

Revisiting The Appointment in Higher Judiciary and Judicial Independence

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Abstract

The framers of our Constitution, while drafting the Constitution, were of the view that the Judiciary should be independent of the executive and should be competent in its own. In the light of such views, specific provisions were made in the Indian Constitution to provide for the appointment of judges, their tenure, their transfer and many more. However, there are recent debates about the appointment of judges and the process adopted in the country. The paper starts by understanding the parliamentary dilemma on the issue and revisits the models of appointment in higher Judiciary through the judges' case, and critically analyses the collegium system as well as the NJAC. The paper suggests other mechanisms taking into account a global perspective concerning the appointment models of other countries.

Keywords: *Constitution, Judiciary, amendment, law, independence*

Literature review

The present review of literature studies the research work done by various researchers on judicial independence, collegium system, the unconstitutionality of NJAC and the appointment in higher Judiciary in India and globally, which is of paramount importance in the research endeavour. Attempts have been made in this paper to draw meaningful guidelines from the past research and gather various objectives, results and conclusions on appointment in higher Judiciary and its judicial Independence, which would help us enhance the current legal structure of our country and upgrade our laws to make it up to the international standards.

- a. Singh M.P. 2000 studied "**Securing the Independence of Judiciary- The Indian Experience**", in which he highlighted the role judiciary played in enhancing its independence despite all the troubles and tribulations India faced since the commencement of the Constitution. The paper gave a walk through the three judges case and their implementations. It also studied the growing unease felt and expressed in the context of Judicial Independence and Judicial Accountability. In the end, it was concluded by the author that the democratic Constitution can survive in a better way due to the independence given to the Judiciary in India, and it is therefore expected to protect, preserve and promote the Independence of the Judiciary (Singh, 2000).
- b. Purushothaman, Purush studied "**Higher Judicial Appointments in India- The Dilemma and the Hope: Trusting the Wisdom of Generations**" (Purush, 2013), in which it was stated in the context of the appointment of higher Judiciary, the conflict that arose between the judicial independence and its accountability. It also highlighted the instances when either the executive or the Judiciary was given primacy in opinion and the resultant havoc created in the System. The paper concluded with the suggestion of creating sound constitutional pacts in the System which would ensure the stability of both judicial autonomy and self-governing accountability.
- c. Tiwari Neeraj (2009) studied "**Appointment of Judges in Higher Judiciary: An interpretational Riddle**", in which the divergence from the original System in the appointment of higher Judiciary, which was supposed to consist of the consultative process, is discussed. The paper studied how from 1993 (the second judges' case), the original System was wholly discarded, and most of the power in the judicial appointment was held in the hands of the Judiciary. The paper concludes by emphasizing the need to re-evaluate the current System of appointment and upgrade the laws regarding the matter.

- d. Bhatia, Gautam (2016) studied "**The Primacy of Judges**", in which the Primacy of Opinion of judges was revisited considering the appointment of Judges in Higher Judiciary. The paper vastly analyses the NJAC judgment finding loopholes in the relation of the primacy of opinion and unconstitutionality of NJAC. The paper finally concludes with the importance of judicial primacy of opinion.
- e. Das Cyrus (2004) studied "**Judges and Judicial Accountability**" in which he described that the judges of Higher Judiciary are accountable in themselves as they are treated as the trustees of the people and thus are supposed to work as per the standards of their position in order to be responsible for their conduct.

Scope and object

The appointment of judges, which was originally supposed to be a consultative process, has, by the effects of some external forces, destabilized the balance between the executive and Judiciary even since the process of appointment of judges has undergone various criticism. It has been subject to a variety of judicial interpretations. Although the provisions relating to the appointment of judges are very clear in the Constitution, the major concern arises from its implementation, which does not align with the ideals framed by the constitution-makers. In particular, the vagueness and devoid of transparency of the System has led to examining the legal structure on the matter. Another main object of the research is to clarify the gap between judicial autonomy and its responsibility and the hampering of judicial independence in the appointment process.

