7 RMLNLUJ (2015) 131

Judicial Appointment: Retrospect and Prospect

by
Mahendra Singh Paswan[*]

I. INTRODUCTION

There are three organs of the government viz. Legislature, Executive and Judiciary, each organ has its own importance. Legislature is to legislate, executive to execute and judiciary is to interpret the law. We have been the witness of this fact that wherever there is controversy relating to provisions of ordinary law or Constitution the judiciary has played its role fairly. The people of India have much faith on it and judiciary has to prove itself that it will do justice. In order to obtain this faith and respect judiciary has to discharge its functions fairly and wisely. Fair and quality judgment can be delivered by the competent judges. The competency of the judges will be insured by the good appointment process.

There has been big debate on the judicial appointments in India. The criticism has occasionally been levelled that the selection has not been proper and has been induced by ulterior considerations. There are also complaints of executive interference in the appointment of judges because of this the concept of committed judiciary came into existence. The charges of favouritism have also been levelled against the appointment process. Wrong appointment affects the image of the court it undermines the confidence of the people in the court. Therefore it makes necessary to understand the various methods of judicial appointments. By this paper First of all I shall analyse the various models for judicial appointments which are found through all over the world then i will try to point out that which model will be appropriate for our condition. Let us see the different models for judicial appointments.

II. MODELS FOR JUDICIAL APPOINTMENT

Generally there are four models[1] for judicial appointments:

1. Appointment by Political Institutions
2. Appointment by Judiciary itself
3. Appointment by judicial Councils which includes non-judicial members
4. Appointment through an electoral system.

Appointment by Political Institutions: Under this model the judges are appointed by all political institutions i.e. organs of the govt. This model contains three systems:

(a) **Representative system**: this is the system in which each of several political institutions select a certain percentage for the court. For Example-Many European Countries like Italy and South Korea the Constitutional Court is formed by 1/3 of the members appointed by President (Executive), 1/3 are appointed by Legislature and 1/3 members are appointed by Judiciary. Thus under this system we find the representation of each organ of the Government, therefore this system is known by the representative system.

Object: The main object of this system is that it focuses on collective nature of the court to insure independence and accountability it mixes the different types of professional and political background in the court.

(b) **Cooperative system**: The system which insures the cooperation between two political institutions for appointing the judges is called cooperative system. In this kind of system two or more institutions must cooperate to appoint members of the court. For Example-in USA, Brazil and Russia the judges of Supreme Court or Constitutional Court are nominated by the President and approved by the house of Legislature by a majority vote

(c) **Domination of single political institution**: This is the system where we find one political institution dominating in nature while appointing the judges. For example-German Constitutional Court is effectively appointed by the Parliament.

2. Appointment by judiciary itself: Under this model the judges are appointed by constituting the judicial councils and this judicial council is

entirely comprised by judges. Thus here we find that judges are appointed by judges only therefore this model is called appointment of judges by judiciary itself[2]. For example-in India emergence of the concept of collegiums system is the best example of this model. There is no any other county where judges are appointed by judges themselves except in India.

Why? Now question arises, why has this model been adopted? The answer comes that to insure judicial independence.

Criticism: the main criticism of this model is that this is against the concept of accountability.

3. Appointment by Judicial councils which includes non judicial members: the third model is appointment by a council which is comprised by judicial as well as non judicial members. This council is the body designed to insulate the functions of appointment, promotion and discipline of judges. This council lies somewhere in between the polar extremes of letting judges to manage their own affairs. This model is very popular, roughly 60% countries have adopted them in some form including Iraq[3]. In USA some states have judicial councils called "merit commission" this the mixed body to nominate judges for appointment.

Composition of merit commission: it is comprised by the following:

a. Judges from various levels of courts

b. Member of the Government bodies i.e. ministry of justice

c. Member of bar association

d. Lay man.

Role of judicial council: sometimes it may have a role in administering judicial examinations and conducting interviews of candidates.

