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Analysis on Judicial Appointment in India

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ABSTRACT

Judiciary being an imperial and unalienable element of a civic society plays vital role in governance, administration and justice. The basic idea of constitutionalism functions in the veins of Indian judiciary, keeping alive the faith of people in supremacy of law. This spirit apparently developed with formation of our constitution. The essence of discussion in constituent assembly with regard to judicial system was well-furnished to attain independent judiciary. Judicial appointment is a crucial issue observed since long time. Evolution of judicial appointment methodology went through a tough struggle of judicial observation in several case laws. This struggle was duly paid off by the development of collegium system. The research includes elucidated knowledge about judicial appointment from all point of views and recommend some crucial issues to be addressed.

Keywords: Collegium, NJAC, Indian Judiciary, Independent.

I. INTRODUCTION

In a society the idea of rule of law, safeguard of rights, and the supremacy of law is vitally perpetuated by the institution of the judiciary. Primarily, the Indian Judiciary elucidate the notion of rule of law where with respect to the authority of law, courts have to test all the administrative action by the standard of legality³ and makes it an important aspect of the doctrine of basic structure⁴. Secondly, an imperial function maintained is protection of dignity of an individual through entitlement of rights inherent to human existence. Wherein, the third segment of the Indian constitution contains civil and political rights guaranteed by machinery of redressal provided under Article 32 and 226 of the constitution. Thirdly, the supremacy law of land i.e., constitution, in India has been reiterated occasionally by the apex court. In the *Minerva Mills*⁵ case the Supreme Court held that “government, legislation, executive and judiciary is all bound by the constitution and nobody is above or beyond the constitution”. The duty of the judiciary pragmatically consists of keeping check on the legislations by the parliament with respect to basic structure of constitution through judicial review. A crucial scenario examined in the context by the judiciary was the verdict of the 99th Constitution

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³ Chief settlement commissioner, Punjab v. Om Prakash, AIR 1969 SC 33

⁴ *Keshvananda Bharti v. State of Kerala*, (1973) 4 SCC 225.

⁵ *Minerva Mills Ltd. and Ors. vs Union Of India and Ors.*, AIR 1980 SC 1789.

Amendment Act declaring the National Judicial Appointment Commission (NJAC) to be ultra vires the constitution. The spirit of constitution, what is known as constitutionalism, has been kept alive by the courts. Courts successfully enlarged the concept of stay, to include its instrumentalities and agencies, developing new legal algorithms for holding them down to the duties and responsibilities towards the people⁶. However, in spite of the inspirational principles, there lies an indefinite scope of escalation in Independence and transparency of Indian Judiciary. Since, judiciary functions the multi-facet operations, it becomes extremely important to maintain independence of judiciary in a democratic society.

Empirically, it is essential to understand the institutional structure of the arbiter. The pyramid structure of the Indian Judiciary consists of the Supreme Court as the Apex Court, High Court subordinate to it in every State and below them are District and Subordinate Courts. Under Art. 124(2), the judges of the Supreme Court are appointed by the President.

II. EVOLUTION OF MEMORANDUM OF PROCEDURE

(A) Outcomes from Constituent Assembly

The phase of framing the constitution is considered a monumental feat in attaining the goal of an independent democratic state. The members deserve immense respect, despite belonging to multicultural backgrounds, they established a uniform principle of constitutionalism and democratic governance. The adoption of the constitution by India was a historic event eagerly observed by the world. One of the crucial aspects with respect to the judiciary extensively deliberated was ‘Independent Judiciary’ which is indispensable after the nation’s semisesquicentennial fourth of July. Independence of judiciary from executive or political influence and by appointment for a lifetime was altogether talked about throughout the discussion of the proposed Art. 103 of the draft. However, the analysis of the scrutiny concerns independence from only the influence which includes legislative, executive, and any other force.

It was initially proposed that the appointment of judges in independent India should accord with the methodology of the United States with a similar provision in the Government of India Act, 1935 i.e., the appointment of Chief Justice by the President on the advice of and consent of ministers (senate in the U.S). To the respective proposal, it was prudently alleged by the honorable member Prof. Shibaan Lal Saksena about the maintainability of ‘independent judiciary’ and proposed that ‘every judge should be appointed on the advice merely of Supreme

⁶ THE LEAFLET, <https://theleaflet.in/indian-judiciary-a-trusted-sentinel-looking-after-our-democracy-chief-justice-mn-venkatachaliah/>(last visited June 12, 2022).

