

APPOINTMENT OF JUDGES IN INDIA: AN ANALYSIS

Suresh Kumar

Asstt. Prof. Himcapes College of Law, Badhera, H.P

ABSTRACT

Legislature, Executive and Judiciary are the three pillars on which democratic structure of India rests and the powers and functions of these organs clearly laid down in the constitution. However, the controversy persists, especially in the appointment of judges between the executive and judiciary. After the passing of Constitution, there was a strong executive say in the appointment of judges. Later on judiciary interpreted the Constitutional provisions and developed the collegiums system, which minimizes the executive say in the appointment of judges to the higher judiciary. With the elimination of the executive role, the position of the judiciary strengthened. The present article discusses the Constitutional Provision, the role of executive and judicial interpretation in the process of appointment of judges.

Keywords: *Constitution, Executive, Judicial Interpretation, Judicial Appointment Commission.*

INTRODUCTION

In the modern time, India is one of the largest democracies in the world. The edifice of any democratic Government rests on three pillars i.e. the legislature, the executive and the judiciary. These three pillars constitute the basis of Government machinery. The Constitution of India, which is the supreme law of the country, defines the powers and functions of these organs. The primary function of the legislature is to enact law, the executive is to execute the law and that of the judiciary is to enforce the law. While enforcing the law enacted by the legislature, the judiciary assigned the following important roles by the Constitution:

1. Interpreter of the Constitution.
2. As the protector of fundamental rights which are guaranteed by the Constitution to the people.
3. To resolve the disputes which have come by way of appeal.

While discharging the above assigned roles, the judiciary reviews the actions of the legislature and executive. The judiciary is being empowered to struck down any law as void if any law is ultra vires to the Constitution. In recent time, it has been a matter of hot discussion as it is reported repeatedly that the judiciary is encroaching in the affairs of the legislature and of the executive. The present article deals with independence of judiciary, especially the provisions regarding the appointment of judges to the higher judiciary, the law made by the legislature versus judicial response to such legislation.

Appointment of Judges to the Higher Judiciary and the Constitutional Provisions

Various countries have adopted various modes of appointment of judges to the higher judiciary. In Great Britain, the appointment of judges made by the Crown, which means the executive, can appoint judges without any restriction. In U.S.A. the President, appoint judges of the Supreme Court with the consent of the senate. The framers of the Indian Constitution saw difficulties in both these methods, so they adopted a middle course. The English method appears to give a blank cheque to the executive while the American system is cumbersome and involves the possibilities of subjecting the judicial appointment to political influence and pressure. The Indian method as lays down in article 121 (2) neither gives an absolute authority to the executive nor does it permit the parliament to influence appointment of judges. The executive is required to consult persons who are well qualified to give proper advice in this regard.¹

1. Appointment of Judges to the Supreme Court

The President in India appoints every judge of the Supreme Court. The power of the President to appoint the Supreme Court judges is not unfettered. The Constitution requires the President to consult such other judges of the Supreme Court and High Courts, as he may deem necessary. The process of appointment of a judge of the Supreme Court is initiated by chief Justice of India through a collegiums consisting of himself and four other senior most judges of the Supreme Court. The recommendation of the collegiums is binding on the President. The Constitution gives no indication of the procedure for the appointment of the chief Justice of India. Over the years, a convention has developed that the senior most puisne judge would become the chief Justice whenever the vacancy arose.²

2. Appointment of Judges to the High Courts

The judges of the High Courts are appointed by the President after consulting the Chief Justice of India, governor of the state concerned and in case of appointment of a judge

¹ M.P. Jain, 'Indian Constitutional Law', 5 ed. 192, Wadawa and co., Nagpur, (2007).

² V.N. Shukla, 'Constitution of India', 11 ed. 473, Eastern Book Co.Lucknow, (2011).

other than the Chief Justice of the High Court, the Chief Justice of the High Court to which the appointment is to be made.³

Appointment of Judges to the Higher Judiciary and Judicial Interpretation

The appointment of judges to the Supreme Court and High Court in India has been a matter of intense conflict between the judiciary and executive over the years. It is necessary for securing the independence and objectivity of the judiciary that judges be selected on merit and political elements should be reduced in the process of selection of judges. The Constitution does not lay down a definite procedure for the appointment of judges to the Supreme Court or the High Court. The Constitution merely says that the President will appoint Supreme Court judges in consultation with the Chief Justice of India and such other judges of Supreme Court, as he may deem necessary.⁴ It was not clear from the above provisions as to whose opinion was finally to prevail in case difference of opinion among the concerned persons. This question was considered by the Supreme Court in several cases:

1. S. P. Gupta v. Union of India⁵

The main question for consideration before the Supreme Court in this case was: of the several functionaries participating in the process of appointment of judges to the Supreme Court and the High Court, whose opinion should have the final say in the process selection. The bench constituting Justice Bhagwati, Justice Fazal Ali, Justice Desai and Justice Venkatarajah took the view that the opinion of Chief Justice of India and the Chief Justice of the High Court were merely consultative and that, "The power of appointment resides solely and exclusively in the President" and the Central Government could override the opinion given by the Constitutional functionaries.

