

Judicial Independence and Collegium system in India

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ABSTRACT

Judicial independence play an important role in maintaining the democratic set-up of any country. The Judiciary acts as a protector of rights of the citizens guaranteed by the law of the land and the constitution. Every democratic country adopts various means to ensure freedom of the judiciary and thereby to ensure individual freedom. An impartial and independent judicial system alone can protect the rights of the citizens against the arbitrary powers of the executive or legislature. The judiciary is comprised of the total judicial system in the country, viz. courts, judges and justices. Judicial independence is important whether the judge is dealing with a civil or a criminal case. So the mechanisms for judicial appointment plays an important role in selecting the persons having the professional skills and qualities that are required for judges in an independent judiciary. An important requirement of sustaining public confidence in the judiciary is the openness and transparency in appointing judges. Openness and transparency in making appointments essentially depend on the mechanisms for appointment of judges. This paper seeks to examine the nature of Indian collegiums system for judicial appointment. Its main purpose is to analyze how far the existing collegiums system for judicial appointment are effective in maintaining judicial independence and public confidence in the judiciary.

Keywords: Appointment of Judges, Independence of Judiciary, National Judicial Appointments Commission

Introduction:----

All the three parts of democratic system are important in their respective way. But the judiciary is considered to be the most important. Justice must not only be done – it must be seen to be done. It is vitally important in a democracy that individual judges and the judiciary as a whole are impartial and independent of all external pressures and of each other so that those who appear before them and the wider public can have confidence that their cases will be decided fairly and in accordance with the law. Judicial independence does, however, mean that judges must be free to exercise their judicial powers without interference from litigants, the State, the media or powerful individuals or entities, such as large companies. This is an important principle because judges often decide matters between the citizen and the state and between citizens and powerful entities. The constitution of India adopts diverse devices to ensure the independence of the judiciary in keeping with both the doctrines of constitutional and Parliamentary sovereignty. In India the judiciary has the power to issue writs in the name of habeas corpus, prohibition, mandamus, quo-warranto and certiorari. The process of appointment of judges also ensures the independence of judiciary in India. The Supreme Court of India was inaugurated on January 28, 1950. It succeeded the Federal Court of India which was established under the Government of India Act, 1935. The system through which the judges of the Supreme Court/High Courts are appointed and transferred is called “ Collegium System”. The Collegium system is one where the Chief Justice of India and a forum of four senior-most judges of the Supreme Court recommend appointments and transfers of judges. Collegium system is a process through which decisions related to appointments and transfer of judges in supreme court and high court, and not by an Act of Parliament or by a provision of the Constitution.

Composition of Indian collegium :----

The Supreme Court collegium is headed by the Chief Justice of India and comprises four other senior most judges of the court. A High Court collegium is led by its Chief Justice and four other senior most judges of that court. Names recommended for appointment by a High Court collegium reaches the government only after approval by the CJI and the Supreme Court collegiums.

Currently the Collegium of the Supreme Court is consists of;

1. Chief Justice Deepak Mishra
2. Justice Jasti Chelameswar
3. Justice Ranjan Gogoi
4. Justice Madan Lokur
5. Justice Kurian Joseph

Appointment procedure :-

The hierarchy of judicial system in India plays an important role in maintaining the independence of judiciary. Supreme Court is the highest court for justice. Then, there are High Court and District Courts in every states. Then, there are People's courts known as Lok Adalats. Judges of the Supreme Court and High Courts are appointed by the President under Articles 124(2) and 217 of the Constitution. The President is required to hold consultations with such of judges of the Supreme Court and of the High Courts as he may deem necessary. Article 124(2) says: "Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years. If in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted." And Article 217 states: "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."

How Collegium System Works?

The Collegium sends the recommendations of the names of lawyers or judges to the Central Government. Similarly, the Central Government also sends some of its proposed names to the Collegium. The Central Government does the fact checking and investigate the names and resends the file to the Collegium. Collegium considers the names or suggestions made by the Central Government and resends the file to the government for final approval. If the Collegium resends the same name again then the government has to give its assent to the names. But time limit is not fixed to reply. This is the reason that appointment of judges takes a long time. It is worth to mention here that there are 395 posts of the judges are vacant in the High Courts and 7 posts in the Supreme Court. There are 146 names are pending for approval between the Supreme Court and Central Government since last two years. Out of these 146 names 36 names are pending with the Supreme Court Collegium, while 110 names are yet to be approved by the Central Government.

History of the collegium system:-----

As per the constitution, as held by the court in the three judges cases - (1982, 1993, 1998), a judge is appointed to the supreme court by the president on the recommendation of the *collegium* - a closed group of the Chief Justice of India, the four most senior judges of the court and the senior-most judge hailing from the high court of a prospective appointee.

