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The Appointments of the Judges of Supreme Court and High Courts in India: An Appraisal

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Abstract

Impartial and independent judiciary is the savior of democracy. The founding fathers of our constitution firmly agree on powerful judiciary for futuristic Indian polity. They believe that appointment procedure of the judges of Supreme Court and high courts ensure that only persons with high caliber should occupy these positions. Comprehensive debates in the constituent assembly show their concern in this regard. In the due course of history of independent India, the appointment procedure was remaining very controversial. The present paper is based on the chronology of events correlated with the system of appointment of judges of Supreme Court as well as High courts. It will also explore the shortcomings which needs the attention of the constitutional functionaries to fulfill this gap.

Keywords: Constituent Assembly, Collective Wisdom, Equality before law, Integrated Judicial System, Judicial Review,

Colonial History of the Appointment of Judges

The legacy of judicial system in India can be traced from one hundred fifty five years back when British Parliament enacted the High Court's Act in 1861[1]. The High

[1] The High Courts of Calcutta, Madras and Bombay were established by Indian High Courts Act 1861.

Courts were established in the provinces of British India but the final court of appeal was Privy Council of England[2]. These provisions were made by the imperial rulers only to legitimize their rule and protect their empire from blood ridden struggles. All these changes were made after the revolution of 1857[3]. By new legal set-up, the imperial Rulers suppressed the revolutionary ideas and hanged freedom fighters by judicial weapon. It is interesting to note that the people living under the colonial rule had no fundamental rights. Anyhow, the imperial ruler made many structural changes and laid foundation to the modern justice delivery system. They enacted the Government of India Act, 1935[4] and created the Federal Court[5] at New Delhi with limited jurisdiction because the Jurisdiction of Privy Council was still on the top of hierarchy of Courts. On the eve of independence, the plural justice delivery system existed because hundreds of local kings had their own judicial set-up. Another problem was that the rules of local kings were highly regional in nature. Hence, the uncertainty of future polity was solved by the constituent assembly. The new justice delivery system was shaped; the federal court was replaced by the Supreme Court of India and powered as highest court of justice. The biggest problem faced by Constitutional assembly was the appointment of judges of Supreme Court and high courts of the states. The establishment of a fair judicial system was not a trivial task for them because judiciary needs officers who have integrity and knowledge of laws of and have the capacity to defend the rights of the peoples and work according to the philosophy of the constitution which is enshrined in the preamble of constitution.

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2 The Judicial Committee ACT, 1833

3 The Revolt of 1857 gave a serious setback to the British East India Company's administration in India. Many sections of political opinion in England opined that the East India Company's economic & administrative policies were mainly responsible for the outbreak of the rebellion. Therefore, after the rebellion, the British Government decided to end the British East India Company's rule in India and to put the charge of Indian Administration under the direct rule of the British Crown. For that purpose the British Parliament passed an act known as "The Act for the better Government in India," or "Government of India Act, 1858".

4 Government of India Act, 1935, Section 200 (3) (a) (b) (c) and (i) (ii)

5 The Federal Court was inaugurated on October 1, 1937, on which date the Vice administered the oath of allegiance to the Court's first three Judges: Chief Justice Sir Maurice Gwyer, and puisne judges Sir Shah Muhammad Sulaiman and Mukund Ramrao Jayakar. Gwyer was an Englishman who had no previous experience in India but had been involved in various stages of the preparation of the 1935 Act; Sulaiman was a Muslim who had earned distinction as Chief Justice of the Allahabad High Court, and Jayakar was a Hindu and a successful Bombay advocate. George H. Gadbois Jr. The Federal Court of India: 1937-1950, Journal of the Indian Law Institute, Apr.-Sept., 1964, Vol. 6, No. 2/3 (Apr.-Sept., 1964), pp. 253-315

