JUDICIAL APPOINTMENTS WITH EMPHASIS ON INDIA'S NJAC MODEL

Prerna Tara

Student, Ms., University of Petroleum and Energy Studies, India, taraprerna@gmail.com

Abstract

The judiciary of any country is the mirror of the country's political system. It is instrumental in giving a proper mould to the social structure of any country. Hence, the selection of the caretakers of justice is of paramount importance. In fact, the procedure as to how they are selected is also of equal importance. The main objective behind this research paper is how these appointments of judges are done and stress shall be laid upon the fact that their selection is of the same relevance as is their duty of upholding the true ideals of justice. Judicial appointments have always played a crucial role in any political scenario of every country, with India's case being the recent one. The Indian Constitution has been written keeping it mind the Doctrine of Separation of Powers which includes the Legislature, Executive and Judiciary. The Indian Judiciary has been relatively kept away from any influence of the other organs. The usual selection of the Judges of the High level Courts has been done by the Collegium system. The National Judicial Appointments Commission was said to be a model proposed in order to overthrow the present system of Collegium. But the recent hearing in the Honorable Supreme Court held NJAC to be unconstitutional. The basic flaw was pertaining to the invasion of the executive into the territory of the judiciary which shall result in the judiciary not being independent anymore. Hence, violating the Basic Structure Doctrine. The research paper shall divulge deeper into this contemporary issue of paramount relevance and shall look into the study of the NJAC with keen detail and results of its failure. It shall also throw light on the alternative strategies that can be adopted by the Government in case of inefficient judicial appointments. After all, the judicial appointments of any nation are a doorway to its progression and overall growth.

Keywords: Judiciary, Doctrine of Power, Collegium, Basic Structure Doctrine

1 INTRODUCTION

Any democratic government believes in the institution of the three main organs of the government. These three main organs include the legislature, executive and the judiciary. There has to be a complete co-ordination between them in order to work for the efficiency of the country. The selection of the judges is a very important part of the judicial system and complete effort has to be made to ensure that the selection is impartial and not under the ambit of any political influence. The Indian Judiciary is differentiated into the Lower Judiciary and the Higher Judiciary. The Lower Judiciary comprises of the District Courts and the Higher Judiciary includes the High Court and the Supreme Court. The selection is done at the district, state and the national level. The district level selection is done by a competitive examination conducted by the various union and state public commissions. Although there is a proper eligibility criteria that has to be followed and then the selection occurs. For the state and the national levels, the selection is done by the recommendation of the President and a unanimous decision by the bench of judges of the Court for which the selection has to be done which is also known as the Collegium System. The NJAC (National Judicial

Appointment Committee) was set up with the objective of having a complete reformation of the current collegium system which is facing its own set of drawbacks.

2 CONSTITUTIONAL PROVISIONS

The Constitution of India gives proper detail about the appointment of judges that is done in the nation at state and national level.

Article 124: Establishment and Constitution of the Supreme Court[1]

(2): 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 the office until he attains the age of sixty five.

Provided that in case of appointment of a Judge other than the Chief Justice , the Chief Justice of India shall always be consulted.

Article 217: Appointment and conditions of the office of a Judge of a High Court[2]

(1): 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.

3 JUDGES SELECTION PROCEDURE- THE EVOLUTION

The procedure as to how the judges are selected has not been a pre decided one since time immemorial. It has been the kind where a proper evolution has occurred in the framing of the selection of the judges looking into the various situations being it legally or politically. The Three Judges Cases have been held responsible for the evolution that has taken place in respect of judicial appointment procedure.

3.1 S. P. Gupta v. Union of India

S. P. Gupta case- let's talk about the law.wordpress.com-

Decided by a bench of seven judges, the matter to be decided rested on several contentious issues:

1. The claim of privilege of certain correspondence between Chief Justices, the CJI and the Law Minister

2. The locus standi of the petitioners

3. The circumstances of appointment and conditions of services and confirmation of Additional Judges, arising in the context of Justices Vohra & Kumar of the Allahabad High Court.