Following are the three cases:

1. *S. P. Gupta v. Union of India* - 1981 (also known as the Judges' Transfer case)
2. *Supreme Court Advocates-on Record Association vs Union of India* - 1993
3. *In re Special Reference 1 of 1998*

First Judges Case: In *S P Gupta Vs Union of India*, 1981, the Supreme Court by a majority judgment held that the concept of primacy of the Chief Justice of India was not really to be found in the Constitution. It held that the proposal for appointment to a High Court can emanate from any of the constitutional functionaries mentioned in Article 217

and not necessarily from the Chief Justice of the High Court. The Constitution Bench also held that the term "consultation" used in Articles 124 and 217 was not "concurrence" meaning that although the President will consult these functionaries, his decision was not bound to be in concurrence with all of them. The judgment tilted the balance of power in appointments of judges of High Courts in favor of the executive.

Second Judges Case: In *Supreme Court Advocates-on-Record Association Vs Union of India*, 1993, a nine-judge Constitution Bench overruled the decision in *S P Gupta* case and devised a specific procedure called 'Collegium System' for the appointment and transfer of judges in the higher judiciary. Underlining that the top court must act in "protecting the integrity and guarding the independence of the judiciary", the majority verdict accorded primacy to the CJI in matters of appointment and transfers while also ruling that the term "consultation" would not diminish the primary role of the CJI in judicial appointments. "The role of the CJI is primal in nature because this being a topic within the judicial family, the executive cannot have an equal say in the matter. The collegium system, the court said that the recommendation should be made by the CJI in consultation with his two senior most colleagues, and that such recommendation should normally be given effect to by the executive. It added that although it was open to the executive to ask the collegium to reconsider the matter if it had an objection to the name recommended, if, on reconsideration, the collegium reiterated the recommendation, the executive was bound to make the appointment.

Third Judges Case: In 1998, President K R Narayanan issued a Presidential Reference to the Supreme Court over the meaning of the term “consultation” under Article 143 of the Constitution (advisory jurisdiction). The question was whether “consultation” required consultation with several judges in forming the CJI’s opinion, or whether the sole opinion of CJI could by itself constitute a “consultation”. In response, the Supreme Court laid down 9 guidelines for the functioning of the Coram for appointments and transfers, this has come to be the present form of the collegium, and has been prevalent ever since. This opinion laid down that the recommendation should be made by the CJI and his four senior most colleagues, instead of two. It also held that Supreme Court judges who hailed from the High Court for which the proposed name came, should also be consulted. It was also held that even if two judges gave an adverse opinion, the CJI should not send the recommendation to the government. Ever since, the collegium has been making recommendations for appointments and transfer of judges.

National Judicial Appointment commission:-----

In 2015, the parliament passed a law to replace the collegium with a National Judicial Appointment commission (NJAC). This was struck down as unconstitutional by the supreme court, in the Fourth judges’ case as the new system would undermine the independence of the judiciary. The National Judicial Appointments Commission (NJAC) is a constitutional body proposed to replace the present Collegium system of appointing judges. The NJAC was established by amending the Constitution [Constitution (Ninety-Ninth Amendment) Act, 2014] passed by the Lok Sabha on August 13, 2014 and by the Rajya Sabha on August 14 2014. Alongside, the Parliament also passed the National Judicial Appointments Commission Act, 2014, to regulate the NJAC’s functions. Both Bills were ratified by 16 of the State legislatures and the President gave his assent on December 31, 2014. The NJAC Act and the Constitutional Amendment Act came into force from April 13, 2015. It will consist of six people — the Chief Justice of India, the two most senior judges of the Supreme Court, the Law Minister, and two ‘eminent persons’. These eminent persons are to be nominated for a three-year term by a committee consisting of the Chief Justice, the Prime Minister, and the Leader of the Opposition in the Lok Sabha, and are not eligible for re-nomination. The Chief Justice and two senior-most judges for appointment to a judicial post if they do not approve of it. Once a proposal is vetoed, it cannot be revived. At the same time, the judges require the support of other members of the commission to get a name through.

By a majority opinion of 4:1, on 16 October 2015, Supreme Court struck down the constitutional amendment and the NJAC Act restoring the two-decade old collegium system of judges appointing judges in higher judiciary. Supreme Court declared that NJAC is interfering with the autonomy of the judiciary by the executive which amounts to tampering of the basic structure of the constitution where parliament is not empowered to change the basic structure. However Supreme Court has acknowledged that the collegium system of judges appointing judges is lacking transparency and credibility which would be rectified/improved by the Judiciary. Arguments against NJAC were based on the three landmark judgements that safeguarded the collegium system, namely, the first, second and third judges’ cases. The first judges case decided in 1981 gave power to the President to refuse the judges’ names recommended by CJI. Twelve years later, this position was reversed by a decision of Justice J.S. Verma under the second judges case which extended primacy to the judiciary. In 1998, this principle was cemented by the Supreme Court, laying down guidelines for effective working of the collegium system. They argued that the right to appointment of judges lay at the core of the independence of the judiciary and formed a part of the basic structure of the Constitution. The landmark judgements were binding and could not be over-ruled by amending the Constitution.

