

APPOINTMENT OF JUDGES IN INDIAN HIGHER JUDICIARY

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ABSTRACT

There are higher courts in every country. The Courts perform many types of functions. The Courts protect the rights of citizens and decide the controversy between the Center and States. It maintains the federal and basic structures of the Constitution. But it is not possible without independent and meritorious judges. So, there is a mechanism for the appointment of such judges. The Indian Constitution also envisages a method of appointment of the Supreme Court and the High Courts' judges. But there is a conflict between the executive and the judiciary regarding the power of higher judges' appointments in India. Many judgments were delivered to settle this controversy. The Indian Parliament also enacted some statutes. But, even these could not solve the problem.

The researchers, in the article, will discuss these controversies systematically. They will search the pros and cons of the 'collegium' and the National Judicial Appointment Commission. They will also suggest a suitable mechanism for appointing independent and competent judges in India.

KEYWORDS

Recommendation, Collegium, NJAC, Independent judiciary, Consultation.

1. INTRODUCTION

There shall be a Supreme Court of India (Union) [Constitution of India 1950] and a High Court for each of the State (Unit). Separation of power between the legislature, the executive and the judiciary is the basic structure of the Constitution of India [Kesavananda Bharati 1973]. Appointment of upright and competent people, particularly in the higher judiciary is a *sine qua non* for a judiciary enjoying the confidence of the people [Katju 2018]. Wrong appointment of judges affects the image of Courts and undermine the confidence of people. The *Sapru Committee* recommended that Justices of Supreme Court must be appointed by head of the State with the consultation of Chief Justice of Supreme Court and judges of High Courts must be appointed with consultation of Chief Justice of India, Chief justice of High Court and head of Unit (State) [Sapru Committee 1945] *Constituent Assembly's ad hoc Committee* suggested two alternate methods for appointment of judges. It was not in favour of giving unfettered discretionary power in the hand of the President. In the Constituent Assembly, it was the unanimous opinion that the Indian judiciary must be competent in itself as well as independent from the executive. *Dr B.R. Ambedkar*, Chairman of the Drafting Committee was not in favour of giving veto power in the hand of Chief Justice of India. On May 24, 1949, he said, "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 a 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 Government of the day. I, therefore, think that it is also a dangerous proposition [Constituent Assembly Debates 1949]. Judges of Supreme Court shall be appointed by the President after consultation with Judges of Supreme Court and High Courts as the President may deem necessary. Judges of High Courts shall be appointed by the President after consultation with Chief Justice of India, Chief Justice of High Courts and the Governor of the State. The Central Executive and the State Executive provide the political input in the process of selection of the Judges of High Courts.

Since the beginning of the Constitution, Judges have been started to be appointed on several grounds other than merit. *Law Commission of India in its 14th Report (1958)*, clearly mentioned that communal and regional considerations had prevailed in making the selection of Judges. *Mr M.C.Setalvad* had criticized the appointment of the Chief Justice of the High Court and Chief Justice of India on the basis of seniority and suggested that Judges must be appointed on the basis of merit.

First blow to the independence of judiciary [Datar 2018] was appointment of Hon'ble Justice Ajit Nath Ray as a Chief Justice of India by superseding three senior most judges raised a new controversy. Tussle started between executive and judiciary. 'Consultation' was interpreted, and it was said that consultation does not mean concurrence and President is not bound by the opinion of the Chief Justice of India and other consulted judges [Himatlal Seth Case 1977 & Gupta Case 1981]. *Justice P. N. Bhagwati suggested for appointment of a Judicial Committee.* Executive was in controlling power [Perween and Jain 2016]. *Law Commission of India, in its 121st Report suggested for National Judicial Service Commission (NJSC).* Bench of nine Judges evolved collegium system for appointment of judges in higher judiciary [Supreme Court Advocates on Records Association 1993]. It was explained and clarified in judges third case [Special Reference No. 1 of 1998 (1998)]. Through 99th Constitutional Amendment & National Judicial Appointment Commission Act, 2014 collegium system was substituted by National Judicial Appointment Commission. In the case of Judges Fourth Case [Supreme Court Advocates on Records Association 2015], this Amendment and the Act were declared unconstitutional and void and the collegium system was again revived. Independence of Judiciary was declared the basic structure of the Constitution.