The constituent assembly on Appointments of Judges

Dr. B.R. Ambedkar described the features related with judicial system as "A dual judiciary, a duality of legal codes and duality of civil services, as I said, are the logical consequences of a dual polity which is inherent in a federation. In the USA the federal judiciary and the state judiciary are separate and independent of each other. The Indian federation through a Dual Polity has no Dual Judiciary at all. The High Courts and Supreme Court form one single integrated Judiciary having jurisdiction and providing remedies in all cases arising under the constitutional law, the civil law or the criminal law. This is done to eliminate all diversity in all remedial procedure"[6]. The founding fathers of the constitution were quite sensitive on the subject of the futuristic judicial system in India. After a long debate they incorporated many ideological values and morals and formed consensus over the framework of Indian judiciary. The principle of procedure establish by the law was incorporated in article 21 of constitution. Judicial accountability provides impeachment process of judges of Supreme Court and high courts in article 124 of the Constitution. The judicial checks over legislature and executive are found in judicial review under articles 13, 32, 131-136, 143, 226, 145, 246, 251, 254 and 372 are inscribed in various parts of the constitution. The article 50 relating to the Directive Principles of State policy says that the state shall take steps to separate the judiciary from the executive in the public services of the state. Prof. K.T. Shah wanted to insert this principle in a rigorous way so that judicial independence should be preserved. He articulated his opinion in constituent assembly that the "judiciary in India shall be completely separate from the wholly independent of the executive or the legislature"[7]. Mr. Naziruddin Ahmad expressed his worry in debate that, "We have been under slavery for centuries and it seems to me that we have not yet been able to get rid of that slave mentality, so that having obtained independence we want to subjugate our judiciary to the wishes and whims of the executive"[8].Shri R.K. Sidhva commented on the role of legislature for appointment of judges "Now coming to the amendment of Professor Shah, he wants the Council of States to decide the question of the appointment of Judges. This I must strongly oppose. We want impartial and independent Judges; and if you leave it to the Council of States there is bound to be individual canvassing, in which case the question of ability, etc, will be set aside. Of course from the point of democracy it may be good to consult them because we want wider consultation and discussion but there must be a limit to it. And if you leave it to the Council of States to appoint Judges that will be going too far". He further said "My honourable Friend, Mr. Mohammad Tahir, wants that pleaders of district courts of twelve years standing should be considered for the posts of Judges of the Supreme Court. Sir, we know of briefless and duffer barristers and lawyers who wander in the corridors of courts; are these people to be appointed Supreme Court Judges? The Supreme Court Judges

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6 Rodrigues, Valerian (2002). "Essential Writings of B.R. Ambedkar," New Delhi: Oxford University Press.

7 Constituent Assembly Debates (May 1949). LokSabha, New Delhi: Government Press, Part 1 and 2, Volume VIII.

8 Ibid.

should be men of experience and knowledge gathered in the High Courts and from that point of view the amendment of Mr. Tahir is objectionable"[9]. Dr B R Ambedkar, the chairman of the drafting committee clarifies the doubts of the members of constituent assembly. He said "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 impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent, person. 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 veto is the President or the Government of the day. I therefore, think that is also a dangerous proposition"[10]. All the issues in the constituent assembly were resolved by consent and mutual understanding. The judicial provisions inscribed in the constitution reflected the collective wisdom of constituent assembly. The composition, powers and functioning of judiciary are well defined in the Constitution of India. The Judges are well reputed and high status dignitaries of the society. Unlike dual judicial set-up, the single integrated judicial system for whole country makes it very powerful. For better functioning, the independence and impartiality of the judiciary were always debated by its functionaries at the inside and intellectuals at the outside. The procedure of the appointment of a Judge is one of the crucial matters of this debate. Transfer of a judge and promotion of a judge are other issues in this context. Constitution is itself a guardian of its provisions. Hence, it provides many provisions so that nobody can encroach upon the basic philosophy of the constitution which is enshrined in the preamble. Article 137 of the Indian constitution made its judiciary more powerful than the judiciary of USA because Indian judiciary can review its own decision. This power was used many times and makes constitution safe from authoritarianism from the executive and legislature. Article 145(3) says that the minimum number of judges, who are to sit for the purpose of deciding any case involving "a substantial question of law as to the interpretation of the constitution or any reference under article 143, shall be five. It shows that the founding fathers believed in the collective wisdom of the judges.

The Appointments of judges and the question of prominence between Executive and Judiciary

The procedure of appointments of the judges was further debated after the commencement of the constitution because many new conventions were going to start with the appointment of new chief Justice of Supreme Court. "When the first Chief Justice of Supreme Court of India, Harilal Kania, Passed away in November 1951, it

[9] Constituent Assembly Debates (May 1949). LokSabha, New Delhi: Government Press, Part 1 and 2, Volume VIII.

