Journal Homepage: - www.journalijar.com
INTERNATIONAL JOURNAL OF ADVANCED RESEARCH (IJAR)
Article DOI: 10.21474/IJAR01/4491
DOI URL: http://dx.doi.org/10.21474/IJAR01/4491
ISSN NO. 2320-5407

RESEARCH ARTICLE

APPOINTMENT OF JUDGES AND OVERVIEW OF COLLEGIUM SYSTEM IN INDIA: A NEED TO REFORM.

Dr. Dharmendra Kumar Singh[1] and Dr. Amit Singh[2].
1. Associate Professor, Department of Law, Bareilly College, Bareilly (India).
2. Assistant Professor, Department of Law, MJP Rohilkhand University, Bareilly (India).

Manuscript Info

Manuscript History

Received: 15 April 2017
Final Accepted: 17 May 2017
Published: June 2017

Key words:-
Judges' Appointment, Collegium, NJAC, Supreme Court(SC)

Abstract

An analysis of the appointment of judges and an overview to the collegium system has been made in this research paper. Furthermore, in relation to the Judges' appointment of SC and HC, all significant cases are evaluated. The Supreme Court struck down the National Judicial Appointment Commission (NJAC) and upheld the Collegiums System of the appointment of judges. India is the only country of the world where judges are appointed by themselves. In order to make the collegium System more transparent and democratic reforms are needed.

Introduction:-

The method of appointment of the Chief Justice of India, Supreme Court (SC) and High Court (HC) judges was laid down in the Constitution of India. The Constitution stated that the President shall make these appointments after consulting with the Chief Justice of India and other SC and HC judges as he considers necessary. The collegium system evolved after three landmark judgments of the Supreme Court, known as the 'three judges cases': the first, second and the third judges cases. The constitution of India provides the method of judges' appointment in Article 124/217 where it is stated that the President (i.e. Central Government), shall appoint judges after consultation with the judges of the Supreme Court and of the High court in the States as the 'president may deem necessary'. On the other hand, in the article 74, it is clearly stated that the President is bound to act in accordance to the advice given by the Council of Ministers. In reference to the Judges' appoint of Supreme Court and High Court, a controversy arises due to the word 'consultation' in Article 124/ 217 and Executive power of the Central Government in the Article 74. This controversy led to the evolution of the collegium system by the Supreme Court in three cases popularly known as 'three judges cases'.

The objective of this study is to see how the method of appointment of judges has evolved, how the Judiciary managed to counter the aforesaid 'controversy' and the viewpoint of the Executive over the years. This paper also describes with the help of judgments in the three judges case, what constitutes the collegium in the appointment of judges in HC and SC. The paper also stresses on the reforms needed the collegium system.

Analysis of Cases and overview of Collegium System:-

The controversy of appointment of judges starts with the issue of J. Zafar Imam in 1968 when the vacancy occurred in the office of Chief Justice of the SC, the then senior most judge J. Zafar Imam was not appointed as the Chief Justice of SC because off his physical and mental infirmity. Again in 1973, Justice A.N. Ray who was fourth in the order of seniority was appointed as the Chief Justice of India. Thus, three senior judges were bypassed, who

Corresponding Author:- Dr. Dharmendra Kumar Singh.
Address:- Associate Professor, Department of Law, Bareilly College, Bareilly.

then resigned from the Court in protest [Justice Shelatt, Justice Grover, and Justice Hegde]. The government invoked the Law commission's recommendation [14th Law Commission] which criticized the practice of appointing the senior most judges as the Chief Justice of the Supreme Court on a ground that a Chief Justice should not an able and experienced judge but also a competent administrator and, therefore succession of the office should not be regulated by mere seniority.

The same story was repeated in 1976, The Government appointed Justice Beg as Chief Justice by-passing Justice Khanna, who was senior to him at that time. This time the main reason behind this appointment as given by Justice Khanna in his autobiography was his descending opinion in the Habeas Corpus case. He has also said in his autobiography that a night before delivering his judgment, he will never be appointed as the Chief Justice. After the retirement of justice Beg, the senior most Judge, Justice Chandrachud was appointed as the Chief Justice. Since then, again the rule of seniority has been followed in the matter of appointment of the Chief justice of India.

