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Appointment and Removal of Judges

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ABSTRACT

The framers of India's written Constitution wisely incorporated checks and balances to bring out the harmonious balance in the power and responsibilities of the three wings of the Government i.e. the Executive, the Legislature and the Judiciary. They already knew that the absence of such a balance or even the perversity would render effective governance an impossibility. The individuals especially look up to the Judiciary to keep up and safeguard the equilibrium by its interpretation of various laws and decisions on the legitimacy and lawfulness of the exercise of their functions by various authorities, in cases preceding it.

This research paper work deals with appointment, removal, and transfer of the Judges of the superior Judiciary in India. The object behind this research work as the topic itself says is to strengthen the Superior/Higher Judiciary. As my current research work is on 'Superior Judiciary', my main object has been for its independent functioning. The reason behind it is that the very existence of an orderly society depends upon the efficient and smooth functioning of its justice delivery system. A free judicial system is always considered imperative to support the efficacy of any Constitutional Order and great Governance. That is why any issue of utmost importance should always be seen through the prism of an Independent Judiciary.

I. INTRODUCTION

"Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. None the less, by the abuse of power, they violate the law"²

It is also worthwhile to mention here that the judiciary in India has performed really well over the last six decades and has contributed significantly to the advancement of public good and good governance. It has succeeded in preserving and protecting the Fundamental Rights of the citizens and vulnerable groups of citizens against the "innovations of exerted democracy". All this has become possible because of many a strong, independent and learned judges, of whom

¹ Author is a student at Symbiosis Law School, Pune, India.

² Benjamin N. Cardozo, *The Nature of the Judicial Process*, Yale University Press, 1921 pp. 129 and 135

any nation could be proud of. On the other hand, courts have not been always infallible. They have made mistakes on their part as well.

Surely judiciary itself has been managing every one of these issues which has ultimately led to the judiciary practically taking over the function of appointing and transferring the members of the judiciary. The question of expulsion for 'proved misconduct and of measures to check deviant behaviour not amounting to 'misbehaviour' of judges of the High Courts and the Supreme Court is equally a significant viewpoint. Judiciary is one of the three hands of the State. Though the polity is dual under the Constitution of India the judiciary is integrated which can interpret and adjudicate both upon the Central and State laws. Hence, the structure of the judiciary is pyramidal in nature. Most of the States in our country have a High Court of their own. Though some states also have a common High Court. Further talking about the legal aspect, Article 124 of the Constitution of India talks about the appointment of Judges of the Supreme Court and their removal. Articles 125 to 129 talk about certain incidental matters. The appointment and removal of the Judges of the High Courts are governed by Article 217 of the Constitution. Article 218 to 221 and 223 to 224A talk about certain matters incidental thereto. Article 222 mentions for transfer of Judges from one High Court to another in India. The power to appoint a judge vests in the hands of the President.³

(A) Statement of problem

The main concern in this regard has been that while in the matter of appointment, one can allow a role for the executive, no such role can be allowed in the matter of removal, transfer or in case of remedies for misbehaviour. In all such issues it is the judgment of the peers that is given due acknowledgement. Main concern has been to deal with and solve instances of misbehaviour among members of the judiciary to safeguard the fair name of judiciary and its independence. Though a few unworthy elements here and there are destroying the image of the judiciary. It has to be checked and rectified. For judiciary, its reputation is of utmost importance; if that is tarnished, nothing remains. That's why it is equally important to create mechanisms which serve to enhance the image and effectiveness of our superior Judiciary. It is important to make reference here that during the whole of my research work, I have accentuated the significance of an independent judiciary. Since it is an independent judiciary which can administer justice to all the persons of its territorial locale without dread and favour. So I have analysed the topic very well by keeping in mind the foremost importance of an independent and superior judiciary.

³ See, Article 124(2) and 217(1) of the Constitution of India respectively.

(B) Research question

The research problem which is addressed here is that where the laws and provisions of the Indian Constitution are clear and unambiguous or whether they require any judicial interpretation or amendment as to the appointment and removal of judges. Secondly, the research paper would also analyse the availability of other methods of appointment and removal of judges in India which can ensure the independence of the superior Judiciary.

(C) Research methodology

The methodology adopted here is doctrinal, analytical and descriptive. This research paper is mainly depended on the primary sources like Statutes and Committee reports and secondary sources like books, journals, case laws etc. Research in this paper has been done on the basis of 'Doctrinal Method' of research. Internet has provided a major contribution of latest information which has helped to explore the topic through different dimensions.