Hypothesis

The work is guided by the following hypotheses:

- The appointment of judges does not provide enough room for discussion in the matters of strengths and weaknesses of the judges recommended due to the lack of transparency and the tussle between executive and Judiciary.
- The ineffectiveness of the Collegium system in the process of appointment.
- The question of independence and accountability of the Judiciary in India.

Research methodology

The methodology adopted for the research is descriptive, doctrinal, and analytical. The research work is mainly based on secondary sources like books, articles, journals, and other research works. It is a mixture of theoretical work which is based on the information gathered from books, articles, and the Constitution of India and thereby analysis and criticism of the information gathered by the author. A comparative analysis is also made better to understand the position of the Indian Legal System vis-à-vis the Legal System of other countries, which also helped the author recommend various alternatives for the country. Wherever there has been any remark about any institution, it has been made only with the motive of upholding the dignity and Democracy of the country.

Introduction

"All the rights secured to the citizens under the Constitution are worth nothing and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary."

--- Andrew Jackson

Our country India to establish a free and democratic society, has adopted a liberal Constitution in the Euro-American traditions, which aim at prosperity and stability of the people. Such a society could be created by completely guaranteeing the Fundamental Rights of the people, which in turn could only be achieved by ensuring an independent judiciary to safeguard those rights. Thus the framers of the Constitution considered these aspects with maximum and identical idealism.

The draft of the Constitution for this very purpose included a provision that separated the Judiciary from the executive. In this backdrop, the judicial appointment assumes significance which has been debated for so long between the legislature, Judiciary and executive, and it cannot be ignored that much of these conflicts have emerged from the need of maintaining the Independence of the Judiciary.

1. Independence of Judiciary

Independence of Judiciary is a concept that the Judiciary should be an independent body and should be free from other branches of the Government. It should have freedom from fear and favour of the other two organs. The concept has its origin in the doctrine of separation of powers. Defining the Independence of Judiciary by emphasizing only the creation of Judiciary as an autonomous institution separate from other branches is not sufficient unless the core idea of judicial independence is exhibited in its definition, which is the independent power of the judges to decide a case before them according to the rule of law uninfluenced by any other factors.

Independence of the Judiciary is important for the sole reason of safeguarding the rights and privileges of the people and thereby providing equity and justice to all. The rule of law, which explains the supremacy of the Constitution, can only be achieved when there is an independent and impartial judiciary at the top level to ensure proper interpretation and implementation of the Rule of Law. Due to these reasons, it becomes of utmost importance to maintain or improve the Independence of the Judiciary and thus protect the Democracy of the Indian System.

2. Parliamentary dilemma

The people of a country losing faith in its legislature and executive are still acceptable, but it would be the vilest day of the people start losing faith in its Judiciary. Judiciary is an institution that acts as a guardian of human and fundamental rights guaranteed to the people under the Constitution. Therefore, the framers of the Constitution, in its very first phase, realized the importance of a strong and independent judiciary in a country that has adopted a democratic form of Government with a federal system working for the welfare of the citizens. The Judiciary was supposed to be an arm of the social revolution that would uphold the equality and freedom of the people of India who have suffered these losses in their past during British Rule. The Constituent Assembly, therefore, ensured to make Judiciary an independent body with full powers of judicial review. The idea for the Independence of the Judiciary in the Indian Constitution has been largely influenced by the report of the Sapru Committee, which strongly criticized the unfettered discretion of the executive for the appointments of the higher Judiciary. The rationale behind the provision of the Union Constitution Committee was to include the apolitical office of the Chief Justices for appointments along with the final words of the President as this would ensure the highest quality of

judges to be appointed. The Constituent Assembly accepted the provision of the Union Constitution Committee along with making the consultation to the Chief Justice of India mandatory.