In 1977, in the case of ***Union Of India vs. Sankalchand Seth*** [1] which was related to the transfer of a judge from one High Court to another under Article 222, Supreme Court held that the President has the right to differ from the advice provided by the consultants. In the words of the Court:

"The consultation implies consultation of two or more persons to find a satisfactory solution. Consultation is different from consentity"
The Constitution of India does not lay down a very definitive provision for the purpose as it merely says that the President is to appoint the judges of the Supreme Court in consultation with the Chief Justice and "such" other Judges of the Supreme Court and of the High Courts as "The President may deem necessary"[2]. It was not clear from this provision as to whose opinion among the concerned persons is to be given importance. This important question has been considered by Supreme Court in several cases after the case of Sankalchand's case.

The First Judges` Case:-
The first controversy arose in ***S.P. Gupta vs. Union of India***[3], wherein a letter/ circular from the Union Law Minister to the Governor of Punjab and the Chief Ministers of all other states and addresses were questioned by way of writ under Article 32 of the Constitution. The letter informed the addressee inter alia, that, "…one third of the judges of the High Court should as far as possible be from outside the state in which the High Court is situated …"and the addressee were requested to obtain from all additional judges working in the High Court's their consent to be appointed as permanent Judges in any other High Court in the country. In response to the letter, quite a few additional judges gave their consent to be appointed outside their parent state. The primacy of the executive was accepted by the majority through the majority of 4:3. In the First judges Case, as it is known on issue of independence of judiciary and on the interpretation of the word consultation.

The P.N. Bhagwati, J. speaking for majority on independence of judiciary and on the meaning of the term 'consultation' and on the consultation process opined:

"The concept of independence of judiciary is a noble concept which inspires the Constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. On the issue of appointment of Judges of the Supreme Court, it was concluded that consultation with the Chief Justice of India was a mandatory requirement. But while making an appointment, consultation could extend to such other judges of the Supreme Court, and of the High Courts, as the Central Government may deem necessary. It was felt that consultation with the Chief Justice of India alone, was not satisfactory mode of appointment because wisdom and experience demanded that no power should rest in a single individual howsoever, high and great he may be and howsoever honest and well-meaning".

It was suggested that it would be more appropriate if a collegiums would make the recommendations to the President regard to appointments to the higher judiciary and the recommending authority should be broader based. If the collegium comprised of people who had knowledge of persons, who may be fit for appointments to the Bench, and possessed the qualities required for such appointment, it would go a long way towards securing the right kind of Judges, who would be truly independent..
The SC upheld the circular/letter envisaging one-third judges from outside the state in the light of deliberations at Chief Justices' Conference, the recommendation of the States Reorganization Commission and the findings of the study team on national integration. The court held that as long as the policy of transfer is evolved in consultation

with the Chief Justice of India and does not violate any constitutional mandate, the same is not open to challenge. Regarding the advice of the Council of Ministers under Article 74 of the constitution of India, in light of the enunciation of law by English Courts[4] and Constitution Bench judgment[5], the majority held that the privilege in this behalf can be claimed under Article 74(2) or under Section 123 of the Evidence Act and the material constituting advice to the President in this behalf can thus be held from the judicial scrutiny by the Court.

The Second Judges` Case:-

The first judges case was overruled by a nine judges bench in the Second Judges case. The correctness of the first judge`s case was doubted by a three judges Bench in ***Subhash Sharma vs. Union of Indi***[6] which opined that the First Case should be considered by a larger Bench.

In the ***Supreme Court Advocates on Records Association vs. Union of India*** [7], popularly referred as Second Judges Case, the petitioners alleged that the executive had failed to properly discharge its duty to fill judicial appointments in the High Courts in a timely manner, and had failed to select the most qualified Judges. The Chief Justice of India constituted a nine judges Bench to examine two questions. Firstly, whether the opinion of the Chief Justice of India in regard to the appointment of Judges to the Supreme Court and to the High Courts as well as transfer of judges and chief Justices of High Courts was entitled to primacy? And secondly whether the fixation of the Judges strength in High Courts was justifiable? By the majority of 7:2, a nine Judges Bench of this court over ruled the Judgment in the First Judges Case.

