

JUDICIAL APPOINTMENT: CONTEMPORARY ISSUES AND CHALLENGES

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CHARACTERISTICS OF JUDICIARY AND ITS OVERVIEW

The judiciary is the third organ of the government whose role is to apply the laws to specific cases and to settle the disputes. So when the judges give out their judgment the real meaning of law is defined. The court has the right to interpret the constitution. “From the citizen’s point of view, Judiciary is the most important organ of the government because it acts as their protector against the possible excesses of legislative and executive organs. Role of Judiciary as the guardian-protector of the constitution and the fundamental rights of the people makes it more respectable than other two organs”.¹

“Judiciary is the repository of public faith. It is the trustee of the people. After knocking at all doors, when one fails to get his grievance redressed, judiciary is the only hope which comes to one's rescue. It is the only temple worshipped by the citizens of the country regardless of religion, caste, creed or place of birth.”² So the people have very much trust on the judiciary and they are in the hope that if no one listens and if we knock the doors of judiciary then they will be there always to give the justice. Because the only ray of hope of the citizens is the judiciary. The judiciary is the guardian of Constitution of India and Fundamental rights of the citizens. The Constitution of Indian is a single integrated system with District Court at the lower level High Court at the middle level and Supreme Court at the apex.

¹ K.K Ghai, “Judiciary: Functions, Importance and an Essential Quality of Judiciary”
<http://www.yourarticlelibrary.com/essay/law-essay/judiciary-functions-importance-and-an-essential-quality-of-judiciary>

² K.C. Jena , Judicial Independence and Accountability: A Critique, Indian Bar Review, (4) 2012, Volume. XXXIX, p.9.

Functions of Judiciary and its importance:

1. To give justice to people: It is the very foremost function of the judiciary to give justice to the aggrieved party by giving the punishment to the people who is found guilty after the trial. If the victim or the aggrieved party had suffer any loss so the court can ask the guilty person to compensate him. When they fear to harm their rights or if their right is violated then court can grant sufficient quantity of compensation so by this they can provide justice to the civilians.
2. Application and interpretation of law: This is done by judges who interprets and apply the laws in a specifically manner according to the specific cases that comes before them. So it is very important how judiciary interprets the law and sets the precedents.
3. In making laws: when any judgement was given by high court it sets precedent on all the lower courts which they follow as the authoritative statement so this way judicial decision can also became the source of law.
4. Protection of rights: Whenever certain rights are violated of the people of the country by other person, state or by any organisation or there is a threat of been violated then the judiciary comes into play to protect the rights.
5. Guardian of the constitution: “The judiciary acts as the guardian of the Constitution. The Constitution is the supreme law of the land and it is the responsibility of the judiciary to interpret and protect it. For this purpose the judiciary can conduct judicial review over any law for determining as to whether or not it is in accordance with the letter and spirit of the constitution. In case any law is found ultra vires (unconstitutional), it is rejected by the judiciary and it becomes invalid for future. This power of the court is called the power of judicial review.”³ If any law found to be void then judiciary has power to remove that part from the constitution.
6. Judiciary has power to enforce the judgement and its decision: judiciary not only interprets the law but also has power to get the law enforced. They can order executive to carry out its decision. Suppose in any case if the accused is directing against the order of the court or not present on the date or have done contempt of the court then court has power to enforce his decision or has power to punish him.

³ K.K Ghai, “Judiciary: Functions, Importance and an Essential Quality of Judiciary”
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7. Special role in the federation: All legal centre state disputes are settled by judiciary also it acts as independent and impartial between central government and state government to solve the matter amongst each other.
8. Open trial: The accused who is tried in the court for the offence committed must be given fair chance to defend him selves. This principle is based on the Latin maxim '*Audi Alteram partem*' which means listen to other side or everyone should be heard. This principle talks about no one should be judged without fair hearing everyone has right or given opportunity to defend themselves in court of law.

APPOINTMENT AND ITS NATURE

The appointment of judges can be divided into two forms i.e. higher judiciary and lower judiciary higher judiciary includes courts such as High court and Supreme court of India and lower judiciary includes lower courts or other than the higher judiciary.

Lower judiciary

The appointment procedure of lower court judges is very easy and the procedure is carried out by state public service commission or by high courts. The process is done by giving a written examination which is like a preliminary objective test and after it is continued by mains subjective test. Then an interview is taken after clearing the mains examination and if an interview is passed than you became a lower court judge. There is also another type of examination for Additional District Judges which is conducted by High court. This type of examination is also called HJS i.e. higher judicial services. Though it is still comes under lower judiciary. The procedure is same as that of Public Service Commission for appointing Additional Judge just the difference is this HJS requires the experience of 7 years as a judge or lawyer.