2. APPOINTMENT OF JUDGES DURING 1950 – 1973

Till the resignation of three judges of the Supreme Court for opposing the appointment of Justice Ajit Nath Ray as Chief Justice of India, there was no big controversy. In the initial period executive was very strong. Judges were being appointed by President and consultative process with the judiciary was nominal. There was no crucial role of judiciary in appointment of judges. In this period executive had started to search committed judges. But there was not harsh opposition on behalf of any shareholders.

At the time of the inauguration of sitting of the Supreme Court first Chief Justice of India, *Justice Harilal Jekisundas Kania* discussed standard to be observed at the time of appointment of judges. He said, "...For some years before 1947, there was a policy to appoint members of different communities, in some proportion in the services, including the High Courts. In theory, it appears to be now accepted that appointments will be only on merits. The policy, however, does not appear to have been completely abandoned. *We hope that political considerations will not influence the appointments to High Courts.* It is necessary that for the High Courts, *merit alone* should be the basis for the selection if the High Courts have to remain strong and independent and enjoy the confidence of the people"

Law Commission of India clearly mentioned that communal and regional considerations had prevailed in making the selection of Judges. Mr. M.C. Setalvad has criticized the appointment of the Chief Justice of the High Courts and Chief Justice of India on the basis of seniority and suggested that Judges must be appointed on the basis of merit.

According to Article 124, Judges of the Supreme Court are appointed by 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 deem necessary for the purpose. According to Article 217, Judges of High Court shall be appointed by the President after consultation with Chief Justice of India, Chief Justice of High Court and Governor of the State. In *Ram Jawaya Kapur v. State of Punjab*, Supreme Court said that after reading Articles 53 and 74, it becomes clear that the President is a formal or constitutional head while the real head is the Council of Ministers. We have accepted the Parliamentary form of Government. In *Samsher Singh v. State of Punjab*, Supreme Court said that wherever the Constitution requires satisfaction of the President or Governor as the case be, for the example in Articles 123, 213, 311(2) proviso (c), 317, 352(1), 356 and 360, in those cases, it is not the personal satisfaction of the President or Governor. It is the satisfaction of the Council of Ministers in a constitutional sense under the cabinet system of Government. So from these cases, it becomes very clear that actual power is in the hand of the Council of Ministers rather than the President or Governor.

Here in the case of appointment of Judges of High Courts practical problem arises when different parties are ruling in Center and State. This problem has been very nicely illustrated by former Justice Markandey Katju are following -

“For example, party ‘A’ may be in power in a State and party ‘B’ in the Centre. The recommendation of the Chief Justice of the High Court will go first to the Chief Minister who is of party ‘A’, as mentioned above. The Chief Minister would want people who are close to his or her political party. In the process, if they are not in approval of the recommended names, the state government may block the list recommended by CJ of HC (e.g. by just sitting on it, without approving or disapproving it).

However, if he or she approves the list and sends it to the Center, the Central Government may not be happy with the list, as it does not contain names of those lawyers who are close to party ‘B’, which is in power in the Center. Therefore, the Central Government may also sit tight on the list. This is the real reason why the vacancies of the High Court judges are not filled up.”

In the initial period, at least months before the retirement of the High Court Judge recommended the name of the successor. It was sufficient time for making inquiries. Justice M.C. Chagla took the oath on the same day after his successor retired. He has mentioned these facts in his autobiography ‘Roses in December.

Article 124 does not mention that the only judge of the Supreme Court would be Chief Justice of India. Outstanding Chief Justice of Bombay High Court was sought to be directly appointed as Chief Justice of India, the proposal was received with vehement opposition by the then-Supreme Court Judges. They threatened to resign *en block*, and hence the move could not fructify.

3. APPOINTMENT OF JUDGES DURING 1973 – 1993

This is the turmoil period in the history of the independence of the judiciary. This period starts from the decision of *Kesavananda Bharati Sripadagalvaru and Ors v. State of Kerala and Anr.* which is known as the fundamental rights case, was decided on April 24, 1973. In this case doctrine of 'Basic Structure' was evolved and indirectly, amending power of Parliament was curtailed. Mrs Indira Gandhi made this decision as a matter of her prestige. She decided to take revenge on those judges who had decided against the Government.