The Conclusion Drawn By The Majority View Was Under:-

1. the process of appointments of judges to the Supreme Court and High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment; and all the Constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, sub serving the Constitutional purpose, so that the occasion of primacy does not arise.
2. Initiation of the proposal for appointment in the case of the Supreme Court must be by the Chief Justice of India, and in the case of High Court by the High Court, and for transfer of a Judge/ Chief Justice of a High Court, the proposal has to be initiated by the Chief Justice India. This is the manner in which proposals for appointment to the Supreme Court and the High Court as well as for the transfer of judges /Chief Justice of the High Court must invariably made.
3. In the event of conflicting opinions of the Judiciary symbolized by the view of the Chief Justice of India and formed in the manner indicated has primacy.
4. No appointment of any Judge to the Supreme Court or any High Court can be made unless it is in conformity with the opinion of the Chief Justice of India. Appointment to the Chief Justice of India should be of the senior most Judge of the Supreme Court considered fit to hold the office.
5. Consent of the transferred Judge / Chief Justice is not required for either the First or any subsequent transfer from one High Court to another High Court.
6. Any transfer made on the recommendation of the Chief Justice of India is not to be deemed to be punitive, and such transfer is not justiciable on any ground.
7. In making all appointments and transfers, the norms indicated must be followed. However, the same do not confer any justiciable right in anyone.
8. Only limited judicial review on the grounds specified earlier is available in matters of appointment and transfers.

Third Judges` Case:-

Consequent upon doubts having arisen with the Union of India about the interpretation of the Second Judges case, the President of India, in exercise of his power under Article 143, referred nine questions to the Supreme Court **In Re: Special Reference No. 1 of 1998**[8] , for its opinion. A nine Judges Bench answered in the Presidential Reference extensively dealt with the majority in second judges case in respect of all aspects including those of consultative process of appointment, non- appointment, binding force of recommendation, justiciability and transfer of judges and chief Justice of High Courts. reference. In the Third Judges Case, the nine judges bench unanimously, on 28.10.1998 held:

1. The expression "consultation with Chief Justice of India" in Articles 124(2) and 217(1) of the Constitution requires consultation with plurality of judges in the formation of the opinion of the Chie Justice of India. the sole individual opinion of the Chief Justice of India. The sole opinion of the Chief Justice of India does not constitute "consultation" within the meaning of the said Articles.

2. The transfer of puisne judges is judicially reviewable only to this extent that the recommendation that has been made by the Chief Justice of India in the behalf has not been made in consultation with the four senior most puisne judges of the Supreme Court and /or that he views of the chief Justice of the High Court from which the transfer is to be affected and of the Chief Justice of the High Court to which the transfer is to be effected have not been obtained.
3. The Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and to transfer a Chief Justice or puisne judge of a High Court in consultation with the four senior most puisne judges of the Supreme Court is concerned, the recommendation must be made with consultation of two senior most puisne Judges of the Supreme Court.
4. The Chief Justice of India is not entitled to act solely in his individual capacity, without consultation with other Judges of the Supreme Court , in respect of materials and information conveyed by the Government of India for non appointment of a judge recommended for appointment'
5. The requirement of consultation by the Chief Justice of India with his colleagues who are likely to be conversant with the affairs of the concerned High Court does not refer only to those judges who have that High Court as parent High Court. It does not exclude judges who have occupied the office of a judge or Chief Justice of that High Court on transfer.