2. Subhash Sharma v. Union of India⁶

The decision of Supreme Court in **S. P. Gupta v. Union of India** was criticized by the Supreme Court in this case. The Supreme Court in this case emphasized that an independent, non-political judiciary was crucial to sustain the democratic political system adopted in India. The bench expressed the view that the role of the Chief Justice of India

³ INDIA CONST., Art. 217 (1).

⁴ INDIA CONST., Art. 124 (2).

⁵ S. P. Gupta v. Union of India, A.I.R. 1982 SC 149.

⁶ Subhash Sharma v. Union of India, A.I.R. 1991 SC 631.

be recognized as of crucial importance in the matter of appointment to the Supreme Court and High Court of the states. The Supreme Court said that primacy be given to the views of the Chief Justice of India in the matter of selection of judges to the Supreme Court and High Courts. This would improve the selection of judges.

3. Supreme Court Advocate-on-Record Association v. Union of India⁷

In this case the Supreme Court gives a wider meaning to the Constitutional provisions concerning the judiciary. The word 'consultation' in article 217 (1) was given a wider meaning. The majority insisted that the main concern of the Constitution is the selection of the most suitable persons for the superior judiciary. The Supreme Court held that, "In the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight as he is best suited to the worth of the appointee." The court also expressed that the initiation of the proposal for appointment of the High Court judges must be by the Chief Justice of the concerned High Court.

4. Re: Presidential Reference⁸

The ruling of Supreme Court in *Supreme Court advocate on record case* regarding appointment of the High Court judges was elaborated further by another nine judge's bench in this case.

The Supreme Court laid down the following propositions with regard to the appointment of the Supreme Court judges:⁹

- (i) The Chief Justice of India must make a recommendation to appoint a judge of the Supreme Court in consultation with the four senior most puisne judges of the Supreme Court.
- (ii) The Chief Justice of India is not entitled to act solely in his own capacity without consultation with other judges of the Supreme Court in respect of materials and information conveyed by the Government of India for the appointment of judges.
- (iii) If the majority of the collegiums is against the appointment of a particular person, that person shall not be appointed. The court also laid down that, "if even two of the judges forming the collegiums express strong views for good reasons that are adverse to the

⁷ Supreme Court Advocate-on-Record Association v. Union of India, A.I.R. 1994 SC 268.

⁸ Re: Presidential Reference, A.I.R. 1999 SC 1.

⁹ A. K. Vishwakarma, *National Judicial Appointment Commission Bill, 2014: Re-Casting the Debate on Independence of Judiciary*, Civil and Military Law Journal, Vol. 51, No.1, 44, January-March 2015.

appointment of a particular person, the Chief Justice of India would not press for such appointment.

National Judicial Appointment Commission

The parliament passes the 121st Constitutional amendment Bill 2014 with a view to replace the collegiums system with regard to the appointment of judges to the Supreme Court and High Court. The bill seeks to enable equal participation of judiciary and executive and ensure that the appointment to the higher judiciary is more participatory, transparent and objective. The bill amends article 124 (2) of the Constitution to provide a commission to be known as the National judicial Appointment Commission (NJAC).

1. Composition of NJAC

The NJAC would consist of six members out of which Chief Justice of India as a chairperson, two senior most judges of the Supreme Court, union minister of law and Justice, two eminent persons (to be nominated by a committee consisting of Chief Justice of India, prime minister of India and leader of opposition in Lok Sabha). Of these two eminent persons, one person would be from SC/ST/OBC or minority community or a woman. These eminent persons to be nominated for a period of three years and shall not be eligible for re-election.

2. Functions of NJAC

The bill assigns following functions to the NJAC:

- (i) Recommending persons for appointment as Chief Justice of India and other judges of the Supreme Court.¹⁰
- (ii) Recommending transfer of Chief Justice and other judges of the High Court's from one High Court to another.¹¹
- (iii) Ensuring that the persons recommended are of ability and integrity.¹²

NJAC Struck Down as Unconstitutional

The validity of NJAC was challenged before the Supreme Court in *Supreme Court Advocates-on-Record v. Union of India*.¹³ In a landmark judgment, a five judge's bench of Supreme Court by 4:1 majority struck down the 99th Constitutional amendment as ultra

¹⁰ The National Judicial Appointment Commission Act, 2014, Section 5.