So first time, rule of seniority in case of appointment of CJI was broken. Hon'ble Justice Sarv Mittra Sikri was the Chief Justice of India at the time of the decision of the Fundamental Rights

case. He retired on April 25, 1973. Hon'ble Justice Ajit Nath Ray was appointed by superseding three most senior judges namely Hon'ble JJ Shelat, Hegde & Grover. Hon'ble Justice A.N. Ray took oath as CJI on April 26, 1973. Hon'ble Mr Justice J.M. Shelat, Hon'ble Mr Justice K.S. Hegde and Hon'ble Mr Justice A.N. Grover resigned to protest for appointment of Hon'ble Justice A.N. Ray as a CJI who was junior to all these three judges. Hon'ble Justice A.N. Ray has decided the fundamental right case in favour of the Government. Seniority was first time overruled. All the three judges had delivered judgement against Government. Term of Hon'ble Justice Ajit Nath Ray was April 26, 1973- January 27, 1977.

In the case of *State of Uttar Pradesh v. Raj Narain*, Hon'ble Justice Jagmohan Lal Sinha convicted the then Prime Minister Mrs. Indira Gandhi for electoral malpractices and debarred her from holding any elected post on June 12, 1975. This led to the imposition of emergency in India on June 25, 1975. In case of *Indira Nehru Gandhi v. Raj Narayan*, Supreme Court by 4:1 (Minority opinion of H.R. Khanna) majority upheld the validity of the election of Mrs Indira Gandhi but held that Article 329A (4) is unconstitutional, which was excluding the power of judicial review. The Court said that democracy which implies free and fair elections, the rule of law and Judicial review is the basic structure of the Constitution. In this case, Court made a balance between the interest of Mrs. Indira Gandhi and the public. It did not totally surrender in favour of Mrs Indira Gandhi.

Hon'ble Justice Mirza Hameedullah Beg (28 January 1977-21 Feb 1978) was appointed by superseding Justice H.R. Khanna on 28 January 1977. Justice H.R. Khanna had given judgment against Government in cases of *Kesavananda Bharati v. State of Kerala & A.D.M. Jabalpur v. Shivakant Shukla*. This was emergency periods (25 June 1975 – 21 March 1977) . During the emergency period, Hon'ble Fakhruddin Ali Ahemad was President. It was the last time when seniority rule was overruled. After Justice M.H. Beg, Justice Yeshwant Vishnu Chandrachud (1977-1985) was appointed who was a most senior judge. In case of *A. D. M. Jabalpur v. S. Shukla*, Justice Yeshwant Vishnu Chandrachud held that during emergency there was no fundamental rights and this case was in favour of Government.

After the decision of Hon'ble Justice Jagmohan Lal Sinha of Allahabad High Court against Mrs. Indira Gandhi, Government decided to search 'committed judiciary'. This decision changed the appointment process regarding judges of the High Court. Before this decision initiation of the recommendation for the appointment in the High Court was done by the Chief Justice of the High Courts. But after this decision, Central Government started to send names for appointment to the Chief Justice of High Courts. Indirectly message was sent that in case of acceptance of all names sent by the Centre Government, the Chief Justice of the High Court would be rewarded, and he may be elevated to Supreme Court.

Chief Justice G.P. Singh had to pay the price of his morality and integrity. He was Chief Justice of Madhya Pradesh since July 1978 and retired in 1984. In 1980 Central Government sent a list of ten lawyers to Chief Justice G.P. Singh and asked him to recommend those names for being appointed as judges of the High Court of Madhya Pradesh. After scrutiny, he did not find even a single suitable name and sent the list back. He was never elevated to Supreme Court.

S.H. Sheth v. Union of India which was substituted by *Union of India v. Sankal Chand Himatlal Sheth and Another* in Supreme Court is not directly related to appointment of judges in higher judiciary. But 'consultation' word was interpreted which has been used under Articles 124(2), 217(1) & 222(1). In this case Government tried to thread for bad consequences in case of judgment against the Government. This was the period of emergency.

Facts – During the 'Emergency' a list of 56 judges to be transferred without their consent had been prepared, but in the first instance, 16 judges had been transferred, and the names of other

judges on the list were deliberately leaked in order to shake the nerves of the High Court Judiciary.

Justice Sankal Chand Seth challenged his transfer from Gujarat High Court to Andhra Pradesh High Court. Constitutional bench of the Supreme Court held that 'Consultation' means full and effective that is active participation of all but it does not mean concurrence. It is open to the President to arrive at a proper decision of the question. It means President is not bound by the opinion of Judges of the Court. In this way supremacy of executive was established and role of judiciary in cases of appointment of judges was mitigated.

