

Appointment of Judges in India: A Legal Study with Special Reference to Collegium System

ABSTRACT

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ABSTRACT OF THE THESIS

Among the global Constitutional Courts, the Supreme Court of India & High Courts are arguably one of the most assertive and powerful Courts in matter of governance and policy making. Initially India has adopted the traditionally legal system of British common law. The Constitution of India is the longest written document in the world, which is considered to give more latitude to the higher judiciary for interpreting the provision of Constitution of India & ordinary laws and settling the federal dispute. Administration of the Courts under the Constitution of India is one of the integrated judicial structure as in Canada, rather than a dualist federal and state system as in United States of America.

The present research work entitled “*Appointment of Judges in India: A Legal Study with Special Reference to Collegium System*” is a dispassionate study of the various aspects of the system of Appointment of Judges in higher judiciary in India. The whole research thesis has been broadly divided into seven chapters and it presents an insightful study into different facets of the judicial appointment process in the higher judiciary in India.

Research work begins with the chapter one, which is introductory in nature and gives an overview of the statement of problem. From the very beginning chapter one outlines the significance of the Constitutional Courts in a democratic governmental system as the *sine qua non* of democracy.

This chapter also contains review of literature, objectives of the study, hypothesis and research methodology. The significance of the research work in current situation as well as its contribution in the domain of established Indian legal system has also been elaborately discussed in

this chapter. Research methodology of this research study is doctrinal and non-doctrinal. Basically it is library based research and it is mainly completed with the tool of descriptive, analytical and comparative methods. Besides these methods researcher has also used and applied non-doctrinal (empirical) method for the need of the above research study, wherein questionnaire method has been adopted to collect the data from the 300 respondents through online and offline mode.

Chapter two of this thesis entitled 'History of Judicial Appointments in India', which is exploring the history of judicial appointments in established judicial system of India from pre-constitutional era to post constitution era. Indian judicial system is oldest judicial system in the world and the traces of this system found in pre-vaidik era. Basically this chapter of research work has been dividing in two parts.

Part one of chapter two dealt with the appointment model of the Judges in higher judiciary in pre-constitutional era, it provides a brief history of judicial appointments during British India. This part of the chapter deals with how judicial institutions were established in pre-independent India and how they worked in British Government in India. It also provides the holistic details that how the appointments have been done in pre-constitutional era by British colonial administration of justice and it also examines the mode of maintaining judicial independence under British India.

Part two of this chapter dealt with the appointment model of the Judges in higher judiciary in India during post-constitutional era. This part of the chapter provides a brief history of judicial appointments in independent India. This part has mainly divided into four subparts, in

which firstly constitutional provisions related to the judicial appointments in higher judiciary have been examined.

Chapter three of the thesis entitled, ‘Comparative study of Various Democratic Countries in respect of Judicial Appointments in the higher judiciary, in which researcher has discussed the various judicial appointments models in some of the important democratic countries of the world. This chapter makes a comparative study on the appointment process of Judges in higher judiciary with the other civilized and democratic countries of the world those are United States of America, Australia, Federal Republic of Canada, Federal Republic of South Africa, United Kingdom and Nepal.

Method of appointment or selection of the Judges in superior or higher judiciary may vary from one nation to another and there is no any strict forward formula, which can be prescribed to all over the world or which can be universally applicable for all the democratic countries. There are various different kinds of methods, which are used to the appointment of the Judges of the higher judiciary however all the methods are based on the theory of check and balance where judiciary and executive both are particularly in the appointment process.

There are two known practices, which are working all over the world in the appointment or selection of the Judges of higher judiciary namely nomination or selection. Some of the nations have adopted the appointment method as well as nomination method like United States of America. Both the modus operandi are operating at different level. In United Kingdom nomination is the only known method of selection of the Judges of higher judiciary. In United Kingdom Judges are chosen from a

special group of lawyers and in the United States of America Judges are selected through nomination from the legal professional.

