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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

A CRITICAL ANALYSIS: APPOINTMENT OF JUDGES IN THE HIGHER JUDICIARY

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Abstract

The Independence of Indian Judiciary is one of most important edifice of the Indian Constitution. It not only encompasses its independence from Legislature or Executive pressures but also from any other type of prejudices affecting it in any manner¹. The Appointment of Judges in the Higher Judiciary (i.e. the Supreme Court of India and High Court of various States) should not give Free Hand to the Executive in any manner by avoiding their interference in this process. Therefore, external pressure should not be allowed during their appointment and transfer of Judges between the High Courts of various States. This Research Paper delves into the Procedure of Appointment of Judges in Higher Judiciary and its required independence.

Keywords: Higher Judiciary, Consultation, Power-tussle, Executive v. Judiciary, Chief Justice of India, Pusine Judges, Appointment and Transfer.

Introduction

The Appointment of judges in the Higher Judiciary encompasses within itself their initial Appointment, Promotion and their Transfer during their tenure of working as Judges. “The Drafting Committee of the Indian Constitution was against the interference of the Executive in the appointment of Judges in Higher Judiciary². The Adhoc Committee of the Indian Constituent Assembly during 1947 stressed upon not to leave this power of Appointment to unfettered discretion of the President and instead suggested two alternative methods. Dr. B.R. Ambedkar supported the Method of Appointment followed by England and USA. He followed the middle path by consideration Procedure of Appointment of these two countries. Therefore, Assembly neither give the Executive nor Judiciary as absolute power in the appointment of the

¹ Madras Bar association v. Union of India, AIR 2010 SCW 4004.

² B. Shiva Rao, the Framing of India’s Constitution: A Study, IIPA New Delhi, 590.

Judges³.” Hence, at present these Judges are appointed by the President under his Warrant and Seal of the President of India after Consultation with Judges of the Supreme Court and the High Court⁴, as described under Article 124 (2) and Article 217 (1) of the Indian Constitution viz.

“Article 124 (2) of the Indian Constitution:

*Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after **consultation** with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years: Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted.*

Article 217 (1) of the Indian Constitution:

*Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after **consultation** with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional or acting Judge, as provided in article 224, and in any other case, until he attains the age of sixty-two years.*

Article 222 (1) & (2) of the Indian Constitution:

*(1) The President may, after **consultation** with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.*

(2) When a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix.”

Here appointment by President actually means that Union Executive is exercising this power i.e. The President will have to work upon the advice tendered by the Council of Ministers.

³ Constituent Assembly Debates Official report, 258, www.parliamentofindia.nic.in

⁴ Article 124 (2) and 217 (1) of the Indian Constitution.

Even the 14th Law Commission headed by Attorney General M.C. Setalvad, suggested that the selection process be favoured towards meritorious Judges but not used by the Indian Government.

Practices Followed in the Appointment of Judges

This can be studied under 3 phases divided as per their working culture:

i) Phase I till 1981; ii) Phase II till 1993 and iii) Phase III after 1993.

i) Phase I till 1981:

During this phase, Seniority was followed in appointment of the Chief Justice of India (CJI) upon vacancy of CJI. The other Judges were appointed by Consultation upon the Proposal of CJI with his senior colleagues and this recommendation was considered by President till 1981. But only two times exceptions were there by non-following of Seniority by the Government, viz. a) In 1973, appointment of Justice A.N. Ray was done by over-ruling the Seniority of the 3 Senior Judges i.e. Justices Sehlat, Hedge and Grover who resigned against this supersession. b) In 1977, Justice Beg was appointed by over-ruling the Seniority of Justice Khanna who resigned against this supersession.

This phase shows the clear signs of the interference by the Executive in Appointment of CJI.

ii) Phase II till 1993:

During this Phase II, there comes the Case Law, **S.P. Gupta v. Union of India**⁵, which is also known by the name **First Judges Case**⁶. There was transfer of various Writ Petitions filed before the different High Courts to the Supreme Court of India under Article 139A of the Indian Constitution for deciding the Constitutionality of Circular issued by the Ministry of Law with respect to the Appointment or non-appointment of the Additional Judges in the High Court. There was questions raised upon the clarification of the meaning of “**Consultation**” in the Article 124 (2) & 217 (1) of the Indian Constitution and about the final voice (primacy) in the appointment of Judges. The majority decision held by 7 Judges Bench that “**Consultation**” does not indicates their Concurrence and the final voice (primacy) is of the Central government after consulting all Constitutional Functionaries, not of the only opinion of CJI. It is justified by saying that Article 124(2) by specifying the word “**President**”, in effect and substance stresses upon Union Government i.e. CJI and other Judges of the Supreme Court and the

⁵ S.P. Gupta v. Union of India, AIR 1982 SC 169.