II. APPOINTMENT OF JUDGES**(A) Constitutional Provisions**

As we all know that the participation of the judiciary in the process of appointment of judges is not without purpose and has its own reasons. Articles 124(2) and 217(1) of the Indian Constitution, laid down that the judiciary has an integral role to carry out in the appointment of the judges in the higher judiciary. These articles provide for "Consultation" with the head of the judiciary in issue related to the appointment of judges. I think its worth to mention here that none of the Constitutions of the commonwealth countries or the Constitution of the USA provides for "Consultation" with the head of the Judiciary in matters related to appointment of judges, it is only Indian Constitution that does.

(B) Necessity for independence of judiciary

The central importance of the Judge in our society underscores the significance of understanding the manners by which forthcoming Judges are chosen and trained and of knowing the groups or individuals most deeply engaged with that cycle. The preparation and purposes for selection determine, to some degree, the sort of judiciary we will have. The role that the judiciary has played in various recorded times has depended as much on the type of men who became Judges as it has on constitutional principles that seem to set the external furthest reaches of legal action. Howsoever good the law is, if a person who ought not to have been made a Judge is appointed, at that point everything turns out badly. A helpless appointee can be a blot on the bench for a long time. Further, the method of appointment and more

particularly the way in which actually appointments were made to the Courts has become a good controversy and decent debate, regardless of whether after decision of the Supreme Court in Advocates-on-Record Association case in 1993 or before the decision of the case S.P. Gupta⁴. While the decision in the S.P. Gupta was blamed of disturbing the circumstances existing at that time by vesting the power in the executive of and also by reducing the significance of the Chief Justice of India and the judiciary, the decision of case Advocates on record⁵ in 1993 is criticized for precisely the contrary reasons. A distinction is also made between appointment and functioning. While in the matter of functioning, the executive can't have any say. It is stated that the executive must be essentially engaged in the process of appointment. The contention is that someone must be answerable for the appointment made and since Chief Justice of India or his associates are not responsible to the citizens of India, the concentration of power of appointment in their hands is undemocratic.

(C) The appointment of Judges

Constitution and that the Executive from time to time have attacked on the independence of judiciary by politicizing the appointment process. One prevents the judge from hearing certain case or to give delayed wrong judgments. And if they fail the other can “legitimately” do this by “packing” the courts with new judges.

1. Historical background

The supreme court of India's collegiums system, which appoints judges is because of three landmark judgments-

- i. S. P. Gupta v. Union of India 1981 (also known as the Judges' Transfer case)
- ii. Supreme Court Advocates-on Record Association v. Union of India – 1993
- iii. In re Special Reference 1 of 1998⁶

The further argument is that as the executive is answerable to the Legislature, which in reality represents the will of the citizens and that involvement of Executive is the only manner of including the element of democracy and accountability in the process of appointment of judges of the High Courts and Supreme Court. The opposite argument in support of the existing method (the decisions of the Supreme Court in 1993 and 1998 as mentioned before) is that the interference of the Executive in the appointment process will undoubtedly demonstrate unfavorable to the freedom and integrity of the judiciary, as the experience during the years

⁴ AIR 1982 SC 149

⁵ (1993) 4 SCC 441; AIR (1994) SC 268

⁶ Special Reference No.1 of 1998, RE (1998) 7 SCC 739

1973 to 1977 and again during the period 1982 to 1993 (during S.P. Gupta case) shows. The arbitrary transfer of High Court Judges and the manner wherein High Court's additional Judges were dealt with (either by the extensions for short periods or by not confirming them) are all said to furnish evidence of the fact that in our present stage of development, the involvement of the executive in the process of appointment of Judges is not desirable. It is generally said that democratic culture has not yet flourished in our country. The attempt to control each and every institution and refusal to see the merit of diffusion of power of governance are inclinations which are not useful to an independent and proficient judiciary. On the off chance that the vesting of the power of selection of subordinate judiciary in the High Court only isn't awful, how does the selection of Judges of High Courts and the Supreme Court become terrible - goes the contention. It is additionally called attention by the advocates of this perspective that today executive is the biggest litigant and the power vested in the Supreme Court and the High Courts by Articles 32 and 226 of Indian Constitution respectively is intended to act as a check upon the executive and that today the significant work in every High Court and the Supreme Court is under these provisions or articles; if so vesting the power of appointment, whether entirely or partially, in the executive will undoubtedly demonstrate biased to this constitutional point of view.

For a proper appreciation of the problem dealt with herein, it is relevant to put forward and attempts at reform tried in last several years in this behalf. They are, briefly, as follows:

2. Sapru Committee Report, 1945:

The Committee suggested that the "head of state should appoint Judges of the Supreme court in consultation with the Chief Justice of Supreme Court, and high courts in consultation with the High Court's Chief Justice and the head of the unit concerned."

3. Proposition of Shri B.N. Rao:

In his written advisory proposal on the Union Constitution, Shri B.N. Rao, the Constitutional Advisor recommended that engagement of judges should be successfully made by the President with the favorable reception of at least two-thirds of the Members of the Council of States, which was intended to be entrenched to advise the President in practice of his arbitrary functioning and of which the Chief Justice of the Supreme Court was to be an ex-officio member.