United Kingdom, Federal Republic Canada and Federal Republic of South Africa are previously following the 'Executive-Legislative' model of appointments but for the purpose to ensuring the transparency, objectivity and accountability of the institutions, they have changed the whole process of appointment. In these countries an independent commission models are being adopted in place of executive legislative models. Now, commission model of Judicial Appointments is adopted by United Kingdom, Federal Republic Canada and Federal Republic of South Africa, while United States of America and Australia are following the 'Executive-Legislative' model of appointments.

In 2005, United Kingdom introduced Commission model, in which Judicial Appointments Commission consisting with fifteen members including the Chairman of JAC have power to nominate the name recommended person for the appointment of Judges of higher judiciary. Out of the fourteen Commissioners five are judicial members, two are professional members, one is tribunal judge and another is non-qualified judicial members. Two professors are also to be appointed as member of the current Judicial Appointments Commission method in United Kingdom.

Similarly in South Africa, there has a Judicial Service Commission. South African Judicial Service Commission has consisted with twenty five members, in whom members are not only the Judge of Supreme Court of Appeal but member from other fields i.e. Attorney Advocates, Member of Parliament, Professors and other are also the member of the Judicial Service Commission. Composition of the South African Judicial

Service Commission shows the representation of all sections of the society, in which political and non-political members are present. This decreases the any scope of tussle among the organs of State because there is appropriate representation from all section of societies including members of legal fraternity. Nepal as newly established constitutional democracy adopted a method of judicial council and constitutional council model of appointment process. In this process judicial appointments are completed after the recommendations of Council. Judicial Council and Constitutional Council model of appointment are as parallel as independent commission model.

Judicial appointments system of India is basically an inter-institutional ‘executive-judiciary’ model, which was based on consultative processes within the constitutional provision. This judicial appointment system emphasis on both political and judicial accountability for the appointments of Judges in Higher Courts, this was considered the most suitable method of appointment of Judges in higher judiciary before the 1993. But after the judgment of *Second Judges Case*, a new model of appointment of Judges came into the existence known as collegium system, which is still in existence after the decision of the *Fourth Judges Case*.

Chapter four of this research work is, ‘Appointment of Judges in India: Constitutional and Legal Provisions with Special Reference to Collegium System. This chapter is exploring the both methods of appointment of Judges in India before 1993 and after 1993.

Part one of this chapter dealt with the ‘Genesis of Collegium System’ and traced the genesis of collegium system in India. It rationally point out the origin of collegium in a series of pronouncement delivered

by the Apex Court of India. This part of chapter focuses on how the collegium came into existence by the interpretation of pertinent provisions of the Constitution of India by the Apex Court. This part of chapter comprehensively deals with the all facts of introducing the collegium system in India by the Apex Court in *Second Judges Case* after overruling the decision of *First Judges Case*. The whole process of appointment and transfer of Judges in the higher judiciary is based on the recommendations of Collegium of Supreme Court and High Courts.

In the series of judgment Apex Court laid down certain guidelines for functioning of the quorum and process for judicial appointment along with Memorandum of Procedure. Certain guidelines for smooth functioning of the quorum and process for judicial appointment has been formulated by the Union Executive named 'Memorandum of Procedure' in 1998. With the help of MoP, 1999 initial recommendation will be started for the appointments in higher judiciary i.e., Supreme Court of India and High Courts.

The Union Executive was not happy with the collegium system of appointment of judges as this method introduced judicial primacy over the Executive which had snatched the Executive primacy in appointment matter, worked before 1993. Therefore to reinstate the Executive primacy in appointment matter, the Government of India has enacted National Judicial Appointments Commission Act, 2014 along with 99th Constitution Amendment Act, 2014 to amend the provisions of the Constitution related to the transfer of Judges and appointment of High Courts and Supreme Court respectively.

But the Constitution bench of the Apex Court in *Supreme Court Advocates on Record Association and another v. Union of India* also

known as *NJAC fourth Case*, declared 99th Constitution Amendment Act and NJAC Act, 2014 unconstitutional considering these efforts of Parliament as violative of the Basic Structure of the Constitution i.e., Judicial independence. Vide its order dated December 16, 2015, the Court laid down that the Government of India may finalize the existing Memorandum of Procedure by supplementing it in consultation with the Chief-Justice of Apex Court. It was also mentioned in para. 10 of the order that the Chief-Justice of India will take a decision based on the unanimous view of the collegium comprising the four senior-most puisne Judges of the Apex Court. They shall take the following factors into consideration such as eligibility norm, transparency in the appointments process, secretariat, complaint mechanism and miscellaneous matter considered appropriate for ensuring transparency and accountability including interaction with the recommendees of the collegium of the Supreme Court without sacrificing the secrecy of judicial appointments.