Judge of Supreme Court, so that they may derive their authority from the Chief Justice and not from Executive'⁷ Particularly, the main objective for putting forward the thought was to dispose of the position of Chief Justice and Supreme Court above suspicion. This was to ensure absolute independence of the judiciary from the executive, however, at this point independence from the legislative was not apprehended.

Aversion of political influence was one of the crucial aspects of independence of the judiciary for an appointment. It was suggested under Art. 193(1) of the proposed draft of the constitution that "Every Judge of the High Court shall be appointed by the President by a warrant under his hand and seal on the recommendation of the Chief Justice and High Court after consultation with the Governor of the State and with the concurrence of the Chief Justice of India."⁸ Later the principle of *mutatis mutandis* was applied to the appointment of Supreme Court judges. Whilst, contravention of appointing a senior-most judge as Chief Justice prevails, consultation with the Chief Justice would have been an empty formality.

(B) Judges cases-

The methodology of the judicial appointment went through a struggling but worthwhile process of evolutionary development, significantly giving rise to a new system of judicial appointments. This process included a series of judicial observations and legislation. The Three Judges Cases, collectively known as "The Three Judges Cases," gave rise to the collegium system. This mechanism of judicial nomination and elevation is referenced nowhere in the constitution or any of its modifications, shocking and unsurprising. This system is contentious, and it has been attacked not only by Indians but also by legal intellectuals and jurists from other countries. This all starts from the first judge's case. All three are following-

1. First Judges Case

Under the case of *S.P. Gupta v. Union of India*⁹ which is also known as the "Court of Appeal". Which is one of the first cases of the Three Judges Case. This provided precedent for the Supreme Courts and High Courts of India's collegium system. The Supreme Court ruled by a majority that the notion of the Chief Justice of India's primacy was not found in the Constitution. It was decided that the recommendation for appointment to the High Court can come from any of the constitutional officials contained in Article 217, not just the Chief Justice. The Supreme Court of India dismissed the government's assertion of privilege from disclosure

⁷ Volume VIII, Constitutional debate - 231.

⁸ Indian Constitution(draft), Art. 193(1).

⁹ *S.P. Gupta v. Union of India*, AIR 1982 SC 149.

and ordered the records to be produced by the Union of India. The petitioners asked for the release of correspondence about the transfer and appointment of judges between the Chief Justice of Delhi, the Minister of Justice, and the Chief Justice of India. The court decided that if the disclosure of a specific document on state concerns is in contradiction with the public interest, it is not required, and in this case, the appointment and appeal of judges is a public obligation. The decision denotes the presence of a binding or persuasion layer under its control. The Indian Supreme Court has declared that the public right to information is part of the right to freedom of speech and expression. It also weakens the safeguards against the release of paid official documents. The Constitution Bench further concluded that the term "consultation" employed in Articles 124 and 217 did not indicate "concurrence," implying that while the President will discuss these officials, his decision does not have to be unanimous.

2. Second Judges Case

The method of appointing and transferring judges has evolved as a result of Supreme Court decisions rather than an Act of Parliament or a provision of the Constitution. In *Subhash Sharma v. Union of India*¹⁰, a three-judge panel of the Supreme Court opined that the majority position in the First Judges case should be reviewed by a bigger bench. The lawsuit is founded on the judiciary's independence as part of the Constitution's basic framework. The 'Second Judges Case' is a well-known case. A nine-judge Constitution Bench rejected the judgment in *S P Gupta* and developed the 'Collegium System' for the appointment and transfer of judges in the higher judiciary in *The Supreme Court Advocates-on-Record Association v. Union of India, 1993*.¹¹ To protect the 'Rule of Law,' which is necessary for the democratic system's survival, as well as the separation of powers, which is enshrined in the constitution with the directive principles of 'Separation of Judiciary from the Executive,' The court established the collegium system, stating that the CJI should make the suggestion in collaboration with his two seniors most associates and that such a suggestion should typically be carried out by the executive.

3. Third Judges Case

President K R Narayanan sent a Presidential Reference to the Supreme Court in 1998, seeking clarification on the meaning of the phrase "consultation" as defined by Article 143 of the Constitution.¹² The Supreme Court established nine rules regarding how the information provided for appointments and transfers should operate. This is the present incarnation of the

¹⁰ *Shubash Sharma v. Union of India*, AIR 1991 SC 477.