4. Appointment of judges by election: Generally this model has been adopted by some states of United State of America. This model gained popularity in 19th century to enhance the accountability of judiciary and because of the fear that judges were elitist. It was adopted to ensure that judges were not simply appointed by elite politicians[4].

III. Appointment of Judges in other countries: Under the constitutional scheme in several countries the appointment of judges to the superior courts is made by the government in the name of the head of the state and there is no special provision for consultation with any other authority.

Position in United Kingdom

All the superior court's judges i.e. House of Lords, judges of the court of appeal, judges of High court, circuit court are appointed by crown acting on the advice of the appropriate minister or prime minister. It is commonly assumed that the Prime minister is guided by the Lord Chancellor. But after the commencement of the Constitutional Reforms Act, 2005[5] the situation has completely changed now this Act makes the provision for the establishment of Supreme Court in place of House of Lord and judges are to be appointed by a special selection commission and by the JACs[6].

Position in Australia

In Australia the judges of the High Court and other courts created by parliament are appointed by the Governor-General-in-council[7].

Canada

According to the Canadian Constitution the Supreme Court of Canada shall consist of a chief justice to be called chief justice of Canada and eight subsequent judges who shall be appointed by the Governor-General-in-council.

Position in USA

The selection of the chief Justice and the judges of the Supreme Court of the USA are made by the President and required to be approved by the Senate[8]. But in some states judges are elected through election process because each American State's has its own judiciary with its own system of appointment.

Position in France

The judges are appointed by the Head of the State with a high powered body which advices the head of the state which advices the head of the state on the appointment of judges of the superior court[9].

Japan

The judges of the Supreme Court are appointed by the cabinet except the chief justice who is formally appointed by the emperor after nomination made by cabinet[10].

Thus we can say that the models which we have discussed above are not exhaustive in nature there may be many more system for appointment of judges. If we see the first model i.e. appointment by political institution, we can say that this model lean towards judicial accountability and it insures political support for the judges but there is a risk of politicisation of judiciary. In this model the degree of representativeness of the judiciary seems to increase with the numbers of political actors involved in the appointment process, but the big drawback of this model is that it does not fully insure the judicial independence, because the appointment process is fully influenced by the executive and legislature.

When we analyse the second model i.e. appointment by judiciary itself, we can say that this model could not be received recognition by the other countries of the world. There is no any other country where the judges are appointed by the judges

themselves except in India.

III. APPOINTMENT OF JUDGES: NATIONAL PERSPECTIVE

The history of judicial administration[11] begins in India with the enactment of High Courts Act, 1860, whereby High courts were set-up in each province and a further appeal from these courts was to the Privy Council in England. In 1935 British Parliament enacted the Government of India Act, 1935.[12] Section 200 of this Act created the Federal court at New Delhi.

Federal Court had the jurisdiction only in Constitutional matters and further appeal would lie to the Privy Council.

Abolition of Privy Council Jurisdiction Act, 1949: After attaining independence the jurisdiction of the Privy Council was abolished by the Abolition of Privy Council Jurisdiction act and all appeals pending before Privy Council were transferred to the Federal Court at New Delhi. On 26th January 1950 the Supreme Court of India was established and it is now the highest court of appeal in India it has appellate jurisdiction in civil and criminal matters. Article 136 gives immense power to the Supreme Court in appellate jurisdiction but on limitation is that Supreme Court can not directly deal with an appeal against an order of tribunal or any court constituted under any law related to the armed forces.

Constitutional Provisions: The provisions of appointment of judges in Supreme Court are contained under article 124 of the Constitution. Article 124 clauses 2 and 3 are very relevant because clause 2 deals with the procedure of appointment whereas clause 3 lays down the qualifications for being a judge at Supreme Court of India.

Article 124(2) runs as follow *: " Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years: Provided that in the case of appointment of a Judge other than the chief Justice, the chief Justice of India shall always be consulted."*

Thus the express power to appoint judges is conferred upon the President of India if we see the proviso; we can say that it imposes the obligation upon President to consult Chief Justice in case of appointment of other judges.

