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THE LAW AND PRACTICE OF JUDICIAL APPOINTMENTS IN INDIA – SINCE 1950 AND CURRENT SCENARIO

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Short Profile

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ABSTRACT:

The question of the process of judicial appointments concerned not only with the administration of justice but also many other basic doctrines such as, Independence of the judiciary, Parliamentary democracy and the maintenance of the Rule of Law in accordance with the Constitutional provisions. It is also significant in the context of the doctrine of Separation of Powers. To enable the Courts to discharge their multi-faceted functions effectively, it is extremely important that the Courts enjoy independence.2 Thus; the issue of judicial appointments is significant. Recently, in August, 2014, Parliament has passed National Judicial Appointments Commission Act, 2014. With this new enactment the 20 years old collegium system has been abolished. Immediately on 15th August, 2014, Justice R. M. Lodha, *CJI,* criticised that it tarnish the image of the judiciary in the eyes of public.

Thereafter, actions and reactions of Parliament and the Supreme Court in appointment of higher judiciary created a new controversy between them. This paper is related to the encounter between Legislative and Judiciary as to the process of the judicial appointments in the Supreme Court and High Courts in India.

KEYWORDS

judicial appointments , Constitutional provisions , democracy , Separation of Powers.

INTRODUCTION :

"Judiciary is a watching tower above all the big structures of the other limbs of the state from which it keeps a watch like a sentinel on the functions of the other limbs of the state as to whether they are working in accordance with the law and the Constitution, the Constitution being the supreme."[1]

- Justice Untwala

The appointment of judiciary is one of the most significant issues in any legal system. This issue deals with various basic values of democracy. It is necessary to maintain the law and order in any country. Therefore, the various basic values are needed to take into consideration while appointment of judiciary.

The question of the process of judicial appointments concerned with many other basic doctrines such as, Independence of the judiciary, Parliamentary democracy and the maintenance of the Rule of Law in accordance with the Constitutional provisions. It is also significant in the context of the doctrine of Separation of Powers.

Montesquieu theory of 'Separation of Powers' says that one individual should not hold and possess all the powers of the governance. In India, the doctrine is not adopted in its absolute rigidity, but the 'essence' of that doctrine with the constitutional limitation and trust implicit in the scheme was duly recognized *In re Delhi Laws Act* . Later, the doctrine of Separation of Powers was elevated to the status of a basic feature of the Constitution in *Indira Gandhi v Raj Narain* .

However, the participatory role of Legislature and the Judiciary and the concept of checks and balances to keep every organ within the limits of constitutional scheme, giving rise to the impression of a potential for conflict between them in the context of separation of powers. It is creating the question of supremacy of powers. Both encountered and interacted with each other in the number of areas until now. The area of the 'Judicial Appointments' is relates to, one of the basic concepts of judicial process, i.e. the 'independence of judiciary', and it is the *sine quo non* for the existence of the 'Rule of Law'. Art. 124 and 217 of the Constitution deal with the higher judiciary appointments in the Supreme Court and high court. Since the government is the major litigant in many cases, it was felt that such power should not vest in the government alone .

Judicial Appointments: Since 1950 to 1994

In our Constitution, the power to appoint the Supreme Court and High Court judges has been given to the President of India Art. 124(2) and 217(1) of the Constitution empowers the President to appoint the Supreme Court and High Court Judges respectively, after consultation with the Chief Justice and other judges, as the case may be.

In the beginning, the Supreme Court consists of the Chief Justice of India and 7 other Judges. Parliament empowered to increase the number of Judges. Accordingly, it increased the number from 8 to 11 in 1956, 14 in 1960, 18 in 1978, 26 in 1986 and presently 31 in 2009.

The total approved strength in all High Courts is 955 Judges. Out of them, 321 vacancies are there in all 24 High Courts and 2 vacancies in the Supreme Court as on 1st Oct. 2014. Thus, nearly 1/3 of the High Court Judges are vacant.

As the President is only the titular head, the actual practice and procedure for appointment of the Supreme Court and High Court Judges was such wherein the Minister of Law and Justice, Prime Minister and the Chief Justice played vital role. The procedure of appointment of the Chief Justice of India and other Judges is discussed separately.