[10] Ibid.

was rumoured that the government was contemplating appointing somebody other than the next most senior justice on the post of chief justice, but all the judges who were on the court at the time threatened to resign if the seniority norms were not followed. Accordingly, on 7 November 1951, the post of chief justice of India went to the most senior judge of the court"[11]. This convention was set only for the appointment of the chief justice of Supreme Court but for other judges of Supreme Court and chief justices and other judges of high court no convention of such level could be established. At that time the appointment procedure of Judges of Supreme Court and high courts was less controversial because the nationalist leaders respected the integrity of Judiciary and vice versa. The judicial scrutiny regarding right to property pushed the government to add ninth scheduled in constitution by its very first constitutional amendment but the government managed to secure some legislation from judicial review, and judiciary respects this move till now. The real tussle began during Mrs. Indra Gandhi's regime. The power of judiciary was articulated in Golak Nath Case, in 1967, best known as 'fundamental rights 'case. The government responded to this judgment by encroachment into the judicial system, the centralization of power began in those days. The independence of judiciary was threatened by appointment of the prime minister's judges and punished those who were not following the dictates of the executive. The controversies for the selection procedures of the judges of Supreme Court and high court continue, with more or less pace of voice, in political as well as in judicial arena. The executive realized the fruit of labour after the judgment in the Keshwanand Bharti Case delivered on April 24, 1973, when a powerful executive struck back. On the retirement of chief justice Mr. Sikri on April 25, 1973, A.N. Ray was made chief justice of India superseding three senior most judges namely Justice Shelat, Justice Hedge and Justice Grower who promptly resigned. The executive said it wanted "forward-looking" judges. The Bar stood firmly behind the superseded judges. The suppression was condemned as subversion of the independence of the judiciary. Protest meetings were held all over India. Chief Justice Hidyatullah's immortal phrase is worth recalling. He said "One will have judges 'looking forward rather than forward looking[12]". The emergency period saw much upheaval and the independence of judiciary directly attacked by the political executive. The Philosophy of the judges was also debated by the then executive. This issue was greatly discussed by the Justice with news men. Mrs. Gandhi openly advocates that judge should follow the philosophy of ruling party. Justice Sikri said there was a great deal of talk about the judges' "social philosophy"; but 'these words do not exist in the oath a judge takes". Judges, he said, should confirm the social philosophy as reflected as in the preamble of the constitution, in the fundamental rights and directive principles, and not "as interpreted by the ruling party". If the theory of social philosophy was accepted a case would be decided differently in different states. A judge in Tamil Nadu would decide the case according

[11] Chandarchud, Abhinav(2012): "Supreme court's Seniority Norm: Historical Origins," Economic and Political Weekly, Volume XLVII No. 8.

[12] Divan, Anil (2008): "Primacy of Executive, a dangerous move," The Hindu, October 22.

to the DMK philosophy and a judge in another state would decide the same case the philosophy of ruling party there". If such a philosophy were to be accepted, "where would the law be" he asked"[13]. The debate was on crest when Justice Khanna, The senior most Judge of Supreme court, was superseded by Justice Hamidullah, who was appointed as chief justice of India instead of the senior most judge of Supreme Court justice. The judiciary and executive have been debated over the issues concerning with the appointments of judges but it is interesting to note that the nature of controversy was not for the appointment of judges but on the superiority that who have upper hand in the appointment procedure whether the judiciary or the executive should have greater role in the appointments of judges of Supreme Court and high courts. The First Transfer of judges' case was establishing the dominance of executive in the matter of the appointment of judges of Supreme Court and high court. They draw the "meaning of the word 'consultation' in article 124(2) is the same as the meaning of the word 'consultation' in article 212 and 222 of the Indian constitution. The only ground on which the decision of the government can be challenged is that it is based on mala fide and irrelevant considerations, that is, when constitutional functionaries expressed an opinion against the appointment,[14]" Justice P.N. Bhagwati gave some suggestion for collegiums which recommend to the president of India for the appointments of the judges of higher judiciary. According to justice Bhagwati "we would rather suggest that there must be collegium to make recommendations to the president with regard to appointment of a Supreme Court or high court judge. The recommending authority should be broad based and there should be in 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 toward securing the right kind of judge, 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"[15]. After that the collegium system or judicial commission became the intellectual tool for speculation. Collegium system was also recommended by Chandarchud, Chief justice in 1983 in seminar at Patna when he remarked that the present process of selection and appointment of judges to the supreme court and the high court was outmoded and "should be given a decent burial: As per news report he suggested a nine member collegiums to recommend the names for appointment to the superior judiciary consisting of three judges, two representative of the Bar, two of the government and two of the opposition. He said that a decision by these nine would be far more credible and acceptable than by a single individual in the narrow confines