⁶ Ibid.

High Courts are merely constitutional functionary.

Hence, this power solely resides exclusively in the Union Government and Central government is not bound to act in accordance with the opinion of CJI and other Judges. The word “Consultation” is different from the word “Consentaneity”⁷ and Concurrence leading to non-primacy of the opinion of CJI & others.

This phase also specifically provide primacy to the opinion of the Executive over the opinion of CJI & other Judges leading to green signal by the Supreme Court itself during Appointment of Judges in the Higher Judiciary.

iii) Phase III after 1993:

During this Phase III, there was series of 2 Case Laws followed by NJAC Act, 2014 viz. a) **Supreme Court Advocates-on-Record Association v. Union of India**⁸; b) **Re: Special Reference No. 1 of 1998**⁹ & c) **National Judicial Appointment Commission (NJAC) Case**¹⁰.

a) Supreme Court Advocates-on-Record Association v. Union of India¹¹:

It is also known by the name “**Second Judges Case**¹²”. In this Case issue raised was about the Primacy of the opinion of CJI and other Judges. This matter was resolved by the Supreme Court by 7:2 majority by over-ruling the Primacy of Executive as held in **S.P. Gupta Case**¹³. This was justified by the reason that there was general consensus during the Draft Constitution about the non-absoluteness of discretion of the Executive and hence, there was provision made in the Constitution regarding the imposing the obligation to consult mandatory the CJI & other Judges of the Supreme Court and the High Court. If this mandatory consultation (Participatory Consultation) is not done with CJI & other Judges of the Supreme Court and the High Court, then meaning of the term Consultation will be frustrated as specified in the Article 124 (2) & 217 (1) of the Indian Constitution. This circumscribed the power of **Article 74(1)**¹⁴, which says about the Constitutional requirement that President had to act in accordance with advice of the Council of Ministers and President had to follow the opinion of Judges, not of the Executive

⁷ Sankalchand Sheth v. Union of India, AIR 1977 SC 2328.

⁸ Supreme Court Advocates-on-Record Association v. Union of India, AIR 1994 SC 268.

⁹ Re: Special Reference No. 1 of 1998, AIR 1999 SC 1.

¹⁰ SCAORA v. Union of India, AIR 2016 SC 5.

¹¹ Spura note 8.

¹² Ibid.

¹³ Supra Note 5.

¹⁴ Article 74 (1) of the Indian Constitution.

upon this matter. No appointment and transfer of Judges will be made unless in conformity with opinion of CJI.

b) Re: Special Reference No. 1 of 1998¹⁵.

It is also known by the name of “**Third judges Case**”¹⁶.” The Presidential reference was put before the Supreme Court in 1998 regarding the nine issues raised belonging to three aspects viz. Consultation between CJI & other Judges ; Judicial Review about the transfer of the Judges and about integrity of Seniority in making appointments in Higher Judiciary. The Supreme Court in clear majority upheld the decision of the Second judges Case about the primacy of opinion of the CJI & other Judges over the Executive. But it increased the strength of the Collegium during Consultation from 2 to 4 Senior-most Judges so as to popularise the “Plurality of Judges during Consultation.” The sole opinion of the CJI will not be termed as Consultation. **Hence, Collegium System begins its working which is the forum of the CJI and the 4 other Senior-most Judges of the Supreme Court.** Seniority has to be followed by non-allowance of the recording the “strong cogent reasons” as justification of the departure from the order of the Seniority. The transfer of Puisne Judges will be reviewed if the recommendation is not made by CJI without consultation with 4 Senior-most Judges of the Supreme Court and the views of respective Chief Justices of those High Court from where and to which High Court that Judge has to be transferred.

