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COLLEGIUM SYSTEM OF APPOINTMENTS OF JUDGES – A CRITICAL STUDY

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Abstract

The National Judicial Appointment Commission Act along with the 99thConstitutional amendment has been considered unconstitutional by the Supreme Court resulted into revival of old system of appointment of judges i.e. "Collegium". The 'collegium system' of appointments is a peculiar system in which Judges themselves appoint Judges. Now, the next question which arises whether the system is best in terms of impartiality and transparency? To find out the answer to this question, this paper will critically analyse the procedure of appointment followed in different countries and make a comparison between them at different aspects.

Authority of appointments in the United Kingdom

Britain follows the arrangement of appointment of Judges by the executive they could be excused whenever by crown. Till 1720, a judge was not permitted to be situated in the office after the demise of the Monarch, who gave the Commissions. In the year 1720, an authorization this respect was made and judges were permitted to hold office for a half year after the death of the Monarch. A rule of 1761 gave that the Commission of Judges will be in the force and impact during great conduct despite the declined status of His Majesty or of any of his beneficiaries and replacements. Consequently, life residency was conceded to the judges by this institution.

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According to Blackstone:

"In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure by the crown, consists one main preservative of the public liberty which cannot subsist long in any State unless the administration of common justice be in some degree separated both from the legislative and from the executive power".

Basically, in the UK Judges are designated by the crown. Practically speaking "Lord Chancellor, the senior law member of the government who is the Queen's Chief Adviser plays role in selection. The Prime Minister in effect designates the appointees but acts on the opinion of the Lord Chancellor. It is the Queen who actually establish the Commission of appointment."

So, in the United Kingdom, basically executive is the appointing authority. In march 2005, the Constitutional Reforms Act, 2005 established a "Judicial Appointment Commission for wales and England" resulted in curtailment of executive power. Presently, Judicial Appointment Commission recommends the names of persons to be appointed in higher judiciary while the executive appoints the judges.

Authority of Appointment in United States of America

The United States Constitution under Section 2 of Article IIstates: "The President shall nominate and by and with the Advice and ascent given as of Senate shall appoint Judges of the Supreme Court and all other Officers of the United States".

Hence, President appoints the Supreme Court judges with the assent of the state.

There is no role of Chief Justice of America in the matter of appointment of judges to the High Court.

The President's power of appointment of Judges is not absolute; it is subject to review done by Senate. This allows to maintain a check on the arbitrary exercise of powers by the President. Hence a system of proper checks and balance has been made while appointing and the Appointing Authority remains the Executive.

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Appointment of Judges in Australia

The High Court of Australia was established by the Australian Constitution under section 71 and considered to be Highest among all federal courts. Section-71is reproduced below:

Section 71. Judicial Power and Courts

"The judicial power and authority of the commonwealth shall be vested as in a Federal Hon'ble Supreme Court, to be called the High Court of Austria, and in such other Federal Courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist a Chief Justice and so many other Justices, not less than two as the Parliament prescribes…"The procedure for their removal is also given in the Section.

Section 72 of the Australian constitution specified that "Judges of the High Court and different Courts made by the Parliament will be appointed for time being of a period expiring upon the Judge attaining the age of seventy years. This arrangement was made to give of residency and to the motivation behind Independence of Judiciary. The Judges of the High Court are appointed by Governor-General-in-Council. There is a transition to set up Judicial Appointment Committee." Judiciary has no job in appointment of Judges.

Authority of Appointments in Canada

In 1875, The Supreme and Exchequer Courts Act, established the Supreme Court of Canada. This Act of 1875 has been replaced by The Supreme Court Act, 1985. Section 2 of the Act confers powers on the Governor of the council to appoint judges of the Supreme Court. Such an appointment doesn't need any ratification by the House of Commons or The Senate.

In Canada and Australia, there is norole of Chief Justice of the Highest Court in the appointments of the judges to the Constitutional Courts. As per the Constitution of Australia, no further provision in the Constitution requiring the assent of the Federal legislature for such kind of appointments.