The importance of adequate checks and balances was also emphasized upon by T.T. Krishnamachari, who cautioned the excessive power of the Judiciary, which would otherwise become an "*Imprerim in Imperio, operating as a sort of superior body to the general body politic*". Responding to this view, B.R. Ambedkar highlighted two crucial aspects. First, the incorporation of consultation with the Chief Justice of India was not in any way meant to undermine the fundamental nature of the power of appointment, which rests with the executive. Rather, it was to ensure a necessary check in order to ensure the independence of the Judiciary. Secondly, the main emphasis was on inter-institutional balance in appointments between the Judiciary and executive, who would mutually check and inform each other. The main idea, which was then understood for ensuring the Independence of the Judiciary, has lost sight in the modern debates, which solely revolve around the judicial conflict with the executive to demonstrate independence.

A. An insight into the models of appointment in the Higher Judiciary

To better analyze the controversies regarding the appointment of the higher Judiciary and Independence of Judiciary, it becomes necessary to understand how judges were appointed in the higher Judiciary. The Constitution has incorporated the appointment of judges to the Supreme Court and High Courts in Article 124 and Article 217, respectively. According to these provisions, the President of India appoints Supreme Court judges in consultation with the Chief Justice of India (C.J.I.) and other Supreme Court and High Court judges as the President of India deems necessary. Furthermore, the President appoints judges to the High Courts in consultation with the Chief Justice of the United States, the Governor of the concerned state, and the Chief Justice of that High Court, as required by the Constitution.

The actual conflict rested in the word 'consultation' and its implications. The three judges' case acts as a landmark that sought to clarify the situation by its interpretation, thereby redefining the appointment of judges, Independence of Judiciary and Separation of powers.

1. Keshavanand Bharti v State of Kerala¹

Keshavanand Bharti, by its judgment, established the doctrine of basic structure, which purports to protect the basic principles and values of the Constitution unaltered by the executive or any act of the legislature. The verdict was not well-received by the Government led by Indira Gandhi as they considered it to curtail their powers. This is where the genesis of the judge's case began in 1973 when one of the judges who dissented the majority opinion in the Keshavanand Bharti's case, Justice Ajit Nath Ray, was promoted to the position of Chief Justice of India, superseding the other three senior judges who had ruled in favour of the judgment. This way executive blatantly attacked the Independence of the Judiciary, and it, in retrospect, has been rightly called the black day for Indian Democracy.

2. S.P. Gupta v Union of India²(The first judges' case)

From the day the Constitution was adopted to the year 1973, the President accepted the appointment of a higher Judiciary as per the recommendations of the Chief Justice of India and other judges. When Justice A N Ray was appointed, it was for the first time felt that the Independence of the Judiciary was undermined. For the first time in the case of Union of India v Sakalchand Himmatlal Seth³, the word consultation was considered to mean effective consultation upholding the spirit of Constitution.

The matters of additional appointments and reckless transfers from one High Court to another came to a head with the issuance of Circular by the Union Minister of Law and Justice in 1981, which acted as a more extensive executive interference in the appointment and transfer of judges.. The Supreme Court eventually heard all of these cases together in a case known as the First Judges Case. By a majority of 4:3, it was held that the word 'Consultation' in the Articles 124(2) and 217(1) of the Constitution does not mean concurrence in the light of the appointment of the judges and hence the ultimate power rests with

¹(1973) 4 SCC 225

²AIR 1982 SC 149

³AIR 1977 SC 2328

the President and under Article 74 which implies that President works only after the consultation of the Council of Ministers.

The major criticism of the judgment was the wrong interpretation of effective consultation as the final word rested with the executive, the point of judicial opinion was rendered useless. Effective consultation would rather be understood as acceptance or non-acceptance of the recommendation of the Judiciary but with valid proof without claiming the parliamentary privilege of non-disclosure. Also, it committed disservice to its cause of independence by holding that the opinion of the Chief Justice of India was not supreme but acted only as a piece of advice.

3. Supreme Court Bar Association v Union of India, 1993 (The second judges' case)⁴

The mass scale corruption and favouritism in the appointment of Judiciary led to the second judges' case where the 11 judges' bench was formed to overrule the decision of 7 judges bench in the first judges' case. In this case, it was held that in the event of non-consensus between the Chief Justice and the President, the opinion of the Chief justice would be given primacy and would be determinative. Although the power of the executive was not altogether taken away on papers, practically in one way, they not only acquired in themselves the Independence of the Judiciary but also kicked out the executive role in the process of appointment. The word 'consultation' was meant after this case to take concurrence of the suggestion of judges by the President.