Appointment of the Chief Justice of India

The Constitution is silent on this issue as to who shall be appointed as the Chief Justice of India among the present Supreme Court Judges. The role of the Chief Justice of India is so vital that in the absence of the President and the Vice-President, he serves as the acting President of India . The President follows the practice of appointing the senior most Judges as the Chief Justice of India. This practice was criticized by the Law Commission in 1958. With this criticism, the Conflict between Government and the Judiciary rose. However, in 1973, the Government departed from the prevailing practice of appointing senior most Judges as the Chief Justice of India. Then government appointed Justice A. N. Ray who was forth in seniority. The three senior judges Justices J. M. Shelat, K. S. Hegde and A. N. Grover resigned in protest. Again in 1977, Justice M. H. Beg appointed as Chief Justice of India instead of Justice Khanna who was the senior in rank and resigned thereafter. This supersession was widely perceived as an outcome of the dissenting judgment of Justice Khanna in *ADM Jabalpur v. Shivakant Shukla* . These situations deliberately created by the then Prime Minister Mrs. Indira Gandhi and attacked on the doctrine of judicial independence. After the retirement of Chief Justice Beg in 1978, then Prime Minister Morarji Desai stuck to the principle of seniority and recommended to the President to appoint Justice Chandrachud the senior most judges as the Chief Justice of India. Thereafter, the practice of appointing the senior judge as the Chief Justice of India has been followed until now. In 1994, the Supreme Court laid down that the proposal for the appointment of the Chief Justice of India, should by convention, be initiated by the outgoing Chief Justice .

Thus, the present system of appointing the Chief Justice of India is that the outgoing Chief Justice shall recommend the name for the next senior judge as the Chief Justice. After such recommendation, the Union Minister of Law and Justice shall forward it to the Prime Minister who will advise the President in the matter of appointment. When there is any doubt about the fitness of the senior most Judge to hold office of the Chief Justice, consultation with other judges would be made as envisages in Art. 124(2) of the Constitution.

Appointment of other Supreme Court Judges

Before 1993, the President's power to appoint the Supreme Court Judges was purely of a formal nature. The final power rested with the Executive and views expressed by the Chief Justice were not regarded as binding on the Executive. If the final power in this respect is left with the executive, then it is possible for the executive to subvert the independence of the judiciary by appointing pliable judges. Art. 124(2) were not clear from this provision as to whose opinion was finally prevail in case of difference of opinion among the concerned persons. This important question has been considered by the Supreme Court in several cases. In the First Judges' case of S. P. Gupta v. Union of India , the Supreme Court held that the view of the executive in this regard had primacy over the view taken by the Chief Justice of India. In 1991, in Subhash Sharma v. Union of India , The Bench of three Judges suggested that

this question be considered by a larger Bench because the constitutional phraseology would require to read and expounded in the context of the constitutional philosophy of separation of powers.

Judicial Appointments: 1994 - 2014

A public interest writ petition was filed by the Lawyers' Association raising several crucial issues. In this Second Judges case S. C. Advocates on Record Association v. Union of India , the nine Judge Bench considered the question of the primacy of opinion of the CJI in regard to the appointment of the Supreme Court Judges. The Court emphasized that the question has to be considered in the context of achieving the constitutional purpose of selecting the best suitable for composition of the Supreme Court so essential to ensure the independence of the judiciary, and thereby, to preserve democracy.

It also emphasized that the consultative procedure under envisaged under Art. 124(2) indicate that the Government does not enjoy primacy or absolute discretion in the matter of appointment of the Supreme Court Judges. It pointed out that the Chief Justice is best equipped to know and assess the worth of the candidate and his suitability for appointment as a Supreme Court Judge, and it was also necessary to eliminate political influence. Thus, the court by way of laying down various propositions, it set up Collegiums system consisting of the Chief Justice and two senior judges of the Supreme Court.