¹¹ The National Judicial Appointment Commission Act, 2014, Section 6.

¹² The National Judicial Appointment Commission Act, 2014, Section 5 & 6.

¹³ Supreme Court Advocates-on-Record Association and Anr.Vs. Union of India (Supreme Court), Writ Petition (Civil) No. 13 of 2015.

vires to Constitution. The bench held that NJAC sought to interfere with the independence of the judiciary, of which appointment of judges and primacy of the judiciary in making such appointments was indispensable. However, Justice J. Chelmaswar, gives a dissenting judgment and held that the ever-rising pendency of cases warranted a “comprehensive reform of the system” and upheld the validity of NJAC. Differing with the majority, he said that primacy of the Chief justice of India is not a basic structure of the Constitution and judiciary’s power over appointments was not the only means for the establishment of an independent and efficient judiciary.¹⁴

The key Holding of the Judgment:-

- (i) Judicial appointments being an integral facet of judicial independence are the part of the basic structure.
- (ii) Judicial primacy in judicial appointments with executive participation is also the part of basic structure.
- (iii) The collegiums allows for the executive participation by maintaining the judicial primacy through the collegiums.
- (iv) The NJAC violates the basic structure by doing away with judicial primacy through its veto provisions.

Justice khehar’s provide five reasons, why the second judges case was decided correctly-¹⁵

1. Firstly, he argued that judicial primacy in appointment was repeatedly accepted.
2. Secondly, he argued that collegiums does not violate the Constitutional scheme by effacing the participation of the executive since the President acting on the aid and advice of the council of ministers can still object to recommended names provided his vision and so on.
3. Thirdly, in the constituent assembly debates, judicial appointments were specifically discussed in the context of judicial independence, making it clear that the Constitutional scheme regards appointment of judges as an integral part of judicial independence.

¹⁴ Utkarsh Anand, *Supreme Court Strikes Down NJAC, Revives Collegiums System*, The Indian Express, 17 October 2015, <http://indianexpress.com/article/india/india-news-india/sc-strikes-down-njac-revives-collegium-system-of-appointing-judges/>

¹⁵ Satendra Singh, *The NJAC Judgement and its Discontents*, The Word Press, 16 October, 2015, <https://indconlawphil.wordpress.com/2015/10/16/the-njac-judgment-and-its-discontents/>

4. Fourthly, in the constituent assembly debates while the word consultation was being discussed, Dr. Ambedkar clearly stated that it was intended to curtail the will of the executive. Dr. Ambedkar was hesitant about giving a complete veto to one individual- the Chief Justice of India. The collegiums achieves the desired balance between the two positions, by placing primacy in the hands of judges.

5. Fifthly, consistent practice since independence allowed the Chief Justice of India, the final say in judicial appointments.

CONCLUSION

It is a well-known fact that the independence of judiciary is the basic requisite for ensuring a free and fair exercise of powers by the different organs of the Government in a democratic system. The framers of the Indian Constitution at the time of framing of our Constitution were concerned about the kind of judiciary they want to have. This concern of the members was responded by Dr. Ambedkar in the following words: *“There can be no difference of opinion in the house that our judiciary must be both independent of the executive and must be competent in itself.”* However, a controversy always lies between the judiciary and the executive over the appointment of judges from the outset of the Constitution. This controversy is the outcome of follies committed by both these organs in the past. After independence, the judges of the Supreme Court were previously judges of High Courts with the senior most of them taking over as Chief Justice of India. In 1958 law commission of India found that this process did not take merit into account. In 1973, the then prime minister interferes with the existing framework and appointed Justice A.N. Ray as Chief Justice of India, superseding three senior judges to him. After this in 1975, again Justice H.M. Beg was appointed Chief Justice of India, superseding Justice khanna. The judiciary stung by such blatant misuse of powers, got an opportunity in the judge’s cases in 1981, 1993 and 1998 to get it right. As a result of the judge’s cases, the collegiums system came into existence. It has almost ended the role of executive in the appointments to the higher judiciary. What the Indian judiciary has achieved today with regard to the appointment of judges, no judiciary has such freedom to appoint judges elsewhere in the world. Whatever it be called - whether judicial activism or judicial over-reach, the struck down of NJAC has added yet another chapter in the controversy for appointment of judges to the higher judiciary in India.