



Appointment of Judges in Supreme Court in India: A Review of Collegium System

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ABSTRACT

Legislature, executive and judiciary are the three pillars of Indian democratic structure. The function and the power of each organ is clearly specified in the constitution, despite of this there is always a clash between these organs. The controversy arose in the appointment of judges between the executive and judiciary will be discussed in this paper. An overview of the collegiums system and analysis of the appointment of judges has been made in this paper. All the cases related to the appointment of judges of Supreme Court and high court will be discussed and clearly evaluated in this paper. The Supreme Court of India held (NJAC) National Judicial Appointment Commission unconstitutional and void and upheld the collegium system for the appointment of judges. As India is the only country in the world where the judges appoint themselves. To make the collegium system more democratic and transparent there should be certain changes in it.

INTRODUCTION

The method of appointment of chief Justice India and other Supreme Court and high court judges is laid down in the constitution of India. In article 124/217 it is clearly stated that the president shall appoint judges after consultation with the judges of the Supreme Court and high court in the states as the 'President may deem necessary'. It is also stated in Article 74 of the constitution that the President is bound to act in accordance to the advice given by Council of minister.

The collegium system has evolved after the 'three judge case' that is the first, second, and the third judge case all these are the landmark judgement.

In appointment of judges the controversy also arises from the word 'consultation' given in article 124/217. All these controversy lead to the evolution of collegium system in three landmark cases known as the 'three judge case'.

The objective of this study is to see how the method of appointment of judges has evolved, the clash between the executive and the judiciary. This paper will clearly evaluate the three judge case and collegium system and will suggest some reforms for the collegium system to make it more democratic and transparent.

METHOD OF APPOINTMENT OF JUDGES

Different countries in the world have different method for the appointment of judges. If we talk about great Britain the appointment of the judges are done by the crown that is the executive can directly appoint the judges without any restriction. In United States of America the president appoint the judges of the Supreme Court with the consent of the senate. In India we saw difficulties in both the method for the appointment of judges so the framers of the constitution came up with an alternative way because the English system appears to be giving independent power to the executive while the constitution of U.S.A has some room for the political influence. The Indian method laid down in article 121(2) neither gives an absolute authority to the executive nor does it permits parliament for the appointment of judges, the president that is the executive has to consult to the judges of the Supreme Court and high court for the appointment.

APPOINTMENT OF JUDGES TO THE SUPREME COURT

As given in constitution the appointment of judges are done by the President of India. The constitution requires the president to consult to the other judges of the Supreme Court and high court, as he may deem necessary. The process of appointment of the Supreme Court judges is initiated by the collegium which is headed by the chief justice of India. The recommendation of the collegium is binding upon the president. There is no such provision in the constitution for the appointment of the Supreme Court judges, generally the senior most judge of the Supreme Court is appointed as the chief justice of India.

APPOINTMENT OF JUDGES TO THE HIGH COURT

The judges of the high court are appointed by the president of India after consulting with the chief justice of India, governor of the state concerned and in the case of appointment of a judge other than the chief justice of high court, the chief justice of high court to which the appointment has to be made.

In India the executive has not been given absolute power for the appointment of judges nor there is any room for the political influence for the appointment of judges.

THE FIRST JUDGE CASE:-

The first judge case known as the S.P. Gupta and others v. Union of India¹, it is popularly known as the judges transfer case, the very main question arose in this case was whether in appointing the additional judges of the high court, the president is bound by the advice given by the Chief Justice Of India. As given in article 217 of the Indian constitution that the “every judge of the high court shall be appointed by the president. The president appoints the chief justice of the high court after consultation with the chief justice of India and the Governor of the state concerned. In case of the appointment of a judge other than the chief justice he may consult even the chief justice of high court.”

In this case the president had relied on the advice of the chief justice of Delhi court rather than the advice of the chief justice of India in non extending the term of the additional judge Mr. Kumar of Delhi high

court. The court by 4:3 majority held that the non extension of the term of Mr. Kumar as additional judge of the delhi high court was valid.

The bench of Justice Bhagwati, Justice Fazal Ali, Justice Desai and Justice Venkataramiah held that the “the opinion of the Chief Justice of India and Chief Justice of High court is merely consultative and that the power of appointment resides solely and exclusively in the president, also the opinion of the C.J. of India had no primacy over the Chief Justice of High court under article 217”

According to Justice Bhagwati “all the three functionaries Chief Justice of High Court, Chief Justice of India and governor of a state are given equal importance in the consultation process and there is no superiority over the opinion of one over the other”.

He also suggested for the establishment of the judicial commission which will make recommendation to the president for the appointment of the Supreme Court and high court judges.