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The appointment process of these countries and other indicates that there is no role of Judiciary in making appointments of Judges. However, in 'collegium system' there is a dominance of the judiciary in the appointments of the Judges of the Higher Courts in India and advice of Chief Justice of India is binding on President.

Systems of Appointment of Judges in other countries

To make a comparison it is also necessary to find out systems ofjudicial appointments in some other countries. In Kenya, Pakistan, South Africa, and United Kingdom, judges of Higher judiciary are appointed through judicial appointment commission. In Israel, the appointments are made upon the recommendation of a Committee. In France, Italy, Nigeria and Sri Lanka, the appointments are made upon the recommendations of councils. In Australia and Canada appointments are directly made by the Governor General. In Bangladesh, President appoints the Judges.

In all these countries mentioned above the executive is the final appointing authority. In South Africa and Sri Lanka where the process of making appointment is made through Judicial Appointment Commission/Councils, the executive has over-whelming majority. In Australia, New Zealand, Bangladesh and USA where the appointment is not made through Commission/Committee or Council, executive makes appointments without any consultation with judiciary. The President of that Republic is the final of making appointing expert in Italy and the Chairman of the Judicial Appointment body. In a large portion of the nation's however the executive is the appointing authority yet independence of judiciary is being maintained.

Peculiar system of appointments in India

In most of the other countries the appointment is made by the executive. In United Kingdom the Constitutional Reform Act 2005resulted in establishment of a Judicial appointment Committee. In United State of America there is no role of Chief Justice of America in the matter of appointment of Judges of 'HC'. President is the appointing authority in case of appointment of Judges of Supreme Court with the consent of senate. In Pakistan, South Africa, Kenya and other

countries appointment are made through Judicial Appointment Commissions. In Australia, New Zealand, Bangladesh etc. the appointment are not made through commission, committee. Executive makes appointment without consultation with Judiciary. In South Africa and Sri Lanka appointment of Judges are made through Judicial Commission/ councils. In no other country the Judiciary has absolute power in the matter of appointment. The Judicial appointment Commission which was to be constituted under National Judicial Appointment Commission Act 2014 was not a peculiar type of commission for recommending name for appointment of Judges. Such type of Commission exists under Judicial System of other countries. The Supreme Court by interpretation has evolved a peculiar mode of appointment of Judges under Collegium system of appointment.

No System of Check and Balances

There is no system of check and balances under 'collegium system' and Judiciary has absolute power in appointment of judges. The Judicial Review of appointment is permissible if there was no consultation by President with Chief Justice of India. The opinion of Chief Justice of India formed in the manner contemplated in The Second Judge case is binding on President. No appointment can be made without consent of Chief Justice of India, hence a sort of veto power has been conferred on Chief Justice of India. There is no system of check and balances under collegium system and absolute power is exercised by Judiciary in appointments.

Views of Framers of Constitution on Judicial Appointment

It is necessary to scrutinize the Debates of Constituent Assembly to gather intention of members of Constituent Assembly.

Regarding appointments of Constitutional Courts, Dr. B.R. Ambedkar said and explained:

"There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself. And the question is how these

two objects could be secured. There are two different ways in which this matter is governed in other countries. In Great Britain the appointments are made by the Crown, without any kind of limitation whatsoever, which means by the executive of the day. There is the opposite system in the United States where, for instance, officers of the Supreme Court as well as other officers of the State shall be made only with the concurrence of the Senate in the United States. It seems to me in the circumstances in which we live today, where the sense of responsibility has not grown to the same extent to which we find it in the United States, it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day. Similarly, it seems to me that to make every appointment which the executive wishes to make subject to the concurrence of the legislature is also not a very suitable provision. Apart from its being cumbrous, it also involves that possibility of the appointment being influenced by political pressure and political considerations. The draft article, therefore, steers a middle-course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be consultation of persons who are ex hypothesis, well qualified to give proper advice in the matters of this sort, and my judgment is that this sort of provision may be regarded as sufficient for the moment.

