



APPOINTMENT OF JUDGES IN HIGHER JUDICIARY- A CRITICAL REVIEW OF THE CONSTITUTIONAL PROVISIONS

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ABSTRACT

The cardinal pillars of Indian democracy are Legislature, Executive and Judiciary. The powers and functions of these organs are clearly laid down in the Constitution. For a democracy to work at its best in order to sustain fundamental freedoms, independence of judiciary is *sin qua non* for the same. Though, the principle and policy of judicial independence rest on various pillars, appointment of judges is the central pillar of the edifice. Bare independence of the judiciary would assure healthy working of democracy in the country. This paper critically examines the constitutional provision of appointment of judges in higher judiciary. It also throws light upon the various legislations brought to overcome the challenge of fair appointment of judges.

INTRODUCTION

No democracy can flourish without an independent judicial system, a system free from fear or favour, or Mala fide intention, a system isolated from other branches of government. The Constitution of India under Article 124 and Article 217 lays down the provisions for the appointment of judges in the Supreme Court and High Courts respectively.

Article 124(2) of Constitution of India deals with the appointment of Supreme Court

judges and reads as, Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal and shall hold office until he attains the age of sixty-five years.¹

Article 217(1) of the Constitution of India deals with the appointment of High Court Judges and reads as, Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal shall hold the office until he attains the age of sixty-two years.²

RESEARCH OBJECTIVES

- a) Is there a need of National Judicial Appointment Commission to ensure free and fair appointment of judges in higher judiciary?
- b) Is the status quo of the appointment of judges in higher judiciary, just and in favour of the healthy working of the democracy?

APPOINTMENT OF JUDGES AND CONSTITUTIONAL PROVISIONS

The forefathers of the Indian Constitution constructed the Constitution in a way that neither gives blank cheque to the legislature nor is a cumbersome method which may give rise to the possibilities of subjecting the judicial appointment to political influence and pressure.³ The Indian method as lays down in article 121(2) neither gives absolute authority to the executive nor does it permit the parliament to influence appointment of judges. The executive required to consult persons who are well qualified to give

¹ India Consti. Art. 124, cl. 2.

² India Consti. Art. 217, cl. 1.

³ www.droitpenaleiljcc.in/PDF/VIII/11.pdf



proper advice to this regard.⁴ The system of appointment of judges has gone through various changes in order to attain such efficient system. The Supreme Court has played an important role in making such changes.

Appointment of judges to the Supreme Court

The Judges of Supreme Court are appointed by the President, although this power of the President is not unfettered. The constitution paves the way for President to seek consultation from such other judges of the higher judiciary, as he may deem necessary. The process of appointment of a judge of the supreme court is initiated by the Chief Justice of India through a collegium consisting of himself and four other senior most judges of the Supreme Court. The recommendation of the collegium is further sent to the President which is a binding recommendation. Over the years, a convention has developed that the senior most judge would become the Chief Justice whenever the vacancy arose.

Appointment of judges to the High Courts

The judges of the High Courts are appointed by the President after consulting the Chief Justice of India, governor of the state concerned and in case of appointment of a judge other than the Chief Justice of the High Court, the Chief Justice of the High Court to which the appointment is to be made.⁵

APPOINTMENT OF JUDGES IN HIGHER JUDICIARY AND JUDICIAL INTERPRETATION

The appointment of judges in The Supreme Court and High Courts has been a matter of incompatibility between the judiciary and the executive over the years. It is crucial for securing the independence and objectivity of the judiciary that selection of judges in High Courts and the Supreme Court is done on the basis of merit and competency and any extra political influence in the appointment shall be eliminated. It is the constitution obligation of the court to keep check on the executive imposing undue influence in appointment of judges. The constitution merely says that the President will appoint Supreme Court judges in consultation of the Chief Justice of India and such other judges of the Supreme Court, as he may deem necessary.⁶ From the above provision it was not clear as to whose opinion was finally to prevail in case difference of opinion rises among the concerned people. This question was considered by the Supreme Court in several cases.

S. P. Gupta v. Union of India⁷

In S. P. Gupta v. Union of India also known as the first judge's case decided on 30/12/1981 by seven judge bench by majority held that Article 124(2) and 217(1) speak of consultation and not concurrence and therefore it was for the Union Government to consider the opinion given by the Constitutional Functionaries and to arrive at its own decision on the appointment or non-appointment. It was

⁴ M.P. Jain, 'Indian Constitutional Law', 5 ed. 192, Wadawa and co., Nagpur, (2007).

⁵ India Const., Art. 217 (1).

⁶ INDIA CONST., Art. 124 (2).

⁷ A.I.R. 1982 SC 149.



further held by Justice Bhagwati that the power of appointment resides solely and exclusively in the President and the Central Government could override the opinion given by the Constitutional functionaries.

Subhash Sharma v. Union of India⁸

The decision of Supreme Court in S. P. Gupta v. Union of India was criticised by the Supreme Court in the case in hand. The Supreme Court in this case emphasised that an independent, non-political judiciary was crucial to sustain the democratic political system adopted in India. The bench expressed the view that the role of the Chief Justice of India be recognised as of crucial importance in the matter of appointment to the Supreme Court and High Court of the states. The Supreme Court said that primacy be given to the views of the Chief Justice of India in the matter of selection of judges to the Supreme Court and High Courts. This would improve the selection of judges.