Higher judiciary

In India according to Article 124, 217 and 222 of Indian Constitution deals with the appointment of Supreme Court and High court judges and the transfer of judges from one high court to another. Appointment of judges on higher judiciary is done in following manner.

1. Through Promotion from Lower Judiciary.

2. Through direct elevation of practicing lawyers and has working experience of advocate for at least 10 years.
3. In case of Supreme Court through direct elevation and promotion from high courts and been a judge for at least 5 years in High court.

But there is evolution in appointing the higher judiciary prior to NJAC before 1981 the appointment of judges of higher judiciary was made by the government through the president with the consultation with chief justice and other judges. The appointment of chief justice is done on the basis of seniority and it becomes a norm or practise which is followed. There is nothing given about the seniority in Constitution but it merely become the practise. So the executive has the power to take decision and interfere in the judiciary. But “in order to preserve the independence of the judiciary, the primacy in the matter of judicial appointments must remain with the judiciary. The National Judicial Commission, being a full time body, could devote the requisite time to select the best candidate by following a fair and transparent system which methodically examines the merits of possible candidates on some laid down criteria. That would also free the appointment system from the control of the government and the nepotistic influence of the judiciary.”⁴ Also recent news about the tussle between executive and judiciary on the appointment of various high court judges have been came up. Before 1981 in the case of Kesavananda Bharti vs State of Kerala a doctrine had been invented and this doctrine holds the hand of parliament by giving less power to make amendments in the constitution.

After 1981

From this year the judiciary is strengthened and the decisions are taken by judiciary for the appointment of judges. The process becomes opaque and the democratic representatives are taking power of judiciary because Indira Gandhi had interfere with this process. The three judge cases has come in 1981 to 1988 which sets the collegium system for appointing judges.

⁴ CHAPTER-6 JUDICIAL ACCOUNTABILITY IN INDIA: ISSUES AND CHALLENGES K.C. Jena ,
Judicial Independence and Accountability: A Critique, Indian Bar Review, (4) 2012, Volume. XXXIX, p.9.

Three Judges Cases

Whenever we talk about the appointment of judges or in role of judiciary this three judge case are always be heard or seen.

1. *S. P. Gupta v. Union of India* – 1981 in this case “the Hon’ble Supreme Court gave verdict in favour of appointment given to the executive. The court stated that the constitution has provisions regarding ‘consultation’ with the CJI and judges of the SC and the HC and it does not imply ‘concurrence’ with the recommendation of the CJI. Hence, the executive continued to have final say in the appointment procedure.”⁵ The executive has right in appointing procedure.
2. *Supreme Court Advocates-on Record Association vs Union of India* – 1993 “This is the landmark judgment of the Apex Court that gave birth to the system for appointment of judges of the Supreme Court and the High Court, called the **Collegium System.**’
A nine judge Constitution bench over-ruled the verdict of SP Gupta case and brought the system of Collegium in place, whereby the CJI along with two senior most judges of the court was give power to recommend the names for the appointment. According to the Supreme Court, this recommendation was to be given effect by the executive. However, the executive was authorized to question the recommendation once and thereafter if the same decision is reached by the collegium again, that was supposed to be declared final.
The court stated that, “The role of CJI is primal in nature because this being a topic within the judicial family, the executive cannot have an equal say in the matter. The word ‘**Consultation**’ should be understood as ‘**concurrence.**’”⁶
3. *In re Special Reference 1 of 1998* in this case “the decision of the constitution bench in the Second Judges Case was upheld by the Supreme Court. The court however increased the number of judges to be consulted by the CJI to four from existing two. The CJI was required to consult each and every one of the four judges and the same could be sent to the executive, only if passed unanimously.”⁷

Throughout the three cases, the court developed the guideline of judicial independence to imply that no other part of the state - including the legislature and the executive - would have any say

⁵ Comparative Analysis of Procedure of Appointment of Judges in India and USA By: Monika Rahar.

⁶ Supra 5

⁷ ibid

in the appointment of judges that means the other branch of state cannot interfere in the judicial work.

Collegium system as decided in second judge case is a process where the chief justice along with four senior most judges of Supreme Court and High court made the recommendation for the appointment of judges. But this system lacks transparency and not accountable to person also almost no democracy in this world had given so much power to judges in this appointment process.