4. The circumstances of transfer of judges, arising in the context of Chief Justice KBN Singh of the Patna High Court.[3]

All the judges agreed that the petitioners did indeed locus standi, but on hearing the entire case, the majority granted no relief and all the petitions were dismissed. The exercise of judicial production did not however, end with the 1486 pages of the judgment dismissing the petition; it in fact went further and laid down several propositions of law with emphatic authority. The case as Palkhiwala points out in his work, We The People, marks the several firsts in the history of the Indian Supreme Court: the CJI filed an affidavit before the SC and the plea of privilege in the matter of documents pertaining to judicial appointments was denied. It cannot be ignored that in a matter of such Constitutional significance decided by the bench of seven judges, the CJI was not on the bench.[4]

The Court proceeds to grant the executive a sort of unquestioned superiority in the matter of judicial appointments, reducing the CJIs opinions to mere 'formal consultation':

"It is therefore, clear that there is a difference of opinion amongst the constitutional functionaries inn regard

[1] Refer to Constitution of India
[2] Refer to Constitution of India
[3] (2011, Sep 27) A Look into the Past: S.P. Gupta v. Union of India. Retrieved from https://letstalkaboutthelaw.wordpress.com/tag/sp-gupta-v-union-of-india/ .
[4] Ibid. at 3.

to appointment of a Judge in the High Court, in the opinion of none of the constitutional functionaries is entitled to primacy but after considering the opinion of each of the constitutional functionaries and giving it due weight, the Central Government is entitled to come to its own decision as to which opinion it should accept…where a Judge of the Supreme Court is to be appointed, the Chief Justice of India is required to be consulted, but again it is not concurrence but only consultation and the Central Government is not bound to act in accordance with the opinion of the Chief Justice of India. The ultimate power of appointments rests with the Central Government and that is in accord with the constitutional practice prevailing in all democratic countries."[5]

The case has gone down as a commendable decision as far as its dicta locus standi and the claim of priviledge go, but on the central issue, concerning the validity of the circular and its apparently negative intention and consequence, it seems to have not performed its duty as the sentinel on the qui vive to the fullest.[6] Justice Gupta who was a part of the minority decision aptly stated:

"The independence of the judiciary depends to a great extent on the security of tenure of the Judges. If the Judge's tenure is uncertain or precarious, it will be difficult for him to perform the duties of his office without fear or favour."[7]

3.2 Supreme Court Advocates-on Record Association v. Union of India – 1993

Supreme Court Advocates-on-record v. Union of India (Judges Appointment cases) is responsible for moving the present system of appointment of judges.

A prelude to this case was Subhash Sharma v. Union of India. In that case, a 3 Judge bench comprising of Ranganath Mishra C.J., M. N. Venkatachallah and M. M. Punchhi JJ referred two questions based on the position of the Chief Justice of India with reference to primacy and the justiciability of fixation of Judge Strength. Fixation of Judge Strength was held to be non- justiciable in the First Judges case.

The main points laid down by the court are: (the narrative of judicial appointments)

1. The process of appointment of judges is an integrated participatory consultative process. All constitutional functionaries must perform this duty collectively to reach an agreed decision.

2. The proposal for appointment of a judge must arise from the CJI (for appointment of the Supreme Court) and from the Chief Justice of a High Court (for the High Court Judge).

3. In the event of conflicting opinions, the opinion of the CJI has primacy. No appointment can be made without the concurrence of the CJI.

4. A collegium system of appointment must be initiated.[8]

Bhagwati J. at para 29 of S. P. Gupta did make a mention of the concept of collegium. The learned Judge opined:

"We would rather suggest that there must be a collegium to make recommendation to the President in regard to the appointment of a Supreme Court or High Court Judge. The recommending authority should be broader based and there should be consultation with wider interests. If the collegium is composed of persons who are expected to have knowledge of the persons who may be fit for appointment on the Bench and of qualities required for appointment and his last requirement is absolutely essential, it would go a long way towards securing the right king of judges, who would be truly independent in the sense we have indicated above and who would invest the judicial process with significance and meaning, for the deprived and exploited sections of humanity."[9]

