Writ Petition no. 13 of 2015.**

14- ***Centre Cites Justice Kannadasan case to question collegium system*, THE HINDU (08 may 2015)**

Justice P.D. Dinakaran, the then Chief justice of Karnataka High Court, as a Judge of the Supreme Court of India in 2009. The recommendation comes along with the names of four other Judges for elevation to the Apex court namely Justice A.K. Patnaik (Chief Justice of Madhya Pradesh High Court), Justice Tirath Singh Thakur, (Chief Justice of Punjab and Haryana High Court), Justice S.S. Nijjar (Chief Justice of Calcutta High Court) and Justice K.S. Radhakrishna (Chief Justice of Gujarat High Court).

In this context a renowned RTI activist Mr. Subhash Chandra Aggarwal filed an RTI application to the Central Public Information Officer (hereinafter CPIO). Supreme Court of India, for knowing the file noting of the collegium for the elevation of certain Chief Justices of High Courts to the Supreme Court of India. However Central Public Information Officer vide his letter dated October 10, 2009 refused to provide the requisite information on the ground that the same could not be provided for the want of being confidential.

Another problem is Collegium is untrained members in the task of selecting judges. There could be room for nepotism, communalism and favouritism in the absence of guidelines. The selection process excludes judges. Nowhere in the whole of the world judges are selecting fellow brother judges. A new code by the constitutional chapter has become imperative. Appointment is a desideratum. Justice J. Chamleshwar, a sole judge who dissented on the NJAC judgement, against the opaque system of appointing judges to the Supreme Court and High Court also said Collegium system has failed.

I think the system of appointment and its secrecy regarding the appointment and elevation is a matter of concern, whereby sometimes it looks that few got elevation and few got rejection with no reason on record. The above discussion has shown that the Collegium has failed miserably and there are innumerable instance whereby we have seen that people losing faith in the judiciary which is really a matter of serious concern.

Conclusion

I feel that that the foundation of this republic is based on the bedrock of justice. For safeguarding fundamental rights the courts have a yeomen duty to take care. In *Keshavanand Bharati* v. *State of Kerala*, it was held that supremacy of the Constitution is amongst the basic feature of the Constitution of India. This supremacy is protected by an independent judicial body as a chief interpreter for upholding the Constitutional duties and obligations.

Even though there is a special power to decide on benches with the Chief Justice, still there is an important principle rooted in our Constitutional scheme and that is '*Be you ever so high, law is above you*'. Rule of Law is one of the basic principle of law and it is

15- **A.I.R. 1973 S.C. 1461.**

16- **Thomas Fuller was an English Churchmen and Historian. So many time he was remembered by the Supreme Court in its decisions.**

beyond any person or post. The principle of rule of law is an important principle of administrative law, which puts check on discretions. Anybody using discretion beyond the principle of natural justice by the virtue of administrative law is subject to scrutiny. If these observations are to understood then I believe that now the time has come, whereby to uphold the dignity of the Constitution of India. Additionally, we need to replace those conventions and laws which are obstructing free flow of the administration of justice. This notion of Bench allocation becomes a very serious issue, when four senior most judges of the Supreme Court decided to hold a press conference expressing their displeasure with the Chief Justice of India with the way of assigning cases. The fact of the matter was all that all four senior judges are members of Collegium. It shows apparently that all is not well in Collegium.

Taking whole situation and aspect into the consideration, I feel that now the time has come when the legislation is required, no doubt NJAC failed miserably but another legislation in the form of National Judicial Commission can be a better solution. Suggesting here the UK model as an alternative, where in United Kingdom there is Judicial Appointment Commission (JAC) consisting of 15 members and the Chairman. Out of the 14 Commissioners, five are judicial members, two are professional members, one is tribunal judge and another is non-qualified judicial member. The current Judicial Appointment Commission in UK, also has two professors in it. The members of commission are appointed in their own right and are not representative of the profession they come from. The diversity of the Commission members enable them to bring their own expertise, knowledge and most importantly they are independent of their mind. Similarly in Malaysia there are Nine member Commission including Chairman, whereby this Judicial Appointment Commission appoint candidates on the basis of merit, integrity, legal knowledge and ability, professional experience and judicial temperament. The best part about this judicial appointment commission is that out of these nine members there is scope for one member from academia. It is an excellent trend that when you have people in selection process from judiciary as well as from academics, it proves to be healthy for the selection criterions. All the necessary information is available at the website which makes it more accountable and transparent. The Judicial Appointment Commission deliberations are sent to the Prime Minister of Malaysia for recommendations and the person who is recommended, can be appointed as a judge on the basis of recommendations. Similarly in South Africa there is South African Judicial Service Commission, which consist of 25 members from the legal fraternity but with distinguished representation from all walks of legal fraternity, like it includes the Chief Justice of South Africa who preside over the Commission, the Judge of the Supreme Court of Appeal , one judge

nominated by the President of the Commission, the Minister of Justice, two advocates nominated from the legal profession, two attorneys nominated within the attorneys profession, one Professor of Law from South African University who teaches law, six members from the National Assembly including three from the opposition parties, Four members from the National

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17- *Available at*: https://m.timesofindia.com/india/shock-sc-judges-press-conference-let-nation- decide-about-cjis-impeachment/articleshow/62471142.cms, (last visited 14 Jan., 2018).

Council of Province, Four more members nominated by the President in consultation with the members of the other parties in National Assembly. This Independent Commission recommends

four names for one post out of which one is picked by the President. Now this composition of independent Commission in South Africa shows the representation of all walks of and sections and polity of the society. This decreases the chances of any kind of conflict because there is appropriate representation from all corners of the society including the legal fraternity. Hence now the time has come when we will have to reconsider 'Collegium' with more transparent solution.

Public confidence in an impartial judiciary is a necessary prerequisite for an impartial judiciary. That confidence is sometimes undermined by the doubt that the judges may be lured by the post- retirement benefits or other benefits in forms of lucrative post retirement appointments. If the head of the institution himself accept post- retirement benefits, like the former Chief Justice of India, Justice P. Sethasivaam, who choose to become Governor of the State after retirement, which is more often a political appointment. Hence taking all aspects of judicial independence and faith of the people into the consideration, I believe that we can also think of at least 10 member Commission, whereby the Chief Justice of India shall be the Chairman of the Commission. Members of the Commission also includes two senior most judges of the Supreme Court, two Professor of at least 10 years, as professorship with reputed institute, two government representatives from All India Services with degree in law, two representatives from Bar Council with 10 years of practice in Supreme Court and a Law Minister from the Union Government. Decision will be taken on the basis of majority. If no candidate is selected on the basis of majority, then he or she should be dropped from the probable list. There must be no primacy of anybody including Chief Justice of India. This National Judicial Commission should be subject to the Right to Information Act. Judiciary is most respected organ of the state and hence there must be sincere efforts both from the Judiciary as well as from the Legislature for controlling damage to the institution. The people of this country have serious faith and respect for the judiciary and it should not be lowered in any sense. It is also important to understand access to justice is pre-requisite to administration of justice. If we want democracy to excel in our country, than we will have to think about transparent system of judicial appointment.

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