After emergency Janata Party came into power in 1977 and it was required with Law Commission of India to submit report on the methods of appointment of judges of Supreme Court and High Court. Hon'ble Justice Hans Raj Khanna was appointed as its Chairperson. 8th Law Commission submitted its 80th Report "On the Methods of Appointment of Judges" 1979. This Committee introduced the Collegium System. First time, it was recommended that Chief Justice must consult with his two Colleagues.

Congress Party again returned into power in 1980. On March 18, 1981 Union Law Minister issued a circular letter. By this letter, it was demanded from Additional Judges for appointment as a permanent judge to give the name of three High Courts in order of preference. Three preferences of High Courts were also sought from persons who have already been or may in the future be proposed for initial appointment. It was challenged by several writ petitions in several High Courts. With the help of Article 139 matter was referred to Supreme Court. In the case of *S.P. Gupta v. Union of India and Anr.* meaning of consultation was again disputed. Supreme Court accepted the meaning of consultation which was given in *Sankal Chand Seth Case*. Supreme Court said that there is only one ground i.e. mala fide & irrelevant consideration when decision of government can be challenged. Justice P. N. Bhagwati suggested for appointment of Judicial Committee. Supremacy of Executive was again established.

Eminent Professor Upendra Baxi suggested for establishment of a collegium system [Baxi 1957]. Law Commission of India, in its 121st Report in 1987, criticized the political interference in the appointment of Judges of Supreme Court and High Court. It was recommended to set of National Judicial Service Commission for the appointment of judges. It was suggested so that the active participation of all shareholders can be ensured. The function of this Commission should be the selection and recommendation of a person for judge of the Supreme Court and High Court.

This system continued up to the decision of *Supreme Court Advocates on Records Association v. Union of India*. In this case concept of the 'Collegium System' was evolved by Justice J. S. Verma & supremacy of the judiciary was established.

4. APPOINTMENT OF JUDGES DURING 1993- 2014

Under this part, *Supreme Court Advocates on Records Association v. Union of India (Judges Transfer Second case)* and *Special Reference No. 1 of 1998 (Judges Transfer Third case)* is going to be discussed.

4.1. Judges Transfer Second case

Ratio of *S.P. Gupta* the case was challenged in *Subhash Sharma and Others v. Union of India*. In this case Supreme Court suggested for reconsideration by a larger Bench of this aspect of the process of appointment of judges [Jain 2018]. As a consequence of the observation of this case, a Bench of nine judges was constituted to reconsider the manner of appointment, which is known as *Supreme Court Advocates on Records Association v. Union of India*. The majority opinion was delivered by Hon'ble Justice J. S. Verma.

In this case, the first time collegium system was introduced, and supremacy of the judiciary was established. In this case following guidelines were established for the appointment of judges of the Supreme Court and High Court –