National Judicial Appointment Commission Act, 2014:-

National judicial appointment commission was established by 99th constitutional amendments act 2014 which came into existence in thirteenth April 2015. The National Judicial Appointments Commission amends the collegium system and ensures transparency and accountability. It ends the opaque mechanism and primacy of judiciary. It does not infringe upon judicial independence the later is regarded as separation of powers between organs. It integrates judiciary with Executive and makes it inclusive. Provision of veto is there for appointing eminent person making NJAC non arbitrary. Growing nepotism and corruption in judiciary will be checked by NJAC. Appointments in collegium system are not always based on merit but in NJAC it will be based on merit [9]. On 16th October 2015 the constitution bench of SC by 4:1 majority upheld the collegiums system and struck down the NJAC by Supreme Court Advocates-on-Record-Association and Ors.Vs Union of India (UOI) case known as Fourth Judges Case.

The Fourth Judges Case:-

In a shock to the central government, the Supreme Court on 16th October 2015, in the fourth Judges Case ***Supreme Court Advocates-on-Record-Association and Ors.Vs Union of India (UOI)*** [10] struck down the constitution's 99th amendment and the NJAC Act as unconstitutional and void, restoring the collegium system for appointment of judges to the higher judiciary. In a "collective order", the constitution bench of Justice Jagdish Singh Khehar, Justice J Chelameswar, Justice Madan B Lokur, Justice Kurian Joseph and Justice Adarsh Kumar Goel said that the constitution's 99th amendment and the NJAC Act are unconstitutional and void. The constitution amendment and National Judicial Appointments Commission (NJAC) Act were brought to replace the 1993 collegium system evolved after second judges case for the appointment of judges to the Supreme Court and the high courts. The court said the system of,

"Appointment of judges to the SC, Chief Justices and judges of the High Courts and the transfer of Chief Justices and judges of the High Courts that existed prior to the amendment begins to be operative".

The court sought suggestions from the bar for improved functioning of the collegium system.

Justice Kehar Stated;-

" *I have independently arrived at the conclusion, that clause (c) of Article 124A(1) is ultra vires the provisions of the Constitution, because of the inclusion of the Union Minister in charge of Law and Justice as an ex officio Member of the NJAC. Clause (c) of Article 124A(1), in my view, impinges upon the principles of "independence of the judiciary", as well as, "separation of powers". It has also been concluded by me, that clause (d) of Article 124A(1) which provides for the inclusion of two "eminent persons" as Members of the NJAC is ultra vires the provisions of the Constitution, for a variety of reasons. The same has also been held as violative of the "basic structure" of the Constitution."*

Justice Joseph Kurien in his judgment started out with the Latin maxim:

"Entia Non Sunt Multiplicanda Sine Necessitate (Things should not be multiplied without necessity)". Complimenting his brother judges' "masterpiece" judgments, he wrote a very short judgment

"leaving all legal jargons and using a language of the common man, the core issue before us is the validity of the Constitution 99th amendment", holding: Direct participation of the Executive or other non-judicial elements would ultimately lead to structured bargaining in appointments, if not, anything worse. Any attempt by diluting the basic structure to create a committed judiciary, however remote be the possibility, is to be nipped in the bud."

According to **Justice Roberts**,
"Court has no power to gerrymander the Constitution. Contextually, I would say, the Parliament has no power to gerrymander the Constitution. The Constitution 99th amendment impairs the structural distribution of powers and hence it is impermissible."

It is indisputable that judicial independence, based on the principle of separation of powers, is part of the Indian Constitution's basic structure. However, the majority judgment in the NJAC case has wrongly interpreted judicial independence to mean primacy in appointments.

In the aftermath of the Supreme Court's verdict that invalidated the 99th Constitution Amendment, rendering nugatory the National Judicial Appointments Commission (NJAC), a popular narrative has entered our conscience that the commission is not a credible alternative to the Supreme Court's 'collegium. But such ideas, for all their apparent forcefulness, ought to be extraneous to any proper debate on the legitimacy of the Supreme Court's ruling .What we must really consider in analysing this verdict is not our respective concerns about what makes for good policy, but rather, what interpretation would ensure the greatest conformity to the Constitution's text, to the intention of its framers and to the document's finest aspirations.