Earlier method: Under the Government of India Act, 1935 the appointment of judges to High Courts were the prerogative of the crown with no specific provision for consulting chief justice in the appointment process[13]. But when our constitution was being drafted, after having extensive debate on consultation process the Constitutional Assembly ensured that no appointment could be made without consulting the Chief Justice of India.

Judicial Response on Appointment of Judges

Judicial response with regard to appointment of judges can be understood with the help of two heads:

1. Executive Supremacy
2. Judicial supremacy.

Executive Supremacy: Executive Supremacy means the president will not be under an obligation to consult the Chief Justice of India, but if he deems necessary to consult for the purpose, only that situation he may consult the Chief Justice of India[14]. The Supreme Court in *Union of India* v. *Sankalchand Himatlal Sheth*[15] held that the word consultation means full and effective consultation but President, however, has a right to differ from them and take a contrary view. Therefore consultation does not mean concurrence and President is not bound by it. In *S.P. Gupta* v. *Union of India*[16] The Supreme Court unanimously agreed with the meaning of the term "consultation" as explained by the Court in *Sankalchand Himatlal Sheth case*. The Court observed that the meaning of the term "consultation" used under article 124(2) is the same as the meaning of the word "consultation" in Articles 217 and 222 of the Constitution of India. The only ground on which the decision of the Government can be challenged is that it is based on *malafide* ground[17].

Thus after analysing these two decisions we can say the president i.e. executive has supremacy in appointment of judges.

Judicial Supremacy: After 1993 Supreme Court has adopted another view on appointment of judges in which it was held that judiciary has supremacy in appointment process in order to maintain judicial independence. In *Supreme Court Advocates-on-Record Assn.* v. *Union of India*[18] the nine judge bench overruled its earlier decisions and laid down certain guidelines;

1. The process of appointment of judges of High Courts must be initiated by chief justice of respective High Court.
2. The proposal of Chief Justice of High Court must be sent to all other constitutional functionaries and it within six months must convey its view to Chief Justice of India.

3. After considering the recommendations of the functionaries the Chief Justice of India should confirm his final opinion and convey it to the President with in four weeks of the final action taken.
4. If there is any objection for the appointment of a particular person, it should be for good reason and must be disclosed to chief justice of India.
5. If objection is valid, candidate should not be appointed, but objection must relate to his character, conduct, health or other factor.

Thus this judgment is highly confusing and it is very difficult to decipher clear preposition.

Special Reference No. 1 of 1998, In re[19] *the Supreme Court laid down certain principles which can be summarised as follow:*

1. Consultation with chief justice of India does not mean consultation only with the chief justice rather it requires consultation with a plurality of judges.
2. Collegiums-The chief Justice of India has to form a collegium of four senior most judges of Supreme Court for the appointment of judges in Supreme Court and for transfer of judges and chief justice of High Courts.
3. Appointment of High Court Judges-the Chief justice has to consult two senior most judges of Supreme Court. This collegium can also take into account the

views of a Supreme Court judge from the particular High Court to which appointments are to be made.

4. The opinion of collegiums should be given primacy.
5. The views of the members of the collegium should be made in writing and forwarded to Government of India along with recommendations of the chief justice.
6. Merit is predominant but seniority should also be kept in mind[20].

Apart from the abovementioned guidelines exhaustive procedure are laid down by the court. Thus we can say that before 1993 the Supreme Court was in opinion that President is sole authority to appoint judges but latter on it lay down that while giving supremacy to the president or executive

it would hamper the judicial independence therefore Supreme court adopted new concept of judicial supremacy in the name of appointment of judges by collegiums which includes only judges[21]. That is why this kind of model is known as appoint of judges by judiciary itself.

Recent development— When the concept of collegium was adopted by the Indian Judiciary to appoint the judges for High Courts and Supreme Court then there was no objection and accepted by the society at large but recently there are many cases which show that the persons who are being appointed as the judge they are having close relations to the senior most judges of the Supreme Court and High Courts, merit is not being taken into consideration rather closeness is becoming the main consideration and many judges are involve in corruption. These are certain reasons which compel to the authorities to rethink the appointment of judges by collegium system[22].