In pursuance of the above orders of Apex Court, the Government of India, after due diligence sent the MoP to Chief-Justice of India on March 22, 2016. The response of the Supreme Court Collegium on the revised draft MoP was received on May 25, 2016 and July 01, 2016. The view of the Government in response to the views of the Collegium of Apex Court was conveyed to the Chief-Justice of India on August 03, 2016. Subsequently, the then Chief-Justice of India sent the MoP on March 13, 2017. The final view of the collegiums of Supreme Court was expressed in the MoP which was received by the Government of India on March 13, 2017. The undisputed legal positions of the MoP are now become final. But if the Government suggests some changes or improvements in the MoP, that can be looked into but till that happens, the MoP as existing would apply.

Part two of this chapter comprehensively deals with the “Question of Transparency, Merit & Representation, Accountability and Other Objective Process of the Collegium System’. The global trends in all over the world indicates that all the civilized and democratic republics are moving to adopting an independent commission for the appointments of the Judges to the superior judiciary for ensuring accountability, transparency, representation, merit and objectivity in process of judicial appointments.

The main allegation against the collegium system is that there has total lack of transparency in functioning of collegium. Members of the Supreme Court Collegium (SCC) have also accused of exploiting their power to appointments their close relatives or particular favorite lawyers as High Court Judges, which resulted that fair appointments are not being done. Proximately, personal enmity of the members of collegium of High Courts (HCC) and Supreme Court has resulted in the delay or denial of appointments to the higher judiciary, which resulted delay in justice.

Selecting or recommending the name of Judges for the appointments to the higher judiciary is tough task, due to favoritism and Nepotism. In the absence of particular guidelines, there could be a room for nepotism, arbitrariness and favoritism; because Judges are also human being and they are also affected from feelings and failings respectively.

Now, the collegium system for the judicial appointments and its secrecy regarding the appointments, transfer or elevation is a matter concern, whereby sometimes it seems that few got elevation and few got rejection with no reason recorded by the collegium of High Courts and Supreme Court. In same manner Union Executive is also accepted few recommendations for final appointments and few send back for re-

consideration for the appointments or transfer without answering any reason.

Although now a days due to the ‘Judicial Primacy’ in matter of appointment and transfer of Judges, there is less scope for political encroachment in the process of judicial appointments to the Constitutional Courts, but the questions of personal affiliation or favoritism or nepotism are still unanswered in Indian judicial system. Collegium system has own problem of opacity and non-accountability because after the judgment of *Third Judges Case*, in which Court gave the less scope to the Union Executive, entirely in collaborative and consultative exercise for judicial appointments to the higher judiciary.

Collegium system of appointments and its confidentiality regarding the judicial appointments or elevation and transfer is matter of concern, where the few names got the elevation, appointments or rejection with no reason on record. So in above condition, there are innumerable instance where citizen of India are losing the faith in Constitutional Courts, so it’s really a matter of serious concern. The question related to the judicial appointments is in early days democratically wide but now these days it is confined with coteries.

Chapter five of this thesis entitled “Judicial Observations Related to Appointment Process of the Judges to the Higher Judiciary”. This chapter deals with the opinion and observations of Judiciary in matter of appointments of Judges of the Constitutional Courts. In this chapter various judicial decision of the Apex Court regarding the independence of judiciary, dispute regarding the transfer of Judges of the High Courts and appointment method of Judges in higher judiciary have been discussed.

As it is the well known fact that higher judiciary in India is an integrated system bound at all levels by the law laid down by the Apex Court but with administrative autonomy of the High Courts and lower courts in the States. The higher judiciary plays an important role in interpreting the provisions of the Constitution, statutes, rules and regulation etc. The Supreme Court enunciated the doctrine of un-amendability of the 'basic structure' of the Constitution in *Keshvanand Bharati Case* to establish the independence of judiciary, supremacy of the Constitution and rule of law.