In 1998, the President had difficulty in endorsing the recommendations made by the Chief Justice of India for appointment of Judges to the Supreme Court and transfer Chief Justices of High Courts. It led the President to seek advisory opinion of the Supreme Court under Article 143 of the Constitution. This *Presidential Reference case* set out nine specific questions for the opinion of the Supreme Court. In respect of the Collegiums system, the Court said that having regard to the object of such consultation, it was desirable that the collegiums should consist of four senior most Judges of the Supreme Court instead of two.

Thus, since 1994, the procedure for appointing the Supreme Court Judges is follows as per the memorandum which is based on the Supreme Court decisions. Accordingly, while appointment of the Supreme Court judges, the Chief Justice of India will initiate the proposal and forward it to the Union Minister of Law, Justice and Company Affairs to fill up the vacancy. Before initiating the proposal, the Chief Justice should be formed an opinion after the consultation with the four senior most puisne Judges of the Supreme Court. After receipt of the final recommendation of the Chief Justice of India, the Union Law Minister will put up the recommendations to the Prime Minister who will advise the President in the matter of appointment.

Appointment of Acting Chief Justice and Ad hoc Judges

Article 126 of the Constitution provides that the President may fill up the vacancy in the office of the Chief Justice. In such case, the senior most available Judge of the Supreme Court of India will be appointed to perform the duties of the Chief Justice of India during the period of vacancy.

Article 127 of the Constitution provides that if at any time there should not a quorum of Judges of the Supreme Court available to hold or continue any session of the Court, the Chief Justice may, with the previous consent of the President and after consultation with the Chief Justice of the High Court concerned request, a judge of High Court duly qualified for appointment as a Judge of the Supreme Court to attend, for such period as may be necessary, the sittings of the Supreme Court. Then the Chief

Justice will communicate to the Law Minister who shall forward recommendation to the Prime Minister who will advise the President in the matter of appointment.

Retired Supreme Court Judge

The Chief Justice of India, with the previous consent of the President, may request any retired Supreme Court of India to sit and act as a Judge of the Court.

Parliament's Role in the current Scenario

Proposal for setting up the Commission

The 80th Report of the Law Commission of India, 1978 recommended that the Chief Justice of India shall consult three senior most colleagues. There was a proposal before the Government of India to constitute a high level Committee for recommending names of persons for appointment of Judges of the Supreme Court of India.

After the case of *S. P. Gupta,* the executive came to wield overriding powers in the matter of selection and appointment of Judges, in its 121st Law Commission Report, 1987 it again examined this matter and recommended the constitution of National Judicial Service Commission composed of 11 persons. It is cleared that it was primarily to dilute the executive power, and as a hedge against executive interference with the judiciary, that the Law Commission mooted the idea of Judicial Commission.

In fact, this Report played the significant role in the Supreme Court decisions in Advocate on Record Case in 1994 and *In re: Presidential Reference case in 1999,* which constituted the Collegium system. Theoretically, at least, this 'de facto' Judicial Commission ensured a freedom from executive interference and consequently guaranteed judicial independence. Thereafter, the National Commission to Review the working of the Constitution has suggested two alternative compositions of the National Judicial Service Commission.

In the US Supreme Court, the method of appointment of Judges is as follows: "The President nominates a person to be a Justice or the Chief Justice of the US Supreme Court. The Senate Judicial Committee examines the person publicly and either recommends confirmation or rejection of the person's appointment. The whole Senate afterwards approves the recommendation..."

Constitutional Amendment and new NJAC Act

In August 2013, the UPA Government introduced the Constitution (120th Amendment) Bill, 2013 and the Judicial Appointments Commission Bill, 2013 in the Rajya Sabha. The said Bill was passed in Rajya Sabha but lapsed with the dissolution of 15th Lok Sabha.

In the first week of July 2014, the conflict arise between new Modi Government and Justice Lodha, CJI, regarding suggesting for appointment of the four judges to the Supreme Court and segregating one name out of four by the government. According to the Chief Justice of India before segregating, the government ought to be consulted with him and suggested that such things should be avoided in future.