Therefore, it can be seen that the Supreme Court Advocates-on-Record v. Union of India was the case that initiated the concept of the selection of judges through the procedure of collegium. The majority verdict written by Justice J S Verma said "Justiciability" and "primacy" required that the CJI be given a "primal" role in appointments. It overturned the S. P Gupta judgment, saying that "The role of the CJI is primal…because

[5] AIR 1982 SC 149
[6] Ibid. at 3.
[7] Ibid. at 5.
[8](2015, Jul 4) The Narratives of Judicial Appointments. Retrieved from https://polityinindia.wordpress.com/tag/in-re-presidential-reference-under-article-1431-of-the-constitution-of-india/
[9] AIR 1999 SC 1

this being a topic within the judicial family, the executive cannot have an equal say…Here, the word 'consultation' would shrink in a mini for. Should executive have an equal role and be in divergence of many a proposal, germs of indiscipline would grow in the judiciary."[10]

3.3 *In re* Special Reference 1 of 1998

In 1998, for the situation of Re Presidential Reference: Under Article 143(1) of the Constitution of India ("second Judges Appointment case"), the Supreme Court further developed this convention and made a framework wherein judges would be designated by a collegium comprising of the four senior-most judges of the Supreme Court. In spite of the fact that the official would make the genuine arrangement, it would have no other part in the arrangement of judges to the High Court or Supreme Court. The preeminent Court dismisses a request to return to the Judges Appointment Cases.

It happened that the Chief Justice M.M. Punchhi, the disagreeing judge in the second Judge's case turned into the C.J.I in 1998. He was horrendously annoyed with the lion's share supposition in the Second Judge's case. When he turned into the Chief Justice, he attempted to make tracks in an opposite direction from the decision and in the matter of exchange of five High Court Judges; he made his suggestion without consulting the two senior most judges around then, in particular A.S. Anand and S. P. Bharucha JJ).

At the onset of the listening to, the Union of India through its Attorney General said that the Union of India is not looking for an audit or thought of the judgment in the Second Judge's case. The nine judge seat, in unanimity talking through S. P. Bharucha J maintained the significant reason of Second Judges case. It extended the quality of the collegium from two to four. On account of arrangement to the High Court, the proposal should be made in counsel with the two senior most puisne judges of the Supreme Court. Further, the solid fitting reasons don't need to be recorded for a take-off from the request of position in appreciation of every senior judge of the High Court who had been ignored for the arrangement to the Supreme Court. What must be recorded is the positive explanation behind the proposal. In the event that the suggestions are made without conference, they are not tying.

The term 'consultation with the Chief Justice of India' in Articles 217(1) and 222(1) of the Constitution of India requires counsel with a majority of judges in the development of the supposition of the Chief Justice of India. Despite the fact that CJI has supremacy in the arrangement, his power has been weakened by the way that a prerequisite of accord in the collegium is fundamental.

The president K R Narayanan issues a Presidential Reference to the Supreme Court over the meaning of the term "consultation" under the pertinent constitutional provisions. The question was whether "consultation" required consultation with a number of judges in forming the CJI's opinion, or whether the sole opinion of CJI could by itself constitute a 'consultation'.[11]

In response, the Supreme Court laid down nine guidelines for the functioning of the quorum for appointment and transfers- this has come to be present form of the collegium, and has been prevalent ever since. This came to be known as the "Third Judges case".

These two cases consequently withdrew significantly from the methodology revered in the Constitution. Numerous have contended that protection of arrangement from official impact is important to advance the legal freedom, yet it is begging to be proven wrong whether this protection has prompted a subjective improvement in the behaviour of the legal all in all, or the nature of judgments. Different regulatory and auxiliary issues have been highlighted. Throughout the years, numerous political gatherings, specialists and commissions have proposed various systems for the arrangement of judges.

4 THE NATIONAL JUDICIAL APPOINTMENT COMMITTEE

The need for a new procedure was witnessed as it was seen that the collegium system did come with its own set of disadvantages and these drawbacks had to be seen and mended for the better health of the nation.