The major outcome of the case, which was expected to secure the balance of power between the Judiciary and executive, resulted in the judicial supremacy of powers in the appointment of higher judiciary and collegiums system to guard the charge of non-transparency and arbitrariness.

4. In re Special Reference 1 of 1998 (Third judges' case)⁵

When Chief justice M.M. Punchhi appointed other judges without consultation of any other judges, the Government of India asked President to approach Supreme Court to clarify this point. As a result, it was made clear that consultation in Article 217(1) and Article 222(1) means to consult with a plurality of judges. This case is also important because it gave the composition of the Collegium, which is followed

⁴ (1993) 4 SCC 409

⁵ AIR 1999 SC 1

even today, which consists of the Chief Justice of India along with four senior judges of the Supreme Court.

The result of this judgment was an inevitable pushback to the supreme power of the Judiciary in the appointment of judges. Also, there is an unwritten Veto power of the Chief Justice of India in matters of rejection.

5. National Judicial Appointment Commission⁶

The NJAC Bill was passed in 2014 by both the houses of parliament in the 99th Constitutional Amendment Bill, thereby declaring the collegiums System inoperative. The NJAC proposed to make the appointment of judges more transparent by appointing them through the members of the Judiciary, legislature and civil society, which consists of three members from the Judiciary, a law minister and two jurists. Through the NJAC amendment⁷, Articles 124 A, B and C were added to the Constitution of India to make the amendment valid. A recent landmark judgment declared the NJAC unconstitutional⁸. The main holdings of the court concerning the unconstitutionality were about its violating of the basic structure of the Constitution by not maintaining judicial primacy, thereby affecting the Independence of Judiciary, which is a part of the basic structure.

The dissenting opinion in the NJAC judgment left some doors open for discussion. The judgment never explained why the primacy of the opinion of the Judiciary a necessary component of the Independence of Judiciary is. Also, the judge assumes that the judicial appointment affects the Independence of the Judiciary, which is based on the narrow definition of judicial independence. The definition does not consider the external bias and pressure which could affect the impartial judgment on the part of judges and, in turn, ruin the whole idea of Independence of the Judiciary. There are other democratic countries like United Kingdom, Canada, and South Africa where political figures control judicial independence without any detriment to judicial independence.

⁶Constitution (Ninety Ninth Amendment) Act, 2014, Gazette of India

⁷The Constitution (Ninety-ninth) Amendment) Bill, 2014, Government of India (2014)

⁸ Supreme Court Advocates on Record v Union of India, (2016) 5 SCC 1

The judgment failed to acknowledge that independence could be better assured where there is a consultative process of selection.

B. Major concerns in the present model of judicial appointment

Judge Jerome Frank stated that-

"In a democracy, it is never unwise to acquaint the public with the truth about the workings of any branch of Government. It is wholly undemocratic to treat the public as children who are unable to accept the inescapable shortcomings of manmade institutions" (Frank, 1973)

When the NJAC was declared unconstitutional, the major point of concern was whether the collegium system is the best alternative or are their loopholes to it. On analyzing, it was found that the collegium system has in one way lost its legitimacy and is not a source to deliver impartial appointments. The Collegium system, although it provides the primacy of the Judiciary, it undermines the basic idea of appointment being a consultative process. Practically there exists no role of the President, and he merely acts as a postman appoints the judge selected by the Collegium. On understanding the approach of the Supreme Court, it can be implied that the Supreme Court seems to interpret too much in the provision that they end up making a new version of the provision, which was not the legislative intent at the time of framing of the provision. One of the biggest examples of it has been the intricate guidelines given by the Supreme Court in the Third Judges' Case, which cannot be interpreted from the bare reading of the provisions of the Constitution of India.