- I. *Consultation* – Consultation means concurrence, which is equated to 'Primacy'.
- II. *Supremacy of Judiciary* – It was propounded that appointment of judges should be the result of collective consultation. It means a decision must be taken after consultation of each shareholder. In case of conflict of opinion between judiciary and executive, opinion of judiciary must be preferred. No appointment under Article 124(2) and Article 217(1) is possible without concurrence opinion of Chief Justice of India.
- III. *S.P.Gupta Case* – *S.P.Gupta case* was overruled on the ground that law laid down in this case was wrong. In this case primacy was given to the Central Government in the matter of appointment of judges of High Court and Supreme Court.
- IV. *Appointment of Supreme Court Judges and Consultation with Collegium* – Under Article 124(2), it has been mentioned that in case of appointment of judges of Supreme Court other than CJI, Chief Justice of India shall always be consulted. He is consulted being ahead of the Supreme Court. His opinion should be formed with a body consisting of the Chief Justice of India, two senior-most Judges of the Supreme Court and the senior Supreme Court Judge who comes from the State. Individual opinion of CJI has no relevancy.
- V. *Appointment of High Court Judges and collegium at two levels* - The Process of appointment under Article 217(1) is to begin with the recommendation of the Chief Justice of the High Court. He must ascertain the views of the two senior-most Judges of the High Court and incorporate the same in his recommendation. The Chief Justice of India while examining the recommendation must take into account the views of two senior-most Judges of the Supreme Court and also the opinion of the senior Judge conversant with the affairs of the concerned High Court.
- VI. *Appointment of Chief Justice of India* – Chief Justice of India shall be appointed on the basis of merit. Seniority shall not be alone ground. Elevation of Justice Madhan Mohan Punchhi as a Chief Justice of India had become very controversial. Initially, then Chief Justice of India Justice J.S.Verma was not in favour of elevation of Justice Punchhi. Stalwart Lawyer Mr. Shanti Bhushan and Mr. Ram Jethmalani also opposed on the basis corruption charges. Prime Minister Mr. I.K.Gujral was also in dilemma. This controversy has been discussed thoroughly by Mr. I.K.Gujral in his book 'Matters of Discretion: An Autobiography' [Gujral 2011]. Although Justice M.M.Punchhi was senior most Justice after CJI Justice J.S. Verma.
- VII. *Initiation of the proposal for appointment of High Court & Supreme Court Judges-*
Initiation of the proposal for appointment of Judges of Supreme Court and High Court must be initiated by the Chief Justice of India and concerned Chief Justice of High Court respectively.
- VIII. *Appointment after Reiteration* – The executive can appoint a recommendee of the judiciary or send it back to the judiciary for reconsideration of the name of the recommendee. But the same name is reiterated after due consideration by the Chief Justice of India with the unanimous agreement of other judicial consultees. Then the executive is bound by the recommendation. Collegium reiterated the name of Justice K.M.Joseph on July 16, 2018. H. M. Seervai has criticized this judgment and said that it was rewriting of the Constitution which is beyond the power of any court [Seervai 1996].
The Executive is adopting another method. Executive is adopting several other methods. For example, inordinate delay or not accepting recommendation of the collegium. It tries to punish judges by choosing some name and rejecting another name. At the time of making the recommendation, seniority is settled. For example, the collegium recommended two names for elevation to Supreme Court on January 10, 2018. First name was Mr Justice K.M. Joseph and second name was Ms. Indu Malhotra, Senior Advocate. According to this it was expected by the

collegium that Mr. K.M Joseph would be senior and in future he would be given preference over Ms. Indu Malhotra, for Chief Justice of India. But executive accepted only one name and rejected another name. It was informed through later dated on April 26 and 30, 2018. It was an inordinate delay. Collegium met on May 11, 2018 it was decided by the collegium to reiterate the name of Justice K.M. Joseph. Collegium had reiterated the name of Justice K.M. Joseph on July 16, 2018.

Law says that in case of reiteration of same name Executive will be bound to accept the name of that person. In case of reiteration the name of Justice two circumstances would have happened. First is that in case of reiteration Executive will accept the name and Justice Joseph would be elevated to Supreme Court. But even in case of elevation, he would be junior of Ms Indu Malhotra. Second is that the Executive shall sit tight on the name of Justice Joseph. It may sit for a long time, and he can never be elevated to Supreme Court. There is no time limit for acceptance of the name for elevation to the Supreme Court. There is another method also to submerge the collegium system. The executive is neither accepting nor rejecting the name sent by the collegium system. For example, for the Calcutta high court, the name of Mohammed Nizamuddin was initially recommended by the Supreme Court collegium, which was returned by the Central government on November 11, 2016. The collegium again recommended the name on November 15, 2016 and that was returned again on March 1, 2017. The collegium reiterated the name once again on April 7, 2017 and the name is still pending with the central government. More than a hundred names are waiting for clearance from Government and Supreme Court.

There should be a time limit for a decision on collegium recommendation.

4.2. Judges Transfer Third case

Chief Justice of India M.M. Punchhi recommended some names for appointment of judges without proper consultation with the collegium. Then-President Mr. K.R. Narayanan referred some questions under Article 143 for the advisory opinion of the Supreme Court. By these questions, it was sought clarification of judgment of *Judges Transfer Second Case*. Supreme Court answered the questions in Special Reference No.1 OF 1998. The main question was whether plurality of opinion of judges or sole opinion of Chief Justice of India will constitute 'consultation' under Articles 124, 217 and 222. Another important question was whether Article 124(2), as interpreted in the said judgment requires the Chief Justice of India to consult only the two senior most Judges or whether there should be wider consultation according to past practice. Summary of these answers are following-

- (i) *Plurality of Opinion* – Supreme Court clarified that the sole opinion of Chief Justice of India does not constitute consultation under Articles 124, 217, and 222. The expression 'consultation with the Chief justice of India' requires *consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India*.
- (ii) *Number of Collegium* – In case of appointment of Judges of Supreme Court, Chief Justice of India must make recommendation after consultation with four senior most puisne Judges of Supreme Court.
In case of appointment of Judges of High Court, Chief Justice of India must make recommendation after consultation with two senior most puisne Judges of Supreme Court.
- (iii) *Reiteration of Recommendee* – In case of Rejection of recommendation by Government and Chief Justice of India want reiterate the name of recommendee, this decision must be taken by plurality of Judges.