In 1987, the Law Commission suggested for a broad based National Judicial Commission. It had the composition such that the Chief Justice is the head of the body and also designated as the Chairman, various three senior most judges come next, the previous Chief Justice to whom the current one succeeded

[10] Anand, U. (2015, Oct 16) Appointment of Judges: 34 year stop start battle of interpretation, *Indian Express*. Retrieved from http://indianexpress.com/article/explained/appointment-of-judges-34-year-stop-start-battle-of-interpretation/.
[11] Ibid. at 10.

to, Law Minister and the Attorney General of India. After that, the Constitution (67th amendment) Bill, 1990 proposed the formation of the National Judicial commission. The bill got lapsed.

This idea was again brought into force in 2013 as it was proposed to introduce a new chapter consisting of just one Article and changes in the other articles in the Constitution (98rd Amendment) Bill,2003.

The Lok Sabha on 13 August 2014 and the Rajya Sabha on 14 August 2014 passed the National Judicial Appointment commission (NJAC) Bill, 2014 to scrap the collegium system of appointment to scrap the collegium system of appointment of Judges. The President of India has given his assent to the National Judicial Appointments commission Bill, 2014 on 31 December 2014, after which the bill has been renamed as the National Judicial Appointment Commission Act, 2014. The NJAC Act and the Constitutional Amendment Act came into force from April 13, 2015.

The National Judicial Appointment Committee is a constitutional body proposed to replace the present Collegium system of appointing judges. It will consist of six people- the Chief Justice of India, the two most senior judges of the Supreme Court, the Law Minister and the two 'eminent persons'. These eminent persons are to be nominated for a three-year by a committee consisting of the Chief Justice, Prime Minister and the Leader of Opposition in the Lok Sabha and are not eligible for re-nomination.[12]

The judicial independence has been kept intact looking by keeping the provisions as such that the Chief Justice and the two other senior most judges have the power to veto any of the name proposed for appointment to the judicial post if they do not approve of it. After the proposal has been vetoed, it cannot be reviewed again. The judges also require the support of the other members in order bring forth other members in the recommendation list.

There was a petition filed by Prashant Bhushan and the centre of Public Interest Litigation against the NJAC Act, it stated that the collegium system must be scrapped as well and a full time judicial appointment commission independent of the government and the judiciary should be consulted to select judges. This body could work in a transparent and scientific manner by laying down the criteria for selection, advertising about the vacancies and evaluation of the applicants/nominees on a discernible basis on the criteria laid down.[13]

The National Commission to Review the Working of the Constitution (NCRWC) felt that the post-1993 arrangement for appointment of judges needed improvement. It states that it would be worthwhile to have a participatory mode with the participation of both the executive and the judiciary in making such recommendations. The Second Administrative Reforms Commission (ARC) has come out strongly in favour of the National Judicial Council to select judges. Though the Second ARC differed from the MN Venkatachaliah Commission on the composition of this body, the central theme remained the same. It said the NJC should be headed by the Vice- President and comprises the Prime Minister, The Speaker of the Lok Sabha, the Chief Justice of India, the Union Law Minister and the Leaders of the Opposition in the Lok Sabha and the Rajya Sabha.[14]

4.1 Judgment

The Judgment as given out by the Supreme Court came by declaring NJAC as 'unconstitutional". It was pointed out, that this Court in the Kesavananda Bharati[15] case had overruled the judgment in the I.C. Golak Nath[16] case. While holding as unconstitutional the part of Article 31C, which denied judicial review, on the basis of the "declaration" referred to above, also held, that the right of judicial review was a part of the "basic structure" of the Constitution, and its denial would result in the violation of the "basic structure" of the Constitution. It was submitted, that the intention of the legislature and the executive, irrespective of the party in power, has been to invade into the "independence of the judiciary". It was further submitted, that attempts to control the judiciary have been more pronounced in recent times.[17]

[12] (2015, Dec 16) NJAC v. Collegium: The Debate Decoded, *The Hindu.* Retrieved from http://www.thehindu.com/specials/in-depth/njac-vs-collegium-the-debate-decoded/article7768919.ece.
[13] Judiciary of Hopes and Aspirations, The Law Teacher. Retrieved from http://www.lawteacher.net/free-law-essays/judicial-law/judiciary-of-hope-and-aspirations.php.
[14] Ibid. at 13.
[15] AIR 1973 SC 1461
[16] 1967 AIR 1643, 1967 SCR (2) 762
[17] *Supreme Court Advocates-on-Record - Association and another v. Union of India*, para 134 pp. 328. Retrieved from http://s3.documentcloud.org/documents/2461419/njac-judgment.pdf