¹¹ *Advocates-on-Record Association v. Union of India*, AIR 1994 SC 268

¹² *Re Special Reference 1 of 1998*

collegium, and it has been in use since then. It was also decided that the CJI should not convey the suggestion to the government even if two judges disagreed. A collegium of four of the Supreme Court's most senior judges would participate in the consultation. The CJI will not propose the opinion to the government even if two of the judges are against it. The Supreme Court's decision established tight standards for the nomination of Supreme Court and high court judges, which is now known as the Collegium System.

III. DEVELOPMENT OF COLLEGIUM SYSTEM

In India, a nationwide dispute has erupted over the mechanism of appointing Supreme Court and High court judges. The executive held the major responsibility for judicial nominations when the Indian Supreme court was established. The Supreme Court established a new method of appointments described as the collegium system in 1993, under which the chief justice of India and senior Supreme court justices make fresh appointments to the Supreme court and high courts. The Indian Supreme Court deemed the regulation unconstitutional after parliament modified the constitution and approved a bill to establish a commission to choose judges in 2014, which was the National judicial appointment commission.

The method of appointing and transferring judges has evolved as a result of Supreme Court decisions rather than an Act of Parliament or a component of the Constitution. The evolution of the collegiums system after three judges' case or constitutional debates as well. From 1981 under collegium appointment of judges became an important issue- there was the first judges' case (1981), second judges' case (1993), and third judges' case (1998). After the third judge's case, the Collegium was increased to a five-member body on the President's recommendation, according to article 143¹³, with the Chief Justice of India and four of his senior-most colleagues. On the other hand, the High court collegium is managed by the Chief Justice and four of the court's most senior judges. Only until the CJI and the Supreme Court collegium have approved a High Court collegium's recommendation for an appointment does it reach the government. The collegium method is used to nominate judges in the higher judiciary, and the government is only involved after the collegium has settled on names.

The Chief Justice of India and the other Supreme Court judges are appointed by the President of India. In terms of the CJI, the retiring CJI proposes his successor. Since the 1970s supersession debate, has been completed by seniority. In 1973, Chief Justice of India A.N. Ray was appointed. The appointment was controversial since the administration removed the seniority of three judges who had previously ruled against the government's position. While

¹³Constitution of India, Art. 143.

reaffirming its 1992 position, the Supreme Court stated that the brainstorming session must include the views of a majority of judges. The Court said that the Chief Justice's single recommendation for appointment and postings would not be valid unless it was backed up by four of his most senior colleagues. The Court further stated that the Chief Justice should not communicate the proposal to the President if two of the judges express reservations about the appointment and transfer. For Supreme court judges, the CJI is the one who started the proposal. The CJI talks with the remainder of the Collegium, as well as the court's senior-most judge from the High Court where the suggested person sits. The consultees must write down their opinions, which should be kept in the file. The Collegium transmits its suggestion to the Law Minister, who then passes it on to the Prime Minister, who then informs the President.

On the other hand, for the chief justice of high courts, appointment methodology will be under collegium. The Chief Justice of the High Court is appointed under the policy of appointing Chief Justices from states other than their own. The decision on the ascension is made by the Collegium. A Collegium consisting of the CJI and two senior-most judges recommends High Court judges. The idea, on the other hand, is being spearheaded by the outgoing Chief Justice of the High Court in question, in cooperation with two senior colleagues. The Governor is advised to convey the recommendation to the Union Law Minister after receiving the recommendation from the Chief Minister.

IV. RISE OF NATIONAL JUDICIAL APPOINTMENTS COMMISSION (NJAC)

The foundation of democracy is an independent judiciary. People have more faith in the judiciary as an institution than they have in the administration or legislature. Investors are more ready to put their money into a jurisdiction with an independent judiciary than in others. In conclusion, the executive and legislative roles in the judiciary should be restrained. The executive, legislature, and judiciary are the three pillars that support the world's largest democracy. Democracy will be unstable if one is weakened while the other is strengthened. The National Judicial Appointments Commission (NJAC) is the organization in charge of appointing and removing judges from India's higher courts. The NJAC Bill aimed to substitute the collegium method of appointing Supreme Court and High Court judges with a judicial appointments commission, with the executive having a voice in who gets appointed. The Supreme Court ruled on 16 October 2015, by a 4 is to 1 majority, that both the Constitution (Ninth Amendment) Act, 2014, and the National Judicial Appointments Commission (NJAC) Act, 2014, were unconstitutional because they would jeopardize the judiciary's independence.