Supporting National Judicial Appointments Commission:---

During the hearing of the bunch of petitions challenging the constitutionality of the National Judicial Appointments Commission (NJAC), Attorney General Mukul Rohatgi had told the five-judge Bench of the Supreme Court that the collegium system was “dead and buried forever”, and wouldn’t be revived even if the Bench quashed the NJAC. The independence of the judiciary is protected under the basic structure through various facets and is not drawn from the appointment of judges alone. “The Constitution has devised a structure of power relationships with checks and balances wherein limits are placed on the power of every authority or instrumentality under the constitutional scheme,” said attorney general Mukul Rohatgi.

The collegiums system has come under a fair amount of criticism. In the year 2009, Law Commission of India said that nepotism and personal patronage is prevalent in the functioning of the Collegium System.

Collegium System is recommending the appointment of the judges without considering the talent available in the market. If the constitution makers had liked this way of appointment of judges, they would have envisaged it in the original constitution itself. Collegium System could not appoint judges as per the vacancies in the courts due to various reasons. In spite of being a democracy, the judges appoint judges in India. Collegium System is not a healthy practice for a democratic country like India. The Collegium System is not the constitutional system so the central government should make appropriate laws to pull out the Indian Judicial System from the monopoly of some families.

Statements against National Judicial Appointments Commission:---

The NDA government's decision to replace the collegium system which has been in place since 1993, has left the legal fraternity somewhat divided. The case has brought together respected names of the legal fraternity such as Ram Jethmalani, Harish Salve, Fali Nariman, T.R. Andhyarujina, Anil B. Divan, K.K. Venugopal and Arvind P. Datar under the same roof, arguing against the validity of the newly formed constitutional body. A few members of the fraternity firmly believe the collegium system is "unconstitutional and anti-democratic" where judges are appointed through "secret soundings and cronyism" while others say that the government wants to "interfere" in the independence of the judiciary and it needs to be resisted. The Supreme Court is examining the constitutionality of the NJAC and has refused to accept the government's demand that the matter be referred to a larger bench of 11 judges from the existing five-judge bench headed by Justice JS Khehar. The court has said the hearing of the case will "continue on merits". Justice Khehar and Lokur raised questions such as:

"Would such persons have to be jurists? If not, how would they have access to information to make a sound decision?"

"The possibility of abuse of veto power is extremely high as these two persons could together strike out an otherwise valid appointment."

"What if such person is found to be shady? What is the procedure of removal of such person?"

After a year of wrangling in the courtroom between the judiciary and the executive, a five-judge bench of the Supreme Court struck down the constitutional amendment that introduced a six-member panel for selecting judges to the higher judiciary, declaring it unconstitutional. Justice VN Khare, former Chief Justice of India, says there is nothing bad with the existing system but accepts that there is scope for its improvement. "There is nothing bad with the collegium system. It is, in fact, superior to the NJAC in many ways. It will also be unfair to say that it is not transparent. But yes, it can be further improved by making it more transparent. Adding that the government passed the NJAC Act in "undue haste and without consulting the judiciary", Professor Faizan Mustafa, vice chancellor of NALSAR University of Law, Hyderabad, told "The independence of the judiciary is not the private right of judges; it is the right of citizens. Ultimately, judicial legitimacy rests on public confidence in the courts. Appointment of judges is seen as a crucial mechanism to achieve judicial independence. Judges must be independent of executive, senior judges and in their ideology." Advocate Shahid Ali, senior lawyer at the Delhi High Court, says the "attempt to interfere in the independence of judiciary through the NJAC will prove to be fatal for the democracy and detrimental for fundamental rights guaranteed in the Constitution"

Conclusion :--- The separation of powers is a fundamental guarantee of the independence of the judiciary. In the decision-making process, judges should have freedom to decide cases impartially, in accordance with their interpretation of the law and the facts. They should be able to act without any restriction or improper influence. The appointment of judges is an important aspect of judicial independence which requires that in administering justice judges should be free from all sorts of direct or indirect interference or influences. The principle of the independence of the judiciary seeks to ensure the freedom of judges to administer justice impartially, without any fear or favour. This freedom of judges has a close relationship with judicial appointment because the appointment system has a direct bearing on the impartiality, integrity and independence of judges independence. Collegium system in India is the system by which the judges are appointed by the judges only also referred to as "Judges- selecting- Judges". It is the system of appointment and transfer of judges that has evolved through judgments of the Supreme Court, and not by an Act of Parliament or by a provision of the Constitution. The Central government has criticised saying it has created an imperium in imperio (empire within an empire) within the Supreme Court. The Supreme Court rejected the National Judicial Appointments Commission (NJAC) Act and the 99th Constitutional Amendment which sought to give politicians and civil society a final say in the appointment of judges to the highest courts. This system is criticised because it is considered to be non transparent as there is no official mechanism involved. There are no prescribed norms regarding the eligibility criteria or even selection criteria. The NDA government has tried twice to replace the collegiums system with National Judicial Appointments

Commission (NJAC) to address the concerns but failed and the collegium system still prevailing but the parliament has slowed down the process of appointment and is drafting the MoP(Memorandum of Procedure) to guide future appointments so that concerns regarding lack of eligibility criteria and transparency could be redressed. Collegium System for judicial appointment may have some advantages and disadvantages and therefore, no particular system can be treated as the best system. Despite this, in order to maintain public confidence in the appointment system and judicial independence.

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