The other minority judge justice Gupta, held that “the advice of chief justice of India is binding upon the president.”

The majority held that the meaning of the term “consultation” is not concurrence and the president is not bound by it. If the president differs from the view of the judges or governor he can take a contrary view that is the power is ‘solely and exclusively’ lies in the president.

This decision was criticised that it would affect the independence of judiciary.

THE SECOND JUDGE CASE:-

Supreme Court came up with a landmark judgement in Supreme Court Advocate on Record Association v. Union of India² and overruled the first judge case known as S.P. Gupta v. Union of India with 7:2 majority. The matter was brought before the court through a PIL writ petition signed by an advocate of Supreme Court for filling up judicial vacancies, the petitioner alleged that the executive is not able to fulfil the post in higher judiciary on time and also not competent enough to appoint most qualified judges.

²Dr. J.N. Pandey, The Constitutional Law of India, 525,2013

¹Dr. J.N. Pandey, The Constitutional Law of India, 524,2013

The chief justice of India set up a 9 judge bench to examine two questions that are whether the supremacy of Chief Justice of India in appointment and transfer of judges of Supreme Court and high court? And second the fixation of strength of the high court judges?

The court held that “Thus the executive element in the appointment process has been reduced to minimum and political influence is eliminated. It is for this reason that the word “consultation” instead of “concurrence” was used in the constitution but that was done merely to indicate that absolute discretion was not given to any one, not even the chief justice of India as an individual, much less to the executive.”

The majority held in this case that the proposal for appointment in case of judges of Supreme Court should be made by the Chief Justice of India and in the case of high court by the Chief Justice of High Court, and for the transfer of chief justice of high court the proposal should be initiated by Chief Justice of India.

The conclusion drawn by majority view was³ :

1. The primacy for the appointment for judges was given to the chief justice of India but he must consult with his two colleagues that is the two senior most judges of Supreme Court. Opinion of other constitutional functionaries was reduced to minimum.
2. All the constitutional functionaries must act together for the judicial appointment procedure.
3. Chief justice of India has the final view on the appointment of judges.
4. Transfer of chief justices and judges of high court cannot be challenged in courts.
5. The senior most judge should be appointed as the Chief Justice of India.
6. No appointment of judges can be done without the consultation of Chief Justice of India.
7. The strength of high court judges can be fixed.
8. The judgement of S.P. Gupta v. Union of India has been overruled. The majority judgement of the S.C. on the appointment and transfer of judges has undone the serious injustice which was done to the judiciary in the S.P. Gupta case and restores to it rightful place for its freedom and independent functioning.

³Dr.Dharmendra Kumar Singh and Dr. Amit Singh, Appointment of Judges and an overview of collegium system in India : A need to reform, IJAR, 17th May, 2017

THIRD JUDGE CASE:-

In the year 1998 President K.R. Narayan issued a presidential reference for the word “consultation” in article 217(1) and 222(1) under article 143 of the constitution that is advisory jurisdiction. The question raised by the president was whether the consultation with the chief justice of India is sufficient or the consultation should be made with the other judges of the Supreme Court including the C.J.I. A nine judge bench of the Supreme Court held that the Recommendation made by the chief justice of India on the appointment of judges of Supreme Court and high court without the consultation process would not be binding on the government. The Supreme Court held that the word “consultation” means consultation with the plurality of judges including the chief justice, the sole opinion of chief justice of India does not mean consultation under the said article.

The S.C. held that for the appointment of judges under article 124(2), the chief justice of India should consult a collegium the collegium should comprise of the four senior most judges of the Supreme Court and if two of the judges give adverse opinion the chief justice should not send the recommendation to the government.

The collegium must include the successor chief justice of India. The opinion of the collegium must be in writing and the Chief justices of India send the recommendation along with his own recommendation.

The court held that the appointment of the judges of the higher court cannot be challenged unless it is not made with the guidelines laid in 1993 judgement and as per the opinion given in 1999 decision that is without consulting the chief justice of India.

The judgement laid down by the S.C in re Presidential Reference⁴ was:

1. The expression “consultation with Chief Justice of India” in Articles 124(2) and 217(1) of the Constitution requires consultation with plurality of judges in the formation of the opinion of the Chief Justice of India. The sole individual opinion of the Chief Justice of India. The sole opinion of the Chief Justice of India does not constitute “consultation” within the meaning of the said Articles.