- (iv) *A Judge Conversant with High Court* - All judges should be treated as conversant with High Court whether that Court was his parent High Court or he was transferred to that High court.
- (v) *Writing* – The opinion of all judges should be in writing.
- (vi) *No binding Recommendation* - If the Chief Justice of India had recommended either for appointment or elevation as judge to Government of India without complying with the consultation process, the Government of India is not bound by that recommendation.

This collegium system continued unless National Judicial Appointment Commission Act, 2014 was enacted.

5. APPOINTMENT OF JUDGES DURING 2014-2015 (NJAC)

Justice P. N. Bhagwati suggested for appointment of a Judicial Committee. Executive was in controlling power [Perween and Jain 2016, p.265]. Law Commission of India in its 121st Report suggested for National Judicial Service Commission. This Commission would have consisted of eleven members. Chief Justice of India would be the Chairperson of this Commission. Chief Justice of India, three senior judges of Supreme Court, three Chief Justice of High Courts, Minister of Law and Justice, Government of India, Attorney General of India, Leader of Bar and an outstanding law academic would be Members of this Commission. Representation of Judiciary, Executive, Bar and Legal Academics were given.

Report of the National Commission to Review the Working of the Constitution suggested for establishment of National Judicial Commission under the Constitution of India. National Judicial Commission should have consisted of Chief Justice of India, two senior most judges of Supreme Court, Law Minister and one eminent person nominated by President after consultation with Chief Justice of India.

National Judicial Appointment Commission Bill, 2014 and The Constitution (Ninety-Ninth Amendment) Bill, 2014 were passed by Parliament near about unanimously. These laws were ratified by more than one-half of the States. These laws were ratified by President on December 31, 2014. The Bill and the Amendment came into force on April 13, 2015. Some Articles were amended and some Articles were inserted. For example Articles 124A, 124B, and 124C were inserted. National Judicial Appointment Commission was given Constitutional status. National Judicial Appointments Commission was established for making recommendations for appointment of Judges of the Supreme Court and High Courts. According to Article 124A, NJAC shall be consisted of six Members, namely, three Members from Judiciary, one Member from the Executive and two eminent members. It was challenged before Supreme Court on the ground of threat for independence of judiciary which is the basic structure of the Constitution. National Judicial Appointment Commission Act, 2014 and The Constitution (Ninety-Ninth Amendment) Act, 2014 were declared unconstitutional in the case of *Supreme Court Advocates on Record Association v. Union of India* on October 16, 2015.

The following propositions were laid down-

- (1) There is no role for High Court Judges.
- (2) Section 5 (2) and Section 6 (6) confer veto powers to two members of the Commission which is not contemplated by Constitutional Amendment.
- (3) In the case of nomination of two eminent members, the judiciary has no significant role. Two eminent persons to 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.

By this judgment collegium system was again revived.

6. APPOINTMENT OF JUDGES DURING 2015- TILL NOW.

At present time judges are appointed according to Collegium system as it was developed in *Second Judges case* and *Third Judges case*. After this Memorandum Showing the Procedure for Appointment of the Chief Justice of India and Judges of the Supreme Court of India and Memorandum Showing the Procedure for Appointment and Transfer of Chief Justices and Judges of High Courts were framed. According to these memorandum there are following procedure for appointment of judges of Supreme Court and High Court –

6.1. Chief Justice of India

Generally senior most judge of the Supreme Court is appointed on the recommendation of the outgoing Chief Justice of India. He must be fit to hold this office. But it is not rule. In case of doubt of his fitness, other judges as envisaged in Article 124(2) must be consulted. Law Minister after receiving the recommendation of CJI or other Judges would put the file before Prime Minister, who shall recommend the President. President shall appoint that recommendee as CJI.

