

JUDICIAL INDEPENDENCE IN JUDICIAL
APPOINTMENTS: A NECESSITY? BY MS.VIDHI
AGARWAL*

Introduction

“Justice can become ‘fearless and free only if institutional immunity and autonomy are guaranteed’.”¹

The importance of judiciary in a democratic setup is unparalleled. The judiciary plays an important role of interpreting and applying the law and adjudicating upon controversies. It is the function of the courts to maintain rule of law in the country. Judiciary is a watching tower above all the other limbs of the state. In a country with a written constitution, courts have to safeguard the supremacy of the Constitution by interpreting and applying its provisions.

Having regard to the importance and significance attached to the function performed by the judiciary, the Constitution has consciously provided for separation of judiciary from the executive.² The separation of powers between these two organs of the government has to be observed with respect to judicial appointments, transfers, retirement *et al.* The separation between the two organs of the government is insisted so that independence of the judiciary can be maintained.

The appointment of judges to the higher judiciary in our country, that is, the Supreme Court and the High Courts of the states has become a contentious issue as there is a constant tug of war between the executive and the judiciary. The issue attracts attention as the service rendered by Judges demands the highest qualities of learning, training and character. Judges are expected to present a continuous aspect of dignity and conduct.

Much of the conflict has stemmed from the need to preserve judicial independence. The term has meant different things to different people over time— to several members of the Constituent Assembly, it was a principle to allow judges to adjudicate free from extraneous considerations, to a majority of judges of the Supreme Court over time, a requirement of the rule of law enshrined in the basic structure of the Constitution and to several popularly elected governments, a principle which had to be carefully bypassed, while appointing sympathetic judges to the higher judiciary. Today, these differences have been put in sharp relief in the context of the operation of the Supreme Court collegium as the focal body for judicial appointments, with judicial independence being used both by judges to justify its perpetuation as well as by the political classes and sections of the civil society activists to explain its purported failures.³

* LL.M, Gujarat National Law University (GNLU), Attalika Avenue, Knowledge Corridor, Koba, Gandhinagar, Gujarat-382007

¹ Union of India v. Sakalchand Himatlal Sheth, (1978) 1 S.C.R. 423 (Bhagwati, J.).

² Indian Const. art. 50.

³ Arghya Sengupta, *Judicial Independence and the Appointment of Judges to the Higher Judiciary in India: A Conceptual Enquiry*, 5 INDIAN J. CONST. L. 99, 99 (2011).

This article will shed light on the process of judicial appointments in India and the various momentous changes the appointment procedure has undergone since independence, while discussing the implications of the passage of the 99th Constitutional Amendment Act, 2014 and the National Judicial Appointments Commission Act, 2014.

Judicial Appointments in India: Retrospect

Constituent Assembly: Perspectives

The Constituent Assembly held vigorous debates as regards the issue of judicial appointments. Judicial independence was seen as a necessary requirement for the judiciary to adjudicate impartially, insulated from political interferences.

According to Dr. Ambedkar, there were two alternative modes of appointing Judges which were before the Drafting Committee. The first was the appointment of Judges in the United Kingdom where the executive had an absolute power to appoint all the Judges of the High Court of Justice, and Lords of Appeal in Ordinary in the House of Lords. In the United States, the President had power to appoint Federal Judges with the advice and consent of the Senate. This method curtailed the absolute power of the President as the Chief Executive to appoint Judges, by giving the Senate a veto. Between the absolute power of the executive in the United Kingdom, and the President's power in the United States, hedged in by the veto of a legislative body, the Drafting Committee steered a middle course.

Further, Dr. Ambedkar stated that the proposed appointment does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature.⁴

Executive-led appointments: 1950-1993

Constitutional Provisions

India has a unified judicial system with the Supreme Court, established under Article 124(1) of the Constitution. There are High Courts below the Supreme Court and under each High Court there exists a system of subordinate courts. The appointment of Judges of the Supreme Court and High Courts is governed by Article 124(2) and Article 217(1) of the Constitution respectively.

The Judges of the Supreme Court are appointed by the President. While appointing the Chief Justice, the President has consultation with such of the Judges of the Supreme Court and the High Courts as he may deem necessary. In case of appointment of other Judges, the President is required to consult the Chief Justice of India though he may also consult such other Judges of the Supreme Court and the High Courts as he may deem necessary.⁵

In the course of the Constituent Assembly debates, Dr. B.R. Ambedkar gave a disclaimer on using the word "concurrence".

"With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the

⁴ C.A.D. VOL. VIII, (1949), at 258.