Referring to the "collegium system" of appointing Judges to the higher judiciary, it was pointed out, that the same was put in place by a decision rendered by a nine-Judge Bench, in the Second Judges case, through which the "independence of the judiciary" was cemented and strengthened. This could be achieved, by vesting primacy with the judiciary, in the matter of selection and appointment of Judges to the higher judiciary. It was further pointed out, that the collegium system has been under criticism, on account of lack of transparency. It was submitted, that taking advantage of the above criticism, political parties across the political spectrum, have been condemning and denouncing the "collegium system". Yet again, it was pointed out, that the Parliament in its effort to build inroads into the judicial system, had enacted the impugned constitutional amendment, for interfering with the judicial process. This oblique motive, it was asserted, could not be described as the will of the people, or the will of the nation.[18]

In comparison, while making a reference to the impugned constitutional amendment and the NJAC Act, it was equally seriously contended, that the constitutional amendment compromised the "independence of the judiciary", by negating the "primacy of the judiciary".

In almost all challenges, raised on the ground of violation of the "basic structure" to constitutional amendments made under Article 368, and more particularly, those requiring the compliance of the special and more rigorous procedure expressed in the proviso under Article 368(2), the repeated assertion advanced at the hands of the Union, has been the same. It has been the contention of the Union of India, that an amendment to the Constitution, passed by following the procedure expressed in the proviso to Article 368(2), constituted the will of the people, and the same was not subject to judicial review. The same argument had been repeatedly rejected by this Court by holding, that Article 368 postulates only a "procedure" for amendment of the Constitution, and that, the same could not be treated as a "power" vested in the Parliament to amend the Constitution, so as to alter, the "core" of the Constitution, which has also been described as, the "basic features/basic structure" of the Constitution. The above position has been projected, through the judgments cited on behalf of the petitioners, to which reference has been made hereinabove.

If a constitutional amendment breaches the "core" of the Constitution or destroys its "basic or essential features" in a manner which was patently unconstitutional, it would have crossed over forbidden territory. This aspect would undoubtedly fall within the realm of judicial review.[19]

5 LATER DEVELOPMENTS

5.1 Report

A report was filed by Ms. Pinky Anand and Arvind P. Datar, Senior Advocate on the various suggestions that could be taken up for the modification of the Collegium system.

The various suggestions were based on five categories being which were

a. Transparency

b. Eligibility

c. Secretariat

d. Complaints

e. Miscellaneous[20]

a. Transparency

The different proposals at a general level depended on having the best possible criteria which should allude to the age, merit, position, uprightness, salary criteria, scholarly capabilities which ought to be effortlessly accessible on the Supreme Court and High Court sites. Other pertinent data about the chose candidate ought to be available in spite of the fact that the straightforwardness to a great level acts to be counterproductive and should hamper the choice making. Subsequently, an appropriate adjustment should be struck in the middle of transparency and secrecy.

[18]Ibid. at 15. Refer to para 140 pp 332.
[19] Ibid. at 15. Refer to para 146 pp 336.
[20] Anand. P., Datar. A.,Neo Colleguim Suggestions filed in Supreme Court. Retrieved at: http://s3.documentcloud.org/documents/2505344/pinky-anand-arvind-datar-njac-collegium.pdf

The Proper system talks around a three stage process that involves the proposal and arrangement of the Judges through a consultative and participatory activity. An IB report ought to be sent by the High Court collegium to the Supreme Court and the names cleared ought to be sent to SC. [21]

b. Eligibility

Different criteria identified with the qualification of the Judges from the High court to the Supreme Court ought to be such that:

It expressed that the Chief Justices ought to be hoisted as well as alternate applicants of legitimacy ought to additionally be considered. All the High Court judges who have finished five years ought to be viewed as qualified and the three senior most judges of the High Court ought to be qualified. 10% of the Supreme Court Judges ought to be from the bar. There was likewise a proposal of directing a written exam for the rise to Supreme Court. [22]

c. Secretariat

The Union of India recommended the foundation of the Secretariat in the Supreme Court and every High Court to guarantee effective determination of judges which will be about the Members of the Bar and regional Court Judges who are delegated to a High Court. For the current judges to be delegated, legitimate data might gathered in light of the quantity of judgments conveyed, landmark cases, It ought to be totally autonomous of the official and it ought to have same status as that of the Supreme Court Registry. [23]

d. Complaints

The names of the candidates should be unveiled to people in general 30 days before the thought by the collegium and the general population must keep in touch with the Committee about the objections and the grievances. This would apply both for the High Court and the Supreme Court. At the point when the protestation is made, the individual ought to be given a chance to give a clarification. The examination should be by the board of resigned judges. [24]

e. Miscellaneous

The Union of India proposed that the exchange ought to be just on the record of the administrative exigencies, irreconcilable circumstance with relatives rehearsing at the Bar or at the solicitation of the concerned judges. Adherence to the idea of transfers not being punitive likewise needs to be considered amid the transfers. A legitimate record of the data identified with the transfers should be kept. A proposal to incorporate more number of female judges was delivered as the number of the female judges is low in the High Courts.[25]

5.2 Neo- Collegium

The order pertaining to the reformation of the Collegium system to recommend the new judges was delivered on 16 December 2015. The order gave the impression that the Attorney General's argument was agreed upon by the majority. The argument stated that it as in the government's hands to look into the Memorandum of Procedure (MoP) which is the procedure to appoint judges and the President and the Chief Justice of India are consulted for the same.[26]

The decisions were given out on the same factors as the Report which was submitted.

The eligibility criteria and the procedure detailed in the Memorandum of Procedure for the appointment of the judges ought to be made available to the Court on the website along with that of the Government's website. It shall also indicate the eligible criteria such as the minimum age, for the guiding of the collegium for the appointment of the Judges, after inviting and considering the views of the state Government and the Central Government. It talked about the establishment of the Secretariat for each High Court and Supreme Court and prescribe its functions, duties and responsibilities. The MoP should also provide a proper mechanism for

[21] Ibid. at 20 para 6 pp.3
[22] Ibid. at 20 para 7 pp. 5
[23] Ibid. at 20 para 8 pp. 8
[24] Ibid. at 20 para 9 pp. 10
[25] Ibid. at 20para 10 pp. 11
[26] SCOI Report (2015, Dec 16) Neo- Collegium order a Damp Squib- SC asks government to prepare collegium procedure Retrieved from http://www.legallyindia.com/scoi-reports/over-to-you-sc-asks-government-to-prepare-collegium-procedure.

dealing with the complaints.[27]

6 CONCLUSION

According to the Supreme Court, the main reason as to why the NJAC model got rejected was because it did not adhere to the Basic Structure Doctrine of the Constitution and it was a threat to the independence of the judiciary. The complete idea that could be made out of the decision was such that the majority of the bench has a mind-set of concluding that the primacy of the judiciary formed a part of the essence of the Constitution and it was not to be tampered with. The basic structure has various key points as have been deduced from the judgment of Kesavananda Bharti v. Union of India[28] but nothing of concrete meaning has been laid out in any of the judgments that talks about primacy of the judiciary as the basic structure. The majority decision held the Second Judges judgment to be valid which implied about the primacy of judiciary. The complex situation arises because of the conflict between the executive and the judiciary where the executive believes in having its share in the decision making related to the appointments but the judiciary does not want any interference of any type. The political conditions cannot be ignored at the time of the judgment. The BJP led Coalition government NDA had initiated the process of having a change in the way judges were appointed. In 2015, the NJAC procedure again came into limelight and the judiciary saw this as a way for the government to interfere in the untouched arena. The judiciary in any way did not welcome this intrusion, hence declared NJAC unconstitutional, leaving no more scope of debate at present. The judiciary felt that the Collegium system did come with its share of drawbacks and suggestions have been asked and given but the real test of the situation is whether this shall lead to any betterment or not? Only time would tell whether the NJAC was an instrument of political intrusion or a genuine mechanism to ward off the evils of the collegium system?

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[28] Ibid. at 15.