⁴Dr. J.N. Pandey, The Constitutional Law of India, 526,2013

2. The transfer of puisne judges is judicially reviewable only to this extent that the recommendation that has been made by the Chief Justice of India in the behalf has not been made in consultation with the four senior most puisne judges of the Supreme Court and /or that he views of the chief Justice of the High Court from which the transfer is to be affected and of the Chief Justice of the High Court to which the transfer is to be effected have not been obtained.
3. The Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and to transfer a Chief Justice or puisne judge of a High Court in consultation with the four senior most pusine judges of the Supreme Court is concerned.
4. The Chief Justice of India is not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court, in respect of materials and information conveyed by the Government of India for non-appointment of a judge recommended for appointment.
5. The requirement of consultation by the Chief Justice of India with his colleagues who are likely to be conversant with the affairs of the concerned High Court does not refer only to those judges who have that High Court as parent High Court. It does not exclude judges who have occupied the office of a judge or Chief Justice of that High Court on transfer.

NATIONAL JUDICIAL APPOINTMENT COMMISSION ACT, 2014:-

There is always a controversy in the executive and the judiciary in the matter of appointment and transfer of judges of Supreme Court and high court the controversy arises to proof the supremacy on each other. In 1987 the law commission suggested that National Judicial Service Commission should have final say in the matter of selection, transfer, and promotion of judges. The law commission suggested that the body should be headed by the chief justice of India and three judge each from the Supreme Court and the high court the previous occupants of the office of chief justice, the Attorney General, an outside legal academician and a representative of the Ministry of Law and Justice.

The bill was passes by then law minister Dinesh Go swami; however the constitution amendment bill lapsed due to the dissolution of LokSabha.

In 99th constitutional amendment 2014 the National Judicial Appointment Commission Act was established and it came into existance on 13th April 2015. It amended the collegium system.

Functions of NJAC

The bill assigns following functions to the NJAC:⁵

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

The NJAC was struck down unconstitutional and void in Supreme Court advocates on record association and ors. V. Union of India by 4:1 majority, that is known as the fourth judge case.

The court held that:-

"Appointment of judges to the SC, Chief Justices and judges of the High Courts and the transfer of Chief Justices and judges of the High Courts that existed prior to the amendment begins to be operative"

Justice Kehar Stated:-" I have independently arrived at the conclusion, that clause (c) of Article 124A(1) is ultra vires the provisions of the Constitution, because of the inclusion of the Union Minister in charge of Law and Justice as an ex officio Member of the NJAC. Clause (c) of Article 124A (1), in my view, impinges upon the principles of "independence of the judiciary", as well as, "separation of powers". It has also been concluded by me, that clause (d) of Article 124A (1) which provides for the inclusion of two "eminent persons" as Members of the NJAC is ultra vires the provisions of the Constitution, for a variety of reasons. The same has also been held as violative of the "basic structure" of the Constitution."⁶

Justice Joseph Kurien in his judgment started out with the Latin maxim: "Entia Non Sunt Multiplicanda Sine Necessitate (Things should not be multiplied without necessity)". Complimenting his brother judges" "masterpiece" judgments, he wrote a very short judgment "leaving all legal jargons and using a language of the common man, the core issue before us

⁵Suresh Kumar, Appointment of Judges in India : An Analysis, ILJCC

⁶Supranote3

is the validity of the Constitution 99th amendment”, holding: Direct participation of the Executive or other non-judicial elements would ultimately lead to structured bargaining in appointments, if not, anything worse. Any attempt by diluting the basic structure to create a committed judiciary, however remote be the possibility, is to be nipped in the bud.”⁷

According to Justice Roberts, “Court has no power to gerrymander the Constitution. Contextually, I would say, the Parliament has no power to gerrymander the Constitution. The Constitution 99th amendment impairs the structural distribution of powers and hence it is impermissible.”⁸

CONSLUSION:-

Appointment and transfer of judges is a very important process and it should be a very transparent and fair process. The interference of executive is no more after the fourth judge case and the collegium system is the only alternative left. But the collegium is also under several allegation in the matter of transparency and the corruption in the system. There should be some reforms in the collegium system to make it more transparent and democratic.

The judiciary in India is the most powerful judiciary in the world. Judiciary encroaches social and political life through the tool of judicial activism also it has the power of Judicial Review.

India is the only country in the world where the judges appoint themselves in the name of independent of judiciary and the basic structure of constitution. After 1993 collegium system appoint the judges which do not take any sort of advice from the executive which is elected by the people of India by doing this it violates the basic structure of constitution and the article 124(2). The collegium should comprise of chief justice of India and three judge each from the Supreme Court and the high court the previous occupants of the office of chief justice, the Attorney General, an outside legal academician and a representative of the Ministry of Law and Justice, creating a more democratic and transparent collegium system.

⁷ *ibid*

⁸ *ibid*