Before 1993, Judges of the Constitutional Courts was appointed by the great seal of President of India after the 'consultation' with the CJI of the Supreme Court and High Courts as the President of India considers it necessary for the purpose of the judicial appointment in Supreme Court. And in the case of High Court, President of India was consulted with the Chief-Justice of India, the concerned Governor of the State and the Chief-Justice of the concerned High Court from where the Judges will be appointed and transferred. However it is also the well-known fact that there is always be a tussle between the Executive and Judiciary in matter of transfer of High Court Judges and appointment of High Court & Supreme Court Judges. Same time High Court Judges are transferred to another High Court just because they decide the cases against the wish and policy of the Government and therefore as punishment they are transferred to another High Court. Apart from this same time primacy of opinion is also a matter of tussle between the Executive and Judiciary. In this regarding various cases come before the Court to decide the controversy & too laid down the guideline/directions to end the controversy.

In a verdict of *SCAORA v. Union of India*, Supreme Court pronounce that power of judicial appointment and transfer is not the ultimate power of the Central Government and the ‘consultation’ with the Chief-Justice of India means that concurrence of the Chief-Justice of India. The word ‘consultation’ with the Chief-Justice of India has been interpreted by the Supreme Court as ‘concurrence’ with the Chief-Justice of Apex Court of India. A nine Judge Constitutional Bench of the Supreme Court of India (with the majority) snatched the power and control in matter of judicial appointment & transfer of the Judges of the Constitutional Courts from the executive branch of the Central Government. Supreme Court of India also ensured the independence of the judiciary from the doctrines of constitutional and Parliamentary Sovereignty. Constitutional Bench of the Supreme Court ruled that the President of India cannot make any appointments to the Constitutional Court unless the appointee conforms to the collective recommendation of the Chief-Justice of India in due ‘consultation’ with the two of his senior-most puisne Judges of the Supreme Court.

In the matter of advisory jurisdiction of the Supreme Court of India under Article 143 of the Constitution, President of India made a reference to the Constitutional Bench to clarified that recommendations made by the Chief-Justice of India in the consultation of the collegium of Judges without complying with the “norms and requirement of the consultation process” under Articles 124(2) and 217(1). President of India has power to consult Supreme Court, so President of India used this power in 1998 in the matter of judicial appointments. A Constitution Bench of the Supreme Court of India gave a detailed specification of a proper ‘consultation process’ with collegium system.

In 2014 Union Government had passed two important legislations named 99th Constitution Amendment Act, 2014 and National Judicial Appointments Commission Act, 2014 by which a new platform has come into existence for the judicial appointment in higher judiciary called as National Judicial Appointments Commission, 2014. But after the *Fourth Judges Case*, Apex Court held both the legislations of Parliament were unconstitutional on the grounds that both the laws violated basic structure of the Constitution and certain other reasons. This chapter also deals the grounds on which Apex Court struck down the National Judicial Appointments Commission Act, 2014 and ordered to formulate new MoPs for the recommendations process of collegium of High Courts and Supreme Court. By this verdict Apex Court revived its own scripted two decades old collegium system for judicial appointments in India.

Chapter six entitled “An Analysis of Social Perception on Collegium System of Appointment of Judges to the Higher Judiciary”, which has been exploring the data analysis of the respondents. In this chapter researcher has presented and analyzed the primary data collected from 300 participants in two different groups of respondents. 150 respondents are research scholars in department of law in various Central/State/Private Universities and different Law Colleges, while 150 respondents are registered advocates in High Court of Judicature at Allahabad and bench Lucknow, Utter Pradesh.

In this chapter the researcher attempts to provide an idea about the state of awareness and concerns of the respondents about the appointment process of the Judges to the higher judiciary. The researcher also tried to briefly discuss the issue of appointments to the higher judiciary related to collegium and through data analysis in the form of chart and tabular representation.

Chapter seven of this thesis entitled ‘Conclusion and Suggestions’. This chapter is prepared on the basis of whole study of this research thesis, certain conclusions are drawn and some suggestions have been given.