According to the majority, the two statutes have an impact on the judiciary's independence, and judicial appointments, among so many other things, should be shielded from executive interference. The Constitution was to be amended to include Article 124A, which specifies the composition of the NJAC. The NJAC's mechanism for proposing people for appointment as Chief Justice of India and other Supreme Court Judges, as well as Chief Justice and other High Court Judges, was outlined in the Bill.

NJAC commission consists of the following members that are the chief justice of India who is ex-officio chairperson, in addition to the Chief Justice of India, there are two more prominent Supreme Court judges. Two eminent persons to be nominated by a committee consisting of the Chief Justice of India, the Prime Minister of India, and the Leader of the Opposition in the Lok Sabha, or in the absence of such a Leader, the Leader of the single largest Opposition Party in the Lok Sabha, provided that one of the two eminent persons is from the Scheduled Castes, Scheduled Tribes, Other Backward Class, minority communities, or a woman. The prominent personalities are nominated for a three-year term and are not eligible for re-nomination.

V. COMPARATIVE ANALYSIS

As far as the judicial appointment method in the United Kingdom is concerned, the Judicial Appointments Commission is an independent body that chooses candidates for judicial positions in English and Welsh courts and tribunals, as well as some tribunals with authority in Scotland and Northern Ireland. The JAC chooses judicial candidates based on merit, in a fair and transparent competition, from a wide range of qualified individuals. The Commission was established on 3 April 2006, under the terms of the Constitutional Reform Act 2005, to maintain and strengthen judicial independence by removing the Lord Chancellor's responsibility for selecting candidates for judicial office and making the appointment process more transparent and accountable. The JAC is a non-departmental executive body that is funded by the Ministry of Justice. The Lord Chancellor approves its goals and objectives. The Chairman is one of the 15 Commissioners. Except for three judicial members who are chosen by the Judges' Council or the Tribunals' Council, all are recruited and appointed by open competition. The Commission's members come from the judiciary, the legal profession, non-legally competent judicial officers, and the general public. In India, the idea of an independent judiciary has been an objective since the formation of the constitution. However, it is an immediate concern to analyze whether the appointment in the Indian judiciary has been distinctly free of any bias or favors. In the second judge case, the convention of 'seniority' evolved as a procedure for appointment on an all-India basis. Unfortunately, this idea of seniority in numerous instances

has been ignored by 'supersession' which is subjected as an open door to biasness, non-transparency, and unaccountability towards anyone.

The judiciary has failed to uphold the standard of accountability in this regard. The principle of good governance necessitates transparency in all aspects of the judiciary's operation. The judiciary's entire operation should be transparent and fair, not only the nomination of judges. It will strengthen the public's trust and confidence in the judiciary. It is also critical that judicial independence not be jeopardized while addressing the key issue of judicial accountability. This inconsistency of fairness and appointments was ought to be addressed by NJAC but the certain composition of the commission was considered to restrict the judicial independence and declared unconstitutional. This is some faults on both sides of the bridge but this path of justice cannot be abridged without finding out a technical approach to engineering loop holes.

VI. CONCLUSION

In order to gain the public's trust and confidence, any democratic organization must adhere to the principles of transparency and fairness in its operations. Too many other state departments and institutions have been pushed to be transparent in their operations by the judiciary. However, numerous stakeholders and intellectuals have highlighted concerns about the lack of transparency in the operation of the Indian judiciary. Others should not have been given this opportunity by the judiciary. It is vital for the judiciary to operate in a transparent manner. The ultimate goal of judicial accountability is to retain public trust in the judiciary, because a legal system can only function if the court's rulings are broadly accepted by the general public. If the public believes that the judiciary is fair, impartial, and independent, they will accept the court's decisions. It means that justice must not only be carried out, but also appear to be carried out. As a result, judges should not only avoid any form of impropriety, but they should also give the impression that they do not engage in any type of impropriety. The lack of transparency in the appointment and transfer of judges is one of the most common charges levelled against the higher judiciary. This piece of writing recommends certain novelty that might clean the spots of criticism raised on appointment methodology which are as follows:

- Introduction of amendments in National Judicial Appointment Commission ensuring independence of judiciary.
- Collaboration of composition method of collegium system and commission system to evolve a new methodology free of all bias.

Adopt the idea of appointment from a successful selection procedure of a country like that of England, Scotland, Northern Ireland.