Consequently after 11 years another petition was filed before the Supreme Court for reconsideration of its earlier decisions in *Suraz India Trust* v. *Union of India*[23] basically the collegiums system was challenged on certain genuine grounds and sought to review the earlier decisions of five and nine judges' bench by two judges' bench, because of technical ground, matter was not decided by the court rather placed before the honourable chief justice for appropriate directions.

National Judicial Appointment Commission: before 1993 there was executive supremacy in appointment process but after that judicial supremacy was adopted. It means earlier we have adopted the first model i.e. Appointment by political institutions (co-operative system) but after 1993 the second model i.e. appointment by judiciary itself, was adopted now this model is still prevailing in the country, but now this model is also being criticised therefore we tried to adopt third model that is 'appointment by judicial council which includes non judicial members' in the name of 'National Judicial Appointment commission'.

The Constitution 99th Amendment Act, 2014- it inserted Articles 124A, 124B and 124C in the Constitution. Article 124 A makes the provision for establishment of National Judicial Appointment Commission. It runs as " *There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely:— (a) the Chief Justice of India, Chairperson, (b) two other senior Judges of the Supreme Court (c) the Union Minister in charge of Law and*

Justice--Member, (d) 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 or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People -- Members,

Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women: Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for renomination."[24]

Article 124B lays down the functions of Commission and Article 124 C deals with the Power of Parliament to make law.

National Judicial Appointment Commission Act, 2014: Parliament has exercised this power and enacted the 'National Judicial Appointment Commission Act, 2014'. This law basically contains procedural aspect. it was enacted to give proper effect to the 99th Constitutional Amendment. Section 5 lays down the procedure for selection of judges of Supreme Court and section 6 for the selection of judges of High Courts.

Constitutionality of Constitution 99th amendment Act, 2014: this amendment was criticised by the various scholars on the ground that it is against the principle of judicial independence because executive has also been given equal role to appoint the judges. Now a days the Government is the biggest litigant before the courts, if govt has active role in appointment process than it will definitely hamper the quality of a judgement, because a judge who was supported by executive during his appointment process he will have certain soft corner for the Govt. Consequently this amendment was challenged in *Supreme Court Advocates-on-Record Assn.* v. *Union of India*[25] 2015 the Bench, comprising Justices J. Chelameswar, Madan B. Lokur, Kurian Joseph and A.K. Goel, has written separate judgments. The Bench in a majority of 4:1 rejected the NJAC Act and the 99th Constitutional Amendment as "unconstitutional and void." On the ground that it violates one very important basic structure of the Constitution that is judicial independence[26]. It is also against the principle of separation of judiciary from executive contained under Article 50 of the Constitution. Thus court has again adopted the second model that is appointment of judges by judiciary

itself through collegium system. But court accepted that there are certain loopholes in collegium system which requires reform in true sense.

IV. CONCLUSION

Thus in conclusion we can say that at present judiciary is playing very important role in interpreting and applying the law. Indian Supreme Court is treated as guardian of the Constitution because the essence of federal Constitution is the division of powers between Union and states, this division is made by a written Constitution which is the Supreme law of land. In order to maintain the supremacy of Constitution, there must be an independent and strong judiciary to decide disputes and to remove ambiguity. But unfortunately there are many incidents which raises question to the credibility of judiciary. When we talk about the appointment process than we can say there is no any other country in the world where judges are appointed only by judges themselves except in India. Indian Parliament took very good initiative to bring reform in appointment process by enacting the Constitution 99th Amendment Act, 2014 and National Judicial Appointment Commission Act, 2014 but unfortunately the Supreme

court had declared these laws unconstitutional as violative of basic structure of the Constitution. I criticise the judgment on the ground that Constitutional Amendment Act was passed by the full majority in Parliament and State Legislatures which shows the will of people of India but court declared it unconstitutional on the basis of a doctrine which is not expressly mentioned in the Constitution i.e. doctrine of basic structure. By this way Supreme Court has underestimated the power of parliament to amend the Constitution under Article 368 and gave importance to such a concept which was propounded by judiciary itself and not even expressly mentioned in the Constitution. It would have better if the National judicial Appointment Commission had been given constitutional validity and suggestions were sought to bring fairness in appointment process through the National judicial Appointment Commission, because had it been accepted, we would have adopted the third model that is appointment by judicial council which includes non judicial members and prevalent in 60 percent countries of the world.