This Phase keep control over opinion and its interference over the Appointment and transfer of the Judges belonging to Higher Judiciary.

c) National Judicial Appointment Commission (NJAC) Case¹⁷:

Even the Appointment of Judges in the Higher Judiciary is under ambiguity in the society by virtue of opaqueness, nepotism and other reasons. Then, Union government brought **99th Constitution Amendment Act, 2014** in the name of **National Judicial Appointment Commission (NJAC)** on the allegation of various grounds against the Collegium System. This was put under 121st Constitution Amendment Bill, 2014 and given assent by the President of India. This Act amended Articles 124(2), 217 and inserted Articles 124A, 124 B and 124 C in the Indian Constitution.

¹⁵ Supra Note 9.

¹⁶ Ibid.

¹⁷ Supra Note 10.

Composition of NJAC: It will be composed of 6 members Committee, viz.

a) The CJI, Chairperson, ex-officio; b) 2 other Senior-most Judges of the Supreme Court next to the CJI as Members, ex-officio; c) The Union Minister of Department of Law & Justice, member, ex-officio & d) 2 Eminent persons nominated as members by the Committee (consisting of CJI, Prime Minister of India & Leader of the Opposition in the Lok Sabha). Out of these 2 nominated members, one nominated member should belong to SC/ST/Minority/OBC/women.

This NJAC Act was challenged in the Supreme Court by **Supreme Court Advocates on-Record Association (SCAORA)**¹⁸. The issues raised were viz. whether NJAC Act was ultra-vires of the Basic Structure of the Indian Constitution and whether primacy to the opinion of the Judiciary is the part of the Basic Structure of the Indian Constitution? The five Judges Bench decided by 4:1 majority that NJAC Act, 2014 is violative of the Basic Structure of the Indian Constitution because it violates the Independence of Judiciary that is an integral part of the Basic Structure of the Indian Constitution. The majority also decided that expression that term “Consultation” would merge into “Concurrence”. The presence of Law Minister and 2 Nominated members in NJAC infringed the “Independence of the Judiciary and Separation of the Powers” because they will increase the strength of political-Executive component leading to its primacy which is decided as ultra-vires of independence of Judiciary. Section 8, NJAC Act, 2014 which placed the Secretary to Government of India belonging to Department of Justice as Convener leading to administrative functioning under the control of the legislative or executive, which is not acceptable & contrary to Independence of Judiciary.

After nullifying by the Supreme Court of NJAC Act, 2014 and approving the prior operating “Collegium System” of the Appointment of the Judges. The Supreme Court also directed the Government of India for framing the Memorandum of Procedure (MoP) for the Appointment of CJI & other Judges of the Supreme Court by the improvement in the Collegium System. This was accordingly revised in Consultation with the State Governments which was finalised (approved) by the “Supreme Court Collegium” for the appointment of Judges in the Higher Judiciary. This provided the Consultation of the CJI with 4 other Senior-most Judges of the Supreme Court for appointment of new Judges to the Supreme Court. But eligibility criteria specified in Article 124 (3) & 217 (2) respectively for the Supreme Court and High Court

¹⁸ Ibid.

should be maintained as minimum essential qualification for appointment to the Post of Judge in the Higher Judiciary.

Conclusion

The Higher Judiciary had traversed the Path of Appointments and Transfer of the Judges through the hands of Executive and Judiciary one by one in different phases of time. But still this Collegium system is sometimes blamed by few society members as opaque, corrupt, nepotised and lack of accountability. But overall this Collegium System supported by the Supreme Court is far better than Executive-Political interference system because this political interference will ruin the Indian Higher Judiciary same as that it spoiled the healthy politics and executive which does not work without corruption and nepotism. Therefore, this Collegium system is far better than other Judiciary of other countries because of maintenance of the clean image of the Independent Judiciary in the eyes of the whole World. Public Confidence should be maintained in this impartial and independent Judiciary by following the various provisions present in the Indian Constitution like not allowing the changes in the Salary and Allowances to the disadvantage of Judges after their appointment¹⁹ and their Salary comes directly from the Consolidated Fund of India²⁰. Their behaviour cannot be discussed by even in the Parliament and Legislature. These provisions have reinforced the Independence of Higher Judiciary. This clearly signifies the far-sightedness of our Constitution Framers which is still maintaining the integrity and independence of judiciary as part of the Basic Structure of the Indian Constitution framework. The Seniority & Merit system should be maintained for maintaining the Integrity of Judiciary in the eyes of peoples of this country and whole World.

¹⁹ Proviso to Article 125(2) of the Indian Constitution..

²⁰ Article 112(3)(d)(i) of the Indian Constitution.