4. Suggestions of Federal Court:

The outline Constitution was sent on to the Federal Court for its perspective in March, 1948 a conference of Judges of the Federal Court (with the inclusion of its Chief Justice) and Chief

Justices of the High Courts was occupied to regard the assumption in the outline Constitution in connection with the judiciary. The Memorandum put forward by the conference proposed that the engagement of the Judges of the High Court ought to be made by the President on the suggestions of the Chief Justice of the High Court in pursuit of the reference with the Governor of the State and with the opinions of the Chief Justice of India.

5. Grounds followed in Articles 124 and 217:

Possibly the respective as a plan as held over (apart from the one by Shri B.N. Rao) represent the ground for the order lined of engagement contrive by Articles 124 and 217. At the unvaried moment, the Constituent Assembly select to hire the manifestation "consultation" in predilection to the manifestation "concurrence".

6. 14th report of the Law Commission of India:

In its 14th Report (1958), the First Law Commission of India, orientated by very different legal experts like Shri M.C. Setalvad⁷, and dignified of some very different personal estate of the time, analyse this problem at length. In its closing observance it is observed that the almost cosmopolitan refrain of remark is that the choice is dissatisfactory and that they have been evoked by administrator influence. It has been said that these choices look to have forwarded on no perceptible rule and appear to have been made out of thoughtfulness of political lookout.

III. NATIONAL JUDICIAL COMMISSION

The Constitution (67th Amendment) Bill, 1990 proposed the formation of a National Judicial Commission which has been resurrected by the Constitution (98th Amendment) Bill, 2003. It consists of the CJI who shall be the Chairperson of the Commission, two other Judges of the Supreme Court, one Union Minister who is in charge of Law and Justice, one eminent citizen of India to be nominated by the President in consultation with the Prime Minister for three years. This Commission draw up a Code of Ethics for the Judges of the Supreme Court and High Court.

Further to this, The National Judicial Appointments Commission Bill, 2014 was introduced in the Lok Sabha which establishes the National Judicial Appointments Commission (NJAC) by the Constitutional (121st Amendment) Bill, 2014.

IV. PROCEDURE FOR SELECTION OF JUDGES

The NJAC should appoint the senior most judge of the Supreme Court as Chief Justice of India

⁷ Distinguished jurist and first Attorney General of India

provided that he is fit to hold the office. NJAC recommend the name of person on the basis of merits and abilities to be a Judge. The NJAC should not appoint any person if one or two members do not agree to such recommendations. Same procedure goes for the appointment of High Court Judges. The president has the power to make changes accordingly.

V. REMOVAL OF JUDGES

(A) Constitutional provisions

Article 124 (4) and (5) and 217 (1) (b) and 218 of the Indian Constitution mention about the 'Removal' of a Supreme Court or High Court judge on the ground of proven misbehaviour or incapacity. Though the use of words like "misbehaviour" or "incapacity" have not been defined or clarified in the Constitution. It is left to the Parliament only to apply its interpretation as to what it means in a particular case.

(B) Impeachment - probability and reality

As per the Constitution, the judge of a High Court can be removed from the office by an impeachment motion supported by 2/3rd majority of the House in the Parliament. But the chances are remote and highly uncertain besides being complex. The truth is there are various limitations to this politicised process of impeachment as reflected in the infamous case of Justice V. Ramaswamy⁸. In this case, the committee was acting under the authority of The Judges Inquiry Act, 1968 and had found Justice Ramaswamy guilty of misappropriation & misuse of a public property. But fortunately, his removal in the Parliament failed since the majority party didn't vote. This whole procedure took 3 years. Hence, Supreme Court expressed its concern by saying that "In the process of removing Judges, Parliament would discharge its obligation in the constitutional scheme with as much responsibility and seriousness as was expected from any other organ of the States or authority involved in the process of removal of a Judge".

Concluding from the above discussion, I am of the firm opinion that the Executive should have no say in the disciplinary and transfer aspect of Judges. There is always an unanimity in the opinion of Executive, may be Parliament can be involved, but surely not the Executive. The independence and the conduct of the Judges should not be questioned by the Executive which is very often the main litigants before the Courts.