⁵ Indian Const. art. 124, [§2](#).

*impartiality of the Chief Justice and the soundness of his judgment..But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day”.*⁶

1950-1981

The executive-led judicial appointments continued for a period of few years after independence. However, there was dissatisfaction among the legal fraternity as regards the appointment procedure. It was a common view that regional and communal influences and the interference of the executive, procured appointments to the Supreme Court. The best of the talent was not mobilised.⁷

The dissatisfaction widened when the Government departed from the long-followed practice of appointing the senior-most judge as the Chief Justice of India and appointed Justice A.N. Ray who was the fourth in the order of seniority. Justifying this move, the Law Minister, Mohan Kumaramangalam proposed a radical re-interpretation to the appointment process, by which the political philosophy of judges, as determined by the government, would be a relevant criterion for appointment.

The First Judges’ Case⁸

The majority (4:3) of the Court held that under Article 124(2) of the Constitution, the word ‘consultation’ does not mean ‘concurrence’ and ruled further that the concept of primacy of the Chief Justice of India is not really to be found in the Constitution. The decision of the Supreme Court was widely criticized as the balance tilted in favour of the executive. After this judgment, certain appointments were made by the Executive over-ruling the advice of the Chief Justice of India.

Collegium-led Appointments

The Second Judges’ Case⁹

In 1993, a nine-Judge Constitution Bench of the Supreme Court over-ruled the decision in the First Judges’ case. The Bench (7:2) devised a specific procedure for appointment of Judges of the Supreme Court in the interest of “protecting the integrity and guarding the independence of the judiciary.” For the same reason, the primacy of the Chief Justice of India was held to be essential. It held that the recommendation in that behalf should be made by the Chief Justice of India in consultation with his two senior-most colleagues and that such recommendation should normally be given effect to by the executive. The three-member body would be referred as ‘Collegium’.

It held at the same time that it was open to the executive to ask the Chief Justice of India and his two colleagues to reconsider the matter, if they have any objection to the name

⁶ C.A.D. VOL. VIII, (1949), at 258.

⁷ Law Commission of India 14th Report, *Reform of Judicial Administration*, 1958, at 34.

⁸ S.P. Gupta v. Union of India, AIR 1982 SC 149.

⁹ Supreme Court Advocates-on-Record Association v. Union of India, 1993 (4) SCC 441.

recommended but if, on such reconsideration, the Chief Justice of India and his two colleagues reiterated the recommendation, the executive was bound to make the appointment. It was also laid down that the senior-most judge should always be appointed as the Chief Justice of India.

The Third Judges' Case

The 1993 decision was reaffirmed in 1998¹⁰ in a unanimous opinion rendered by a nine-Judge Bench of the Supreme Court on a reference being made by the President under Article 143 of the Constitution. There was, however, some variation. It was held that the recommendation should be made by the Chief Justice of India and his four senior-most colleagues and further that Judges of the Supreme Court hailing from the High Court to which the proposed name comes from must also be consulted.

Drawbacks of the Collegium System

The system of recommendation for judicial appointments by a collegium of the five senior-most judges is not institutionalised: no mechanism is prescribed (by the collegium itself), no office is set up, no data gathered in advance, no criteria evolved as to who among the High Court Judges – all aspirants to a place in the Supreme Court – should be recommended. There is no reason given as to why a broad consensus among *all* the Judges of the Supreme Court is not to be preferred to the views only of the five senior-most. The entire system operated ad-hoc, based on no principle.¹¹

Judicial Appointments in India: Prospect

Past Proposals

121st Report of Law Commission of India

The Law Commission of India recommended the constitution of a National Judicial Service Commission. The Report¹² recommended that the Judicial Service Commission should be composed of eleven persons, namely, the Chief Justice of India and three senior most Judges of the Supreme Court, the immediate predecessor in office of the Chief Justice of India, three senior most Chief Justices of the High Courts, Minister for Law and Justice, the Attorney General of India and an outstanding law academic.

It was observed that recommendation of such a Commission should be binding upon the President but it shall be open to the President to refer the recommendation back to the Commission in any given case along with information in his possession regarding the suitability of the candidate. If, however, after reconsideration, the Commission reiterates its recommendation, the President shall be bound to make the appointment.

The Constitution (67th Amendment) Bill, 1990

The Constitution (Sixty-seventh Amendment) Bill, 1990 provided for the constitution of a National Judicial Commission for appointments to be made to the higher judiciary. The

¹⁰ Special Reference No. 1 of 1998, (1998) 7 SCC 739.