Supreme Court Advocate-on-Record Association v. Union of India⁹

The Supreme Court in this case gave a wider meaning to the constitutional provision relating to the appointment of judges to the higher judiciary. The word 'consultation' in article 217(1) was given a wider meaning. The majority supported that the main concern of the Constitution is the selection of the most suitable persons for the higher judiciary. The Supreme Court held that, "In the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest

weight as he is best suited to the worth of the appointee." The court also expressed that the initiation of the proposal for appointment of the High Court judges must be by the Chief Justice of the concerned High Court.

NATIONAL JUDICIAL APPOINTMENT COMMISSION

The parliament passed the 121 Constitutional amendment Bill 2014 with a view to replace the collegium system with regard to the appointment of judges to the Supreme Court and High Court. The bill sought to enable equal participation of judiciary and executive and ensured that the appointment to the higher judiciary is more participatory, transparent and objective. The bill amended article 124 (2) of the Constitution to provide a commission to be known as the National Judicial Appointment Commission (NJAC).

Composition of NJAC

The NJAC would consist of six members out of which Chief Justice of India as a chairperson, two senior most judges of the Supreme Court, union minister of law and Justice, two eminent persons (to be nominated by a committee consisting of Chief Justice of India, prime minister of India and leader of opposition in Lok Sabha). Of these two eminent persons, one person would be from SC/ST/OBC or minority community or a woman. These eminent persons to be nominated for a period of three years and shall not be eligible for re-election.

Functions of National Judicial Appointment Commission

The bill assigned following functions to the National Judicial Appointment Commission:

⁸ A.I.R. 1991 SC 631.

⁹ A.I.R. 1994 SC 268.



- Recommending persons for appointment as Chief Justice of India and other judges of the Supreme Court.
- Recommending transfer of Chief Justice and other judges of the High Court's from one High Court to another.
- Ensuring that the persons recommended are of ability and integrity.

National Judicial Appointment Commission struck down as unconstitutional

The validity of National Judicial Appointment Commission (NJAC) was challenged before the Supreme Court in *Supreme Court advocates-on-Record v. Union of India*. In a landmark judgment, a five judge's bench of Supreme Court by 4:1 majority struck down the 99 Constitutional amendment as ultra vires to Constitution. The bench held that NJAC sought to interfere with the independence of the judiciary, of which appointment of judges and primacy of the judiciary in making such appointments was indispensable. However, Justice J. Chelmaswar, gives a dissenting judgment and held that the ever-rising pendency of cases warranted a "comprehensive reform of the system" and upheld the validity of NJAC. Differing with the majority, he said that primacy of the Chief justice of India is not a basic structure of the Constitution and judiciary's power over appointments was not the only means for the establishment of an independent and efficient judiciary.

CONCLUSION

It is a well-known fact that the independence of judiciary is the basic requisite for ensuring a free and fair exercise of powers by the different organs of the Government in a democratic system. The framers of the Indian Constitution at the time of framing of

our Constitution were concerned about the kind of judiciary they want to have. This concern of the members was responded by Dr. Ambedkar in the following words: "There can be no difference of opinion in the house that our judiciary must be both independent of the executive and must be competent in itself." However, a controversy always lies between the judiciary and the executive over the appointment of judges from the outset of the Constitution. This controversy is the outcome of follies committed by both these organs in the past. After independence, the judges of the Supreme Court were previously judges of High Courts with the senior most of them taking over as Chief Justice of India. In 1958, Law Commission of India found that this process did not take merit into account. In 1973, the then Prime Minister interferes with the existing framework and appointed Justice A.N. Ray as Chief Justice of India, superseding three senior judges to him. After this in 1975, again Justice H.M. Beg was appointed Chief Justice of India, superseding Justice Khanna. The judiciary stung by such blatant misuse of powers, got an opportunity in the judge's cases in 1981, 1993 and 1998 to get it right. As a result of the judge's cases, the collegium system came into existence. It has almost ended the role of executive in the appointments to the higher judiciary. What the Indian judiciary has achieved today with regard to the appointment of judges, no judiciary has such freedom to appoint judges elsewhere in the world. The struck down of NJAC was a vital step in order to prohibit potential political influence and encroachment in appointment of judges. NJAC would create loopholes for the negative influence in appointing judges of higher Judiciary. It could not ensure



independence of the judiciary hence was in conflict with the basic structure of the the constitution. The status quo of the appointment of judiciary entertains insignificant political influence and hence is beneficial for the working of the Indian Judiciary.

BIBLIOGRAPHY

- Constitution of India- V. N. Shukla
- Constitutional law of India- Dr. J. N. Pandey
- Introduction to the Constitution of India- D. D. Basu
- Constitutional law of India- H. M. Seervai
- <https://www.manupatrafast.in>
- <https://indiankanoon.org>
- http://elib.bvuict.in/moodle/pluginfile.php/170/mod_resource/content/0/Neha%20Nagargoje.pdf
- http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/14_advance_constitutional_law/32_judicial_appointments_and_accountability/et/7630_et_32_et.pdf
- <https://www.thehindu.com/specials/in-depth/njac-vs-collegium-the-debate-decoded/article10050997.ece>