With regard to the question of the concurrence of the Chief Justice, it seems 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 vest in the President or the Government of the day. I therefore, think that that is also a dangerous proposition".

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Dr. B.R. Ambedkar was neither in favour of giving any veto power to Chief Justice nor prepared to give absolute powers to the President in matter of appointment. He was in favour of maintaining a proper balance and if instead of 'consultation' word 'concurrence' would have been used in Constitutional provisions, Chief Justice of India would have been conferred with power of appointments.

During the Course of Assembly Debates some of the Members moved motion for making amendment. There was disagreement among various members whether the word 'Consultation' or the word 'concurrence' be used. It was clarified that if word consultation is interpreted to mean 'concurrence' the whole scheme will be changed. Mr. T.T. Krishnamachari, delivered a speech in Constituent Assembly on 27th May, 1949. He said:

"The Independence of Judiciary should be maintained and that the Judiciary should not feel that they are subject to favors that the Executive might grant to them from time to time and which would naturally influence their decision in any matter. They have to take where the interests of the executive of the time being happens to be concerned. At the same time, Sir, I think it should be made clear that it is not the intention of this house or of the framers of the Constitution that they want to create specially favored bodies which in themselves becomes an 'Imperium in imperio', completely Independent of the executive and the legislature and operating as a sort of Superior body to the general body politic".

In reply to debate it was clarified by Dr. B.R. Ambedkar that Constituent Assembly was in favour of Independence of Judiciary and not in favour of creating 'Imperium in Imperio'. He was in favour of adopting a middle course.

Against intention of framers of constitution

The constitutional framers were in favour of independence of judiciary from executive. There were long Constitutional Assembly debates in this regard. Dr. B.R. Ambedkar was not in favour of giving absolute authority to president for making appointment of judges. If absolute authority is conferred upon the President or on any other authority there is possibility of misuse

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of power. Dr. Ambedkar was also not in favour of giving absolute authority to Chief Justice of India. He was in favour of consultation with Chief Justice of Supreme Court before President makes appointment of Judges. When some members suggested with instead of word 'consultation' word 'concurrence' be used in the relevant provisions it was not accepted by Dr. BR Ambedkar. He was in favour of adopting a middle courts, where neither President nor Chief Justice of India has a dominant role to play in the matter of appointments. The Collegium system has been evolved against the intention of the Constitutional framers. It is the duty of judiciary as well as the executive to look into the intention expressed by the Constitutional framers for proper working of the constitution. We are not simply criticizing judiciary for providing an alternative mechanism for appointment of judges. The system provided by the judiciary has been subjected to close public scrutiny. The system is not a working as per satisfaction of the people. The people are loosing faith in judiciary. When there is no transparency and accountability in a system. It is bound to be criticized not only by the common people. So it is duty of Parliament and the Central Government to take necessary initiative in this regard. The persons from different Strata of the Society including judiciary be consulted to provide an alternative piece of legislation/mechanism for appointment of Judges.

It can be concluded that a collegium system is not free from defect and other lacunas. The Constitution was amended by The Constitution (99thAmendment) Act, 2014. The National Judicial Appointments Commission was to be established under National Judicial Appointment Commission Act, 2014. The Supreme Court held that both these Acts are unconstitutional.

It can be concluded that the matter appointment, the judiciary is not enjoying absolute powers in any other country. The Constitution framers were in favour of Independent Judiciary and the separation of powers, but not in favour of excluding the executive from the process. Even before The second Judges case the opinion of Chief Justice of India was given graded weight. If we analyse the cases of appointment after 1993 we find that there are a number of cases where charges of corruption were leveled against members of Higher Judiciary. The present collegium

system is not free from defects and lacunas. Though suggestions were sought by Supreme Court for improvement of procedure adopted by collegium system to bring transparency in procedure, yet no significant progress has been made in this regard. There is urgent need to provide alternative system of appointment of judges which would be free from defects of collegiums system.

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