¹¹ Fali S. Nariman, *Needed: Dialogue, statesmanship*, THE INDIAN EXPRESS, Aug. 6, 2014, at 9.

¹² Law Commission of India 121st Report, *New Forum for Judicial Appointments*, 1987.

constitution of Commission was to comprise of the Chief Justice of India as its Chairman plus two of his senior-most colleagues. For recommending appointments to the High Court, the Commission was to consist of Chief Justice of India as its Chairman, the State Chief Minister, one other senior-most Supreme Court Judge, the Chief Justice of the High Court and one other senior-most Judge of the High Court.

National Judicial Appointments Commission

Most of the constitutional democracies of the world adopt either the Judiciary-Executive model or the Executive-Legislative model.

However, several countries have now moved to a more innovative inter-institutional model of appointment where a statutorily constituted judicial appointments commission plays a significant role. This commission, consisting of the judicial and the executive branch, is charged with the responsibility of making recommendations or appointments of judges based on a procedure that ensures transparency and judicial independence.¹³ England, South Africa and Malaysia are examples of this model.

After the various drawbacks and failings of the collegium system of appointments surfaced, India has moved to the model of judicial appointments by a judicial appointments commission. To facilitate the setting up of a National Judicial Appointments Commission, two bills were passed. (They will soon be declared the law of the land once the States' ratification and the President's assent regarding the same is received.)

99th Constitution Amendment Act, 2014

The Act envisages setting up a National Judicial Appointments Commission. It seeks to insert new Articles 124A, 124B and 124C after Article 124 of the Constitution.

The Commission will consist of six members: the Chief Justice of India, Chairperson, *ex officio*; two other senior Judges of the Supreme Court next to the Chief Justice of India – Members, *ex officio*; the Union Minister in charge of Law and Justice – Member, *ex officio*; two eminent persons who will be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People.¹⁴

One of the eminent persons shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women. Further, eminent persons shall be nominated for a period of three years and shall not be eligible for re-nomination.

The National Judicial Appointments Commission Act, 2014

The Act provides for the time frame to initiate the process of filling up of vacancies in the Supreme Court and High Courts and the procedure for selection of Chief Justice of India,

¹³ Working Paper No.1/2014, *Recasting the Judicial Appointments Debate: Constitutional Amendment (120th Amendment) Bill, 2013 and Judicial Appointments Commission Bill, 2013*, CENTRE FOR LAW AND POLICY RESEARCH (Oct. 16, 2014, 20:32 PM), <http://clpr.org.in/wp-content/uploads/2014/02/JAC-Working-Paper.pdf>.

¹⁴ 99th Constitution Amendment Act, [§ 124A\(1\)](#) (2014).

Chief Justice of High Courts and Judges of the Supreme Court and High Courts. It further provides that if two members of the Commission do not agree, then the Commission shall not make such recommendation. It also provides that if two members of the Commission do not agree, then the Commission shall not make such recommendation. However, if the Commission makes unanimous recommendations on such reconsideration, then the President shall make the appointment accordingly.¹⁵

Challenges and Suggestions

Merit based appointment

The two Acts contain provisions that the person recommended should be of 'ability and integrity'¹⁶, and 'ability, merit and any other criteria of suitability as may be specified by regulations'¹⁷. These are the only provisions which hint at the need for a merit based criteria for appointment.

There should have been a standardized criteria for evaluating merit. The American Judicature Society and the American Bar Association administer an official performance evaluation of the Judges. The recommended performance evaluation criteria include-: legal ability, integrity and impartiality, communication skills, professionalism and temperament, administrative capacity, necessary skills for jurisdiction of court.

Diversity

The Acts should have encouraged diversity in appointment, in terms of gender, religion, caste and ethnicity, like it is done in the UK¹⁸ and South Africa¹⁹. A diverse background of Judges ensures wider considerations regarding any subject matter, which, in turn, helps in achieving the basic objectives of a fair, just and independent judicial system.

Comparative analysis of the law relating to judicial appointments in other countries vis-a-vis India

In **United Kingdom**, the Judges are appointed by the Crown, which prior to 2005 meant the Executive of the day, without any restriction. The power of the executive was curtailed in March 2005, by the Constitutional Reform Act, 2005 which established a Judicial Appointments Commission for England and Wales and a Judicial Appointments and Conduct Ombudsman. In the **United States**, on the other hand, the President appoints the Supreme Court Judges with the consent of the Senate.²⁰

In **Australia**, Section 72 of the Constitution of Commonwealth of Australia provides merely that justices of the High Court (the Highest Court) shall be appointed by the Governor-General in Council in consultation with the Attorney-General (as provided by Section 6 of the High Court of Australia Act, 1979) while Judges of the State Supreme Courts are appointed

¹⁵ The National Judicial Appointments Commission Act (Statement of Objects and Reasons (2014)).