Later “on 31st December 2014, the President assented to the 99th Constitutional Amendment Act, 2014 and the NJAC i.e. National Judicial Appointment Commission Act, 2014, Taken together, these two pieces of legislation have established the National Judicial Appointments Commission (NJAC), which is vested with the power to appoint judges to the Supreme Court of India and the High Courts. The NJAC is comprised of the Chief Justice of India, two senior-most Justices of the Supreme Court, the Minister for Law and Justice, Government of India and two eminent persons selected by the Chief Justice of India, Prime Minister and Leader of Opposition in the Lok Sabha (Lower House of Parliament).”⁸ This commission replaced the Collegium system and this commission also ensures the transparency because of its organised structure by the consultation of almost among all organ of government body also due to its criteria for appointment of candidates. Secondly accountability as there is less scope of political influence due to its composition of Chief Justice, Law minister and Opposition leader and also this commission is answerable to every appointment. And lastly faster appointment by creating more vacancies. Function of this commission is to suggest the Chief justice of India, judges of Supreme Court, Chief justice of High court and judges of High court. Also transfer of Chief justice and other judges from one High court to another. Also it takes care of appointment of candidate by looking the criteria their ability and its merits as per the regulations given in the Act. Talking about the procedure this commission emphasis more on knowledge, ability and skills in appointing the Chief justice rather than age.

But “on 16 October 2015 the Constitution Bench of Supreme court by 4:1 Majority upheld the collegium system and struck down the NJAC as unconstitutional after hearing the petitions

⁸ Arghya Sengupta, “The Challenges for Judicial Appointments in India” (OxHRH Blog, 19 February 2015) <<http://humanrights.dev3.oneltd.eu/the-challenges-for-judicial-appointments-in-india>>

filed by several persons and bodies with Supreme Court Advocates on Record Association (SCAoRA) being the first and lead petitioner.”⁹

COMPARATIVE STUDY WITH USA AND DIFFERENT NATIONS

“USA has dual system of Courts namely the State Courts and the Federal Court. The federal Courts consist of the Supreme Court of USA, the Court of Appeal and the District Court.

Constitutional Provisions regarding appointment of Judges

Section 2, Article II, the United States Constitution states that; The President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Judges of the Supreme Court and all other Officers of the United States”. Justices of the Supreme Court, judges of the Circuit Courts of Appeals and the District Courts all are appointed by the President of the United States with the advice and consent of the Senate. These justices and judges are appointed for life, and they can only be removed through impeachment by the Congress.

Procedure of Appointment

Whenever any vacancy comes up in the federal courts, the Department of Justice with the White House sends recommendations for nominating persons for the same posts, to the President.

On approval, these recommendations are sent to the Senate. The senate refers these recommendations to the Senate Judicial Committee. If the committee passes nomination with majority, the President gives final approval by signing the nominations.”¹⁰

Internationally there are various method by which appointment can be done of higher judiciary judges.

1. In UK higher judiciary judges are appointed by a commission consisting of five person.

“It consists of the SC President, his deputy, and one member each appointed by the

⁹ *"Supreme Court upholds collegium system of appointment of judges, rules NJAC unconstitutional". IBN Live. 16 October 2015.*

¹⁰ Comparative Analysis of Procedure of Appointment of Judges in India and USA By: Monika Rahar <https://www.latestlaws.com/articles/comparative-analysis-of-procedure-of-appointment-of-judges-in-india-and-usa-by-monika-rahara/>

JACs of England, Scotland and Northern Ireland. ¹¹The JACs comprise lay persons, members of the judiciary and the Bar and make appointments of judges of lower courts.”

2. In Canada the appointment procedure is done by the Governor in Council and it took place by “a selection panel comprising five MPs (from the government and the opposition) reviews list of nominees and submits 3 names to the Prime Minister.”¹²
3. In USA appointment are held by president and procedure is “Supreme Court Justices are nominated by the President and confirmed by the United States Senate.”¹³
4. In Germany appointment are took by taking election in which “half the members of the Federal Constitutional Court are elected by the executive and half by the legislature.”¹⁴
5. In France again appointment is made by president and then “President receives proposals for appointments from Conseil Superieur de la Magistrature.”¹⁵ i.e. Superior Magistrate Council.

Comparison between India and USA in terms of appointment

1. “In United States of America, the President nominates judges and appoints them with the approval of the Senate while in India recommendation is sent to the President by the Collegium of Four senior most judges of the Supreme Court along with the Chief Justice of India.
2. In USA, if the Senate (house of the parliament) passes the candidacy of persons nominated by the President by a majority vote, then only the President can appoint the person so selected while in India the parliament has no such role to play.
3. The Indian system of appointment of Judges has evolved over years from the entire power being vested in the Executive till 1993 to the birth of Collegium system after Second Judges Case to the National Judicial Appointment Act and now constant attempts to reach to a Memorandum of Procedure which accommodates proposals of

¹¹ Schedule 8, Constitutional Reform Act, 2005

¹² Statement by the Prime Minister of Canada on the retirement of Justice Morris Fish,

¹³ Article II, Section 2, The Constitution of the United States of America

¹⁴ Article 94 (1), Basic Law for the Federal Republic of Germany.