[13] Mirchadani, G.G. (1977): "Subverting the Constitution," New Delhi: Abhinav Publications.

[14] Panday,J.N. (2011): "The Constitutional law of India, "Allahabad: Central Law Agency.

[15] S.P. Gupta vs President of India and Ors, on 30 December, 1981, AIR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365

and secrecy of his chambers,"[16] (Jai 2003). The experts in this field continue to speak about the alternatives. As early as 1986, Prof. Upendra Baxi in an article published in the Times of India on August 5, 1986 suggested a different composition of the collegiums which is follow: The President of India; The Speaker of the Lok Sabha;The Chairman of the Rajya Sabha; The Leader of the Opposition (if there be one);The Minister of Law and Justice, Government of India; The Chief justice of India; Five Senior Judges of Supreme Court; The Attorony General of India ;[17](Jai 2003).Justice D.A. Desai a former judge of Supreme Court of India and the Chairman of Eleventh Law Commission (1985-1988) also in favour of change in the appointment system of Judges in Supreme Court and high courts. The further move to change the system made by the then union government in 1990 was to introduce sixty seventh constitutional amendment bill, but it failed due to the early dissolution of ninth Lok Sabha. The game entirely changed after the 'second transfer of judge case'[18]. The superiority of the judiciary was established after the establishment of the collegium system. This system was started during emergence of coalition governments in the union and larger states when the executive was weak and on the other hand judiciary started becoming stronger. The late V.N. Gadgil, as M.P. (Rajya Sabha) introduced a well-researched and beautifully drafted Private Member Constitution (Amendment) Bill, 1996 to amend articles 124 and 217. It came up for discussion on 18 December 1998. Gadgil argued that the judgment of the apex court in second judges' case was based on distrust in Parliament and the executive,"[19]. The philosophy of the then president Dr. K.R. Narayan was well debated. While giving assent to the four names suggested by the then chief justice of the Supreme Court in November 1998, Narayanan wrote that "while recommending the appointment of Supreme Court judges, it would be consonant with constitutional principles and the nation's social objectives if persons belonging to weaker sections of society like SCs and STs, who comprise 25% of the population, and women are given due consideration... Eligible persons from these categories are available and their under-representation or non-representation would not be justifiable,"[20].The legal theorist and intellectuals were continually arguing for the fare selection of judges. But Without any big challenge, the collegiums system worked till the completion of the fifteenth lok sabha. The sudden challenge was occurred when NDA formed the government after Sixteenth Lok Sabha election under the leadership of Shri Narendra Modi.

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[16] Jai, Janak Raj (2003): "Commissions and Omissions in the Administration of Justice," New Delhi: Regency Publications.

[17] ibid

[18] Writ Petition (civil) 1303 of 1987 Supreme Court Advocates-on-Record Association and another Union of India, Date of Judgment: 06/10/1993

[19] Ranjan, Sudhanshu(2012): "Justice, Judocracy and Democracy in India: Boundaries and Breaches," New Delhi: Rutledge.

[20] Lal, Amrith (2005): "Narayanan's Talisman," The Times of India, 13 November.

The collegiums System and Its limitations

The Supreme Court Advocates-on-Record Association vs. Union of India (The Second Judges Case-1993) exclusively changed the scenario and introduced the collegium system of appointment of judges. The first judge case was overruled by this judgment and restored the judicial primacy over the executive for appointments of judges of Supreme Court and high courts. The judicial primacy was restored in the appointment of judges. How the judicial collegium would essentially execute this task were unclear in the decision; hence, in an advisory opinion in Special Reference No.1 of 1998[21] ('The Third Judges' Case') the Supreme Court unanimously clarified its earlier decision. The panel of the four senior most judges of the apex court recommended the person fit for taking responsibility of the judge of high court or Supreme Court. The question of priority was solved in this system because the recommendation of the collegiums was final and binding on the president to obey the recommendations. It was considered that only a legal expert, the senior most judges of the Supreme Court, could tell who was eligible to occupy the top most posts. Still it was not free from criticism.