¹⁶ 99th Constitution Amendment Act, § 124B(c) (2014).

¹⁷ The National Judicial Appointments Commission Act, § 5(2) (2014).

¹⁸ Constitutional Reforms Act, § 64 (2005).

¹⁹ South Africa Const. sec. 174, § 2.

²⁰ M.P. JAIN, INDIAN CONSTITUTIONAL LAW 202 (LexisNexis Butterworths Wadhwa, 6th ed., 2010).

LAW MANTRA THINK BEYOND OTHERS

(International Monthly Journal, I.S.S.N 2321 6417)
Journal.lawmantra.co.in www.lawmantra.co.in

by the Governors on the advice of the government wherein the Attorney-General of the States play an important role.

In **Canada**, Judges are appointed by the Cabinet (either federal or provincial) with a major role played by the Minister of Justice/the Attorney-General. In **Ireland**, Judges are appointed by the President on the advice of the government.

In **Israel**, Judges are selected by the Judicial Selection Committee. On the basis of their recommendation, the Judges are appointed by the President. The Appointment Committee comprises nine members including three Judges of the Supreme Court, two lawyers elected by the Bar Association, two members of the Knesset and two Ministers of the Government, one of them being the Minister of Justice, who chairs the Committee.

In **Japan**, the appointment of the Chief Judge of the Supreme Court is made by the Emperor as designated by the Cabinet, and other Judges are appointed by the Cabinet. However, every appointment is made only in consultation with the Chief Judge of Japan. In **Switzerland**, Judges are elected by the Federal Legislature.

The question arises why did the framers of the Constitution depart from other countries and provided this innovative procedure, when even the Government of India Act, 1935²¹ did not. It is attributable to their conviction that at our stage of development and having regard to the propensities of the Executive (to control every organ of State and every institution of governance), any one organ cannot be vested with the sole power of appointment to judiciary, a co-equal wing of government.²²

The requirement of consultation with not only the Chief Justice of India but with certain other Judges at the Supreme Court and High Court in Article 124 is an added indication of the concern the founding fathers had with the independence of the judiciary.

Conclusion

The passage of the Constitution (121st Amendment) Bill, 2014 & The National Judicial Appointments Commission Bill, 2014 has been met with appreciation and apprehension at the same time. The judicial officers of this country regard these Bills as corrosive of the concept of 'independence of judiciary' as the Bills end the judicial monopoly in the appointment of Judges. On the other hand, the legislature and executive wings of the government view this as a positive development.

Dr. Ambedkar, the Father of the Indian Constitution, never envisaged that the power of judicial appointment would vest in any one organ of the government, that is, either the executive or the judiciary. It was the intention of the framers of the Constitution to evolve a system that would include the participation of both the organs of the government. This multiplicity of authorities was proposed so as to ensure checks and balances.

It can be said that the system of judicial appointment in India has come a full circle. Prior to 1993, a collaborative model of judiciary-executive appointment was followed. However, due

²¹ Government of India Act, § 220(2) (1935).

²² National Commission to Review the Working of Constitution, *A Consultation Paper on Superior Judiciary*, MINISTRY OF LAW & JUSTICE (Oct. 16, 2014, 20:37 PM), <http://lawmin.nic.in/ncrcw/finalreport/v2b1-14.htm>.

to certain instances of controversial appointments, the system of appointments underwent a sea change; one example being the introduction of a judicial collegium. The First Judges' Case, the Second Judges' Case and the Third Judges' Case highlight the problems which plagued the system of judicial appointments and transfers; thereby resulting in these cases.

The above-mentioned 2014 Bills seek to address the situation and remedy the ails affecting the judicial autonomy. It is the prerogative of the executive and the judiciary to iron out the differences which persist and have a meaningful dialogue. Statesmanship is the need of the hour, because we cannot risk another judicial decision. The executives, the Judges and the lawyers must resolve to avoid, at all cost, a Fourth Judges' Case.²³

After all, the creation of the National Judicial Appointments Commission is a concrete opportunity to create a new participatory and transparent method of appointment to the judicial positions in line with contemporary constitutional design. This reform would restore parity between executive and judiciary in appointment of judges, which is constitutional and in conformity with rule of law and separation of powers.

²³ Fali S. Nariman, *Needed: Dialogue, statesmanship*, THE INDIAN EXPRESS, Aug. 6, 2014, at 9.