¹⁵ Article 65, Constitution of France

both; the Judiciary and the Executive. But there is no such tussle or confusion in appointment in USA.”¹⁶

To take an example of the composition and the commission in which the appointment is made the South African Model of a Judicial Service Commission is a best example. It is established under the Constitution of 1996. “The South African Commission consists of judges, the Minister of Justice, practising and academic lawyers, members of the National Assembly including a substantial number of opposition members, members of the Provincial parliaments, persons nominated by the President of South Africa after consulting leaders of all political parties represented in the National Assembly and in some cases the Premier of the Province or the Premier’s nominee. Thus the composition of the Commission is representative in nature and is not under the exclusive control of the executive government.”¹⁷

This commission of using this South African Judicial Committee is very open to fairness and one should take an example from this commission for appointment of judges. “The Commission identifies a list of meritorious candidates by advertising judicial vacancies and interviewing the ‘short-listed candidates in public, as if in open court’”¹⁸ “It ‘must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President’ who ‘may make appointments from the list’.”¹⁹ “The President ‘must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made’.”²⁰ “The Commission then ‘must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list’.”²¹

¹⁶ Supra 10

¹⁷ Sarkar Ali Akkas, Appointment of Judges: A Key Issue of Judicial Independence, Bond Law Review, Volume 16, Issue 2.

¹⁸ Hugh Corder, ‘Seeking Social Justice? Judicial Independence and Responsiveness in a Changing South Africa’, in Russel PH and O’Brien DM (ed) *Judicial Independence in the Age of Democracy: Critical perspective from around the world* (University Press of Virginia, London, 2001), p198.

¹⁹ Constitution of South Africa, s 174(4)(a-b).

²⁰ Constitution of South Africa, s 174(4)(b).

²¹ Constitution of South Africa, s 174(4)(c).

ISSUES AND SUGGESTIONS

- “Collegium system is a closed door affair without a formal and transparent system, created apprehensions about the process of appointment.
- Judiciary appointing its own members goes against the principle separation of powers and principle of check and balance by one branch on another. It shows judicial supremacy over the other branches.
- The limitation of the collegium’s field of choice to the senior-most judges from the High Court for appointments to the Supreme Court, overlooking several talented junior judges and advocates.
- The administrative burden of appointing and transferring judges without a separate secretariat or intelligence-gathering mechanism dedicated to collection of and checking personal and professional backgrounds of prospective appointees.”²²

“Mahesh Chandra Sharma, the former Rajasthan high court judge who believes "The peacock is a lifelong Brahmachari. It never has sex with the peahen. The peahen gets pregnant after swallowing the tears of the peacock". He said in an interview that “Scientific evidence isn't everything... there's religious evidence.”

This force us to think, what kind of judgments these judges have produced in their lifetime. Justice Chamleshwar said it very well that "Collegium system to appoint judges has no accountability. Transparency is a vital factor in constitutional governance. Transparency is an aspect of rationality. The need for transparency is more in the case of an appointment process.”

Millions of cases are pending across the country, every month millions of new PILs are filed, Judiciary is ready to hear all pleas whether it is running BCCI, banning liquor on highway, banning BS-III vehicle, banning tinted glass in cars, asking government for anti-smog plans, bringing back Kohinoor Diamond and many more similar cases.”

²² <http://www.drishtias.com/editorial-analysis-issues-related-to-appointment-of-judges>.

Suggestions

- “The selection process of judges has to be transparent and fair, which is only possible by involving other two branches in the process of appointments.
- All vacancies of judiciary must be made public and appointment process must be initiated by commissions like national judicial service commission, an autonomous body comprising members from various backgrounds to short list the candidates for appointment
- A final say on the appointment should be with a committee comprising members from all the three branches of government, i.e. Judiciary, Executive and Legislature. It will take into account all recorded materials on the candidates and recommends the candidate for appointment. This system would strengthen judicial independence.”²³

CONCLUSION

“All mechanisms for judicial appointment may have some advantages and disadvantages and therefore, no particular system can be treated as the best system. Despite this, in order to maintain public confidence in the appointment system and to ensure judicial independence the commission system is perhaps a very effective mechanism for judicial appointment. However, to ensure the effectiveness of this mechanism the commission should be representative in nature comprising members of the executive, legislature, judiciary, legal profession and lay persons. In addition, it should be ensured that the commission uses a system which is transparent and open to public scrutiny. In this regard the composition and working system of the South African Judicial Service Commission may be an acceptable model. Such a mechanism may be very effective to ensure the appointment of the best-qualified people to judicial office.” The South African model is the best to follow where there is more emphasis on qualified people somewhere I feel that NJAC should not be removed because It provides transparency in the system and focuses on merit and eligibility of people rather than seniority and also all bodies of government should be included in decision making of the appointment of judges.

²³ *ibid*

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