———

* Assistant Professor (Law), Dr Ram Manohar Lohiya National Law University, Lucknow.

[1] 'Judicial Appointments and judicial Independence' by United State Institute of Peace, 2009. p. 2 www.usip.org/judicial accessed on 18/02/2016.

[2] 'Judicial Appointments and judicial Independence' by United State Institute of Peace, 2009. p. 4 www.usip.org/judicial accessed on 18/02/2016.

[3] Judicial Appointments and judicial Independence' by United State Institute of Peace, 2009. p. 2 www.usip.org/judicial accessed on 18/02/2016 p. 4.

[4] Ibid p. 5.

[5] Sections 25 to 31 of chapter III of Constitutional Reform Act, 2005 completely governs the Appointment of judges at Supreme Court.

[6] Section 61 of chapter 1 of Part IV and Schedule 12 of the Constitutional Reform Act deals with the judicial Appointment Commission, www.legislation.gov.uk/ukpga/2005/4 accessed on 20-03-2016.

[7] Section 72 of chapter III of Commonwealth of Australian Constitution Act, 1900, prescribes the procedure for appointment of judges of High Court and other courts.

[8] Article II (2) 2 of US Constitution- The appointments are made by nomination of the President by and with the advise and consent of the Senate.

[9] Articles 64, 65 and 67 of French Constitution.

[10] Articles 6, 76, 79 and 80 of the Constitution of Japan, Article 6 deals with the appointment of chief judge of Supreme Court by Emperor, Article 76 contains the provision for vesting the whole judicial power in Supreme Court, Article 79- all other judges are to be appointed by cabinet except chief judge and Article 80 provides that the judges of the inferior courts are to be appointed by cabinet from the members nominated by chief judge.

[11] 80th Law Commission Report on Method of appointment of judges, Historical Background, Chapter 4, p. 12.

[12] Sections 200 (2) and 3 of Government of India Act, 1935.

[13] M.P. Jain, 'Indian Constitutional Law' Lexis Nexis Butterworths Wadhwa, Nagpur, 2010, pp. 201, 202.

[14] Ibid p. 204.

[15] (1977) 4 SCC 193 : AIR 1977 SC 2328.

[16] First Judges case, 1981 Supp SCC 87 : AIR 1982 SC 149.

[17] J.N. Pandey, 'Constitutional Law of India' Central Law Agency, Allahabad, 2007, p. 474.

[18] Second Judges case, (1993) 4 SCC 441.

[19] (1998) 7 SCC 739 : AIR 1999 SC 1, on 23 July 1998 the President of India referred nine questions for consideration by the Supreme Court. These questions were related to three aspects viz. Consultation, judicial

review of transfers of judges and the relevance of seniority in making appointment to the Supreme Court.

[20] Narendra Kumar, 'Constitutional Law of India' Allahabad Law Agency, Faridabad, 2015 p. 625.

[21] V.R. Krishna Iyer, 'Judicial Appointment and Disappointment, The Hindu 18th August 2012.

[22] Santosh Paul, 'Choosing Hammurabi-debate on Judicial Appointmrnt' Lexis Nexis, Haryana, 2013.

[23] (2012) 13 SCC 497 on 4th April, 2011 Bench JJ Deepak Verma, B.S. Chauhan.

[24] Article 124A(1) taken from www.indiacode.nic.in/coiweb/amend/99th.pdf accessed on 19/03/2016.

[25] (2015) 6 SCC 408.

[26] Independence of judiciary is part of the basic structure held in *Kumar Padma Prasad* v. *Union of India*, (1992) 2 SCC 428.