Another major point is that the Government cannot reject the judge recommended by the Collegium for the second time, but the loophole is that there is no prescribed time limit by which the Government can accept or reject. This acts as a barrier to the Independence of the Judiciary wherein there is the scope of intentionally holding back the recommendation for a long period without any deliberation. The present process of appointment has also attracted critique for carrying the aspects of favouritism or nepotism, and it has been largely feared that it may result in the situations of the judicial aristocracy (Bhushan, 2009)

C. Comparative study of judicial independence and appointment of judges: a global perspective

India borrowed the Independence of the Judiciary from the United States. The independence and the power of judicial review in Germany go even beyond the powers of the Supreme Court of United States. However, when we look at the System of appointment in higher Judiciary in these countries, there is no primacy of the opinion of Judiciary even then has caused any detriment to the Independence of Judiciary. In the United Kingdom, the judges are appointed by the recommendation of the President and Deputy President on approval of the Lord Chancellor⁹. In the United States, the federal judge is appointed by the President in consultation with the Senate¹⁰. In Canada, the Governor-General is empowered by the Constitution on consultation of the Privy Council to appoint Justices. In South, Africa an appointment is made by the President on the recommendation of the Judicial Service Commission after consultation with the Chief Justice¹¹. In Germany, appointments are made by-election; half of them are elected by the executive and half by the legislature. The System of appointment in all these countries clearly shows judicial independence is more likely to emerge when there is a consultative form of selection, and there is no need for collegiums to ensure Independence of the Judiciary. There must be a balance of Judiciary, executive and legislature to ensure fair selection.

D. Conclusion

There are serious concerns about the Indian institutions that have eroded the dignity, efficiency, integrity and most importantly, the faith of people from its System, which implies that the sole hope for a common person rests in its judicial System. In such a situation to ensure Justice- Social, Economic and Political" it becomes of utmost importance to maintain the Independence of Judiciary. The present article unfolded the historic pathway that the appointment of judges has covered, along with the importance of the Independence of the Judiciary. The paper, on another note, critically analyzed the instances that took place from 1973 to the unconstitutionality of NJAC and the present-day System of appointment of judges. Despite the measure taken to ensure the Independence of the Judiciary, there are shortcomings to the present System. Although the present collegium system is outwardly free from executive interference, still there are issues of lack of transparency and accountability.

⁹Schedule 8, Constitutional Reform Act, 2005

¹⁰Article II, Section 2, The Constitution of the United States of America.

¹¹Sections 174-178, Constitution of South Africa

E. Recommendations

The judicial appointment in India has been suffering major criticisms in recent days. There is a need to revisit the appointment in higher Judiciary through Collegium and upgrade India's legal System. Following are certain recommendations which could add to the objective-

- **Transparency in Appointments-** the major changes that are required in the Indian System revolves around the transparency issue. An example of a country where fair and open competition is ensured is the System in the U.K, where vacancies are advertised. Then the selection process takes place, including the shortlisting, references, recommendations, consultation, panel discussion, report submission and lastly, the quality assurance. India can adopt such a process as it would not only make the appointment transparent but also increase the accountability of the Judiciary and reduce malpractices.
- **Recommendatory Guidelines-** there have been many committees formed and various recommendations made regarding the appointment of judges, but the courts do not adopt them. One of the major recommendations which should be adopted is the Report on Restatement of Values of Judicial Life, 1997, which would serve as guidelines for the judge to build in themselves an independent, strong, and respected Judiciary.
- **Performance Evaluation-** In India, the Supreme Court is the watchdog of the Democracy, so it should be made necessary to evaluate the performance of the judges to ensure their efficiencies and whether they are upholding the Rule of Law or not. Such an evaluation was suggested in a report by the Planning Commission Panel in the 12th Five Year Plan to ensure the formal check and sustain the sagging public confidence.
- **Accountability of the judges-** A system that would ensure the accountability of the judges about their actions and their performances would enhance the societal confidence in the judicial system of our country, which is an essential part of Democracy.

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