Immediately thereafter, in August, 2014, Parliament passed the Constitutional (121st Amendment) Bill, 2014 and the National Judicial Appointments Commission Bill, 2014 which seek to amend the Constitution to replace the method of appointments to the higher judiciary with that of a National Judicial Appointments Commission. Actually, it seeks to nullify the present 21 years old collegium system. The said Bills passed on 11th August 2014 in Lok Sabha with 367 in favour and no one against it and on 13th August 2014 it passed unanimously in the Rajya Sabha with 179 members were in favour of the Bill. But, one of the renowned jurist members of Rajya Sabha Adv. Ram Jethmalani remained abstained.

The Bill provides for the procedure to be followed by the NJAC for recommending persons for appointment as Chief Justice of India and other Judges of the Supreme Court (SC), and the Chief Justice and other Judges of High Courts (HC). It also provides for filling of the vacancies.

On 15th August, 2014, two days after passing the Bills, Justice R. M. Lodha, CJI expressed his opinion, opposing the Bill, said that the new method of appointing judges will tarnish the image of the judiciary in the eyes of public.

Moreover, the bill requires the passing by majority with minimum 50% of total state legislatures of the Country. Meantime, two petitions challenging the said bill have been filed. Now, it is interesting to see how judiciary reacts in these petitions on this. Many retired Judges like Justice P. B. Sawant, Justice Sujata Manohar, etc. opposed the said Bills nullifying the present collegium system.

CONCLUSION

The proposed Commission will pave the way for the executive to have a say in the appointment of judges, thus ending the exclusivity of the judiciary in the matter. The new system was, in fact, a backlash against the system that existed earlier, which gave the executive an upper hand in the choice of judges. The Supreme Court lawyer and activist Prashant Bhushan said, "The system of appointment of judges by the judiciary did lead to the depoliticisation of the judiciary to a large extent and substantially improved its independence. But the process was still shrouded in secrecy and keeping the control over appointments with sitting judges, who had little time from their judicial work, coupled with the lack of transparency in such appointments, led to nepotism and arbitrary appointments."

Another objectionable area in the said Bill is in respect of the Law Minister and two eminent persons as the members of the NJAC. The lay men will be selected through the another Committee of 3 members including the CJI as the head and other two members will be from the political field i.e. the PM and a Leader of the opposition party. It would be against the basic principles of Independence of Judiciary and Separation of powers.

The framers of our Indian Constitution adopted the scheme of Parliamentary Democracy; wherein all organs are to serve the common purpose of public good deriving their authority from the common source i.e. Constitution of India. Each organ has a clear role in the Constitutional scheme. It envisages a participatory role of the people in the governance as political sovereignty vests in the people. Therefore, it should be remembered by each organ of the Government that Constitution is the supreme and the claim of supremacy by any of the organs is misplaced and contrary to the spirit of the Constitution.

1. AIR 1951 SC 332
2. AIR 1975 SC 2299
3. S. P. SATHE, JUDICIAL ACTIVISM IN INDIA, Oxford
4. Source – Data published by Dept. of Justice, Ministry of Law and Justice (1st Oct. 2014)
5. The Chief Justice M. Hidayattullah served as the acting President of India.
6. AIR 1976 SC 1207
7. The longest tenure as the Chief Justice of India i.e. 2696 days (seven years and few months)
8. Supreme Court Advocates on Record Assn. v. Union of India, AIR 1994 SC 268
9. M. P. JAIN, INDIAN CONSTITUTIONAL LAW, (6th Edn. Reprint 2012)
10. AIR 1982 SC 149, A similar view was expressed in Union of India v. Sakalchand Sheth, AIR 1977 SC 2328
11. AIR 1991 SC 631
12. AIR 1994 SC 268
13. Special Reference No. 1 of 1998 re, AIR 1999 SC 1.
14. The Constitution of India, Art. 128
15. S. P. Gupta v. Union of India, AIR 1982 SC 149
16. M. P. JAIN, INDIAN CONSTITUTIONAL LAW, (6th Edn. Reprint 2012)
17. Ibid
18. Report submitted in 2002.
19. T. K. TOPE's, CONSTITUTIONAL LAW OF INDIA, 3rd Edition
20. The Week, August 24, 2014 pg. 33
21. Ibid.

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