Firstly, the modus operandi of collegiums for appointments of judges is criticized by the aspirant as well as general public because the anonymity in proceedings and ambiguous criteria adopted for the selection of a judge. During appointment no information concerning qualifications and general bio-data of a candidate is made public. The main argument in favour of the NJAC by the executive is that the new provisions address the problems discussed previously and enhance the transparency and take into consideration the merit.

Secondly, kith and kin of the judge have more chance of becoming the judge. All possibility of favouritism and nepotism in selection of judges are present in it. A person who belongs to an influential class would have more chance of being appointed as a judge. If a lawyer who is related to a judge is earning lucratively in his practice then the preference will go with that profession but if they are not well in practice they incline towards appointment as a judge. Large numbers of relatives of the judges occupy the positions of judges in the high court and the Supreme Court of India. Kith and Kin of a judge are occupying the positions as judicial officer is pointing the finger to the fairness of the selection of judges. "In May 2013, over 1,000 lawyers of the Punjab and Haryana High Court protesting the recommendation of seven names by the High Court Collegium for appointment as judges wrote: "The independence and integrity of the judiciary has been put at stake by the Collegium while recommending the names of advocates for elevation as judges... the decisions of the Collegium seem to have been based on considerations other than merit and integrity of the candidate". They added, "It has now become a matter of practice and convenience to recommend advocates who are the sons, daughters, relatives and

[21] In Re: Under Article 143(1) of the ... vs Unknown on 28 October, 1998, AIR 1999 SC 1, RLW 1999 (1) SC 168, 1998 (5) SCALE 629, 1998 Supp 2 SCR 400

juniors of former judges and Chief Justices. Nepotism and favouritism is writ large. We all need to rise to the occasion and oppose such recommendation,"[22].

Thirdly, the executive criticize the authority of judiciary because the judges are not elected persons and therefore it is questionable if they enjoy the equal power with executive.

Fourthly, it is alleged that the collegiums system has failed to adopt inclusive approach because dalits and women are marginally represented in the judiciary. It is further criticized that the quality of the decision of judges and its impartiality is under a cloud. Principally, the decisions of Patna high court on Laxmanpur Bathe Miyapur, Nagri Bazar and Bathani-tola, besides Laxmanpur Bathe well define the psychology of the judges. These cases undermine the reputation of judiciary especially the high courts. "The latest case relates to a Bihar village, Laxmanpur Bathe, where the members of Bhoomihars (the landlords) killed 58 Dalits, including 27 women and 10 children. An upper-caste judge has released all the 16 accused on the plea that there was no evidence. It is a travesty of justice. The lower court had sentenced the accused to life imprisonment. If the High Court judge did not find any evidence he could have constituted a special investigation team (SIT) to work under its supervision to hold a fresh probe. The result of this judgment is that the Dalits have migrated from the village where they and their forefathers had lived for years. What has happened at Laxmanpur Bathe is the fate of Dalits all over the country. Equality before law, enshrined in the Constitution, has become a farce,"[23]. "There is no dispute that caste plays a decisive role even now. It may not be an exaggeration to say that the expectations of Dalits and tribals lay shattered. The victims of massacres carried out by the Ranvir Sena at Laxmanpur Bathe, Bathanitola, Nagri Bazar, and Miyapur cry in wilderness for justice. Their concerns have not been addressed by the judiciary,"[24].

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[22] Prasad, Nagasaila and V. Suresh (2013): "The costly tyranny of secrecy,"The Hindu, 5 July.

[23] Nayar, Kuldip (2013): "RSS, Madani, Laxmanpur Bathe,"Mainstream, Volume LI, No 47.

[24] Biswas, A.K. (2013): "The 'Uncle Judge Syndrome' shadow over Laxmanpur Bathe," Mainstream, Volume LI, No. 49.