6.2. Judges of Supreme Court

In case of expected vacancy, CJI will initiate proposal and forward his recommendation to the Union Law Minister. The opinion of the Chief Justice of India for the appointment of a Judge of the Supreme Court should be formed in consultation with a collegium of the four seniormost puisne Judges of the Supreme Court. If the successor Chief Justice of India is not one of the four seniormost puisne Judges, he would be made part of the collegium. He should have a hand in the selection of Judges who will function during his term as Chief Justice of India [Memorandum for appointment].

Name of the recommendee shall be sent to the the Union Minister of Law, Justice and Company Affairs will put up the recommendations to the Prime Minister who will advise the President in the matter of appointment. President shall appoint that recommendee as Judge of Supreme Court. As soon as the President signs the warrant of appointment, the Secretary to the Government of India in the Department of Justice will announce the appointment and issue the necessary notification in the Gazette of India.

6.3. Chief Justice of High Court

Chief Justice of India after consultation with two senior judges of the Supreme Court. Such views would be sent by CJI to Union Law Minister. After receiving the recommendation of CJI, Law Minister would obtain the views of the concerned State Government. After receipt of the views of the State Government, the Union Minister of Law, Justice and Company Affairs, will submit proposals to the Prime Minister, who will then advise the President as to the selection.

6.4. Judges of High Court

Proposal for appointment of Judges shall be initiated by Chief Justice of the High court. However, if the Chief Minister desires to recommend the name of any person he should forward the same to the Chief Justice for his consideration. Where a vacancy is expected, the Chief Justice of that High Court, after consulting two senior colleagues, shall communicate to the State's Chief Minister. Its copy of the recommendation shall be sent to the Governor.

The Governor as advised by the Chief Minister, should forward his recommendation along with the entire set of papers to the Union Minister of Law.

The Union Minister of Law would then forward the complete material to the Chief Justice of India for his advice. The Chief Justice of India would, in consultation with the two senior Judges of the Supreme Court and shall send his recommendation to the Union Law Minister, who shall forward it to the Prime minister. Prime Minister would advise to President, who shall appoint such recommendee as a High Court judge.

7. SUGGESTIONS

There are the following suggestions for the transparent and accountable procedure for the appointment of judges of Higher Judiciary –

- (1) There must be an independent body known as National Judicial Appointment Commission (NJAC). It must have consisted of Chief Justice of India, senior most Judge of Supreme Court, Chief Justice of Two High Courts, Eminent Person, Union Law Minister, President of Bar Council of India. The decision must be taken by the majority. An eminent person must be selected by all remaining members by the majority. The Chief Justice of India must be its Chairperson.
- (2) There must be a time limit for shortlisting the names of judges for the Supreme Court and High Court. The time limit must also be for President to take decisions regarding names sent by NJAC.
- (3) President must have the power to reject the name. But after reiteration of the name, President must accept the name within the stipulated time.
- (4) The President must have either accepted all recommendee or rejected all recommendee with reasons.
- (5) The age of retirement must be increased up to 70 years, and there must be a cooling period of two years for the next appointment for any post. It must be for all Judges, whether he belongs to High Court or Supreme Court.

8. CONCLUSION

Framers of the Constitution of India knew that without an independent judiciary, democracy couldn't exist. Without democracy rights of citizens can't be protected. Reports of The Sapru Committee and the Constituent Assembly's ad hoc Committee were discussed. Dr B.R. Ambedkar was not in favour of giving veto power in the hand of the Chief Justice of India. Constituent Assembly was not in favour of giving absolute power either in the hands of executive or judiciary. So, President has conferred the power to appoint judges after consultation with judges as the case may be.

It was realized very soon that judges were not being appointed on the basis of merit. *Mr M.C.Setalvad* suggested that Judges must be appointed on the basis of merit rather than seniority. The appointment of Hon'ble Justice Ajit Nath Ray and Hon'ble Justice Mirza Hameedullah Beg as Chief justice India raised controversy. Supreme Court decided many cases to interpret the 'consultation' word and set off controversy. Parliament also made efforts and enacted National Judicial Appointment Commission Act, 2014 and The Constitution (Ninety-Ninth Amendment) Act, 2014 unanimously. But it was declared unconstitutional in the case of *Supreme Court Advocates on Record Association v. Union of India*. Even Supreme Court accepted that there is a need to reconsider the procedure of appointment of judges in the collegium system.

The above discussions denote that controversy regarding the appointment of judges has not been settled down. The Researcher had suggested some points with the hope that these suggestions will finally settle the conflict between the judiciary and executive, and it will be helpful to bring accountability & transparency in the appointment of the higher judiciary.

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