1. Judicial Corruption and Removal of Judges:

As mentioned earlier that our Judiciary system is transparent and smooth but there are also so

⁸ Veeraswami Vs. Union of India, 1991 (3) SCC

many incredible complaints against it. This research paper is about strengthening the Higher Judiciary. Hence, the integrity of the higher judiciary was never doubted but in the current scenario the decline of Judges in India is visible and venomous. In earlier times, the framers of Constitution had envisaged a fair judicial system free from political stress and governed by the rule of law. With passing time, cracks started appearing in this system which couldn't be observed at the outset. Some of the reasons being the mounting political pressures, unchecked nepotism and lack of public morality and accountability. Its roots could be traced in late thirties when the line between the right and wrong has become completely blurred or obliterated. Some of the instances from where the lack of morality and ethics of Judges seeped in our Judicial system includes: the mysterious involvement of Mysore High Court Judges in a sex-scandal, sitting judge of Rajasthan High Court had found seeking sexual favours from a litigant and Judge of the Delhi High Court was found involved in the illegal activities etc. Henceforth, the decay that has recently emerged due to these instances shows the existence of the ills which had plagued the transparent and efficient judicial system.

(C) Procedure for checking deviant behaviour of judges

According to the Indian Constitution, Article 124(4) provides that a Judge of the SC shall not be removed except by the order of President passed by 2/3rd of the members of each house present and voting and supported by a majority of the total membership. By virtue of Article 218, the clause in Article 124 applies equally to the Judges of the High Courts also. As mentioned earlier that the meaning of deviant behaviour is not defined anywhere and left to the discretion of the courts to decide and interpret accordingly. Indeed, this is not an easy question and involves a high amount of uncertainty. But the things that constitutes 'misbehaviour or deviant behaviour' includes bribery, misappropriation, commission of serious crimes or crimes involving moral turpitude.

VI. CONCLUSION AND RECOMMENDATION

(A) Conclusion

Thus in sum and substance, the accountability of any public institution is very significant for the establishment of democracy itself. What we know since a long time is that in a democracy all the wings of the State are responsible and answerable to the citizens at large. Hence, Judiciary is no exception to this⁹. For smooth functioning of the constitution, the independence of the Judiciary is a pre-requisite. Judicial independence doesn't mean absence of

⁹ Sunil Deshta, Independence and Accountability of Judiciary in India: Problems and Solutions, Orient Journal of Law and Social Science, March 2009, Vol. III, Issue 4, p.65

accountability because it ensures transparency as well¹⁰. As this research paper was about strengthening the superior judiciary, the decision of the **Judges' Case** has always kept the judiciary free from the executive and made it self-competent. Along with this, the decision of **Judicial Appointment Commission** to give unfettered power to the Parliament on Judicial Appointments has faced several criticism.

Moreover, **impeachment** as a method to make judiciary answerable is very uncertain and cumbersome. Also, according to the **Judges Inquiry Act, 1968** an investigative committee can be set up in the process of removal of judges and investigative can be carried out for the misbehaviour or incapacity of Supreme Court and High Court Judges. Till now, only Justice Ramaswami of the SC has been investigated for misconduct.

To conclude this research paper, I would like to mention that the way corruption has polluted the air we breathe, in the same way judiciary is no exception to it. In judiciary, often judges are involved in corrupt practices and enter the domain of misbehaviour which is beyond their permissible limits. These activities need to be checked and addressed as soon as possible to make our judiciary transparent and effective again. Thus, it is concluded that free and impartial appointment and removal of judges are very importance aspect at all level of judiciary. Hence, the need of an hour is to ensure maximum independence to Judiciary with accountability.

(B) Suggestions

After analysing various facets of Judiciary, here I put forward certain suggestions. If these suggestions are taken into consideration then the need of an hour can be fulfilled.

- There must be a written code of conduct for the Judges of the Supreme Court and High Court which should be enforceable to achieve the desired results.
- The Judges must disclose their assets to avoid the notion of corruption at the time of their appointment. If it doesn't happen then such a notion would lead to a situation where citizens loss faith in Judiciary.
- The reasons of Judicial appointment and removal should be made public in any case to make our system more transparent and accountable.
- The complaints against judicial officers and actions against delinquent judges must be taken seriously and should be addressed in accordance with law. The Judges Inquiry Act, 1968 has a complete procedure of hearing complaints.

¹⁰ Sunil Deshta and Kamal Jeet Kaur Sooch, *Philosophy of Judicial Accountability: An Introspection*, Civil & Military Law Journal, April-June, 2009, p.60

- To make the judges answerable to public the Chief Justice of India must have the power to discipline all the other judges while at the same time he should exercise self-restraint.
- As mentioned earlier, the meaning of the word “misbehaviour” has an ambiguity in our constitution and left on the interpretation of the courts. This must be made clear in our Constitution itself as soon as possible.
- The final suggestion is that the Bar and Press should be completely restricted from criticizing judges until and unless the judges of the Supreme Court and High Court are proved guilty of misbehaviour or misconduct.
- The Right to Information Act must be strictly enforced and every judicial proceedings, the appointments of the Judges and the judgements delivered by them should be made accessible to the people.
- All the vacant post of the Judges should be filled as early as possible and whenever vacancies arise.