When viewed thus, the majority judgment in this case is profoundly unsatisfactory. The verdict upholds an extra-constitutional forum, created by the Supreme Court's own members to serve its own ends, in the place of a system lawfully enacted by a popularly elected Parliament. What's more, the judgment fails to adequately answer the fundamental question at the root of the controversy: how is judicial primacy in making appointments to the higher judiciary a part of our Constitution's basic structure? Consequently, the decision acquires an entirely political character. It is subsumed not by constitutionalism but by an anti-democratic temper. Declaring that the judiciary cannot risk being caught in a "web of indebtedness" towards the government, the Supreme Court rejected the National Judicial Appointments Commission (NJAC) Act and the 99th Constitutional Amendment which sought to give politicians and civil society a final say in the appointment of judges to the highest courts[11].

Suggestions to reform the Collegium system:-
Appointment of Judges is a cardinal process in a democratic country like India and it should be done with utmost care and caution. Executive interference came to an end and the collegiums is the only alternative left after fourth Judges case. But now, even the collegium is also under several allegations and people are continuously raising questions over the working process of collegium. Collegium has been blamed of not being transparent and accountable and corruption charges have been levied. Therefore, we have tried to figure out some problems in existing system of collegium and have given few suggestions accordingly to improve it and make it more effective and efficient.

1. A formal Application by an eager judge to the collegiums for being selected or elevated to a higher post is to be made with full formal and official Bio data and CV.
2. All meetings of the collegiums should be video-recorded with good audio quality. Decisions of the collegium must reflect scrupulous following of due-process and best practices.
3. The Central Government supports this reform to include in the collegium, the present senior judges of the High Court, senior lawyers, Attorney General of India and Advocate General of states(for HC appointments), thus creating a democratic and transparent collegium system.
4. Individual members of the collegium may propose or support eligible candidates for selection, elevation, transfer to a different High Court etc., but this should be done in writing to the chief of that collegium (Chief Justice) and their recommendations etc. must be placed on record.
5. The chief of the collegium may also propose eligible candidates, but to prevent him from abusing his pre-eminent position, candidates proposed by him must be independently scrutinized by other collegium judges, and their opinions (whether favorable or adverse) must be placed on record.
6. The proposed candidates should be shortlisted by the collegium secretariat based on independently verifiable factors such as rate of case-disposal, length of tenure in the present and previous positions, complaints, etc.

7. The income and assets of High Court and Supreme Court judges and their close relatives should be regularly appraised by the Comptroller and Auditor General (CAG) to ensure that (a) true accounts are being rendered and (b) asset growth is within the bounds of official income sources. Judges about whom CAG raises red flags must not be considered eligible for any elevation until CAG's questions are satisfactorily answered, and the investigation is complete.
8. Judges about whom CAG raises red flags must be transferred at the earliest to another High Court in order to break any existing nexus, and to facilitate independent investigations, unhindered by the influential position of the judge.
9. Judges found to be lobbying, engaging in backroom-politics and/or trading favors with influential persons (including senior counsels, judges, ministers, bureaucrats, party leaders, business magnates, etc.) for procuring preferential treatment from the collegium must be sent a stern warning letter by the chief of the collegium for the first offence, disqualified from applying to the collegium for three years in case of a second offence, and permanently debarred from elevations in case of a third offence.
10. All elevations and selections must be made by an independently verifiable process, minimizing the scope for subjective elements of favoritism, nepotism, political appointments, etc.
11. Any collegium judge who shows tendencies of over-ruling or short-circuiting the due process must be debarred from further participation in the collegium.
12. All the above-mentioned documents and audio-recordings of the collegiums and candidates must be available to citizens from the Collegium Secretariat under Right To Information Act. Ideally, such documents should be routinely uploaded on the website of the respective High Court or Supreme Court, and available through a simple net-search.
13. Collegium Secretariat should be a single centralized organization headquartered in New Delhi, with offices in every High Court. Secretariat in each state should be headed by a team of senior bureaucrats who are suitably insulated from pulls and pressures by judges, lawyers, ministers, etc. It must support the Collegium in its decision-making with all the background-data of candidates, as well as objective comparison and analysis of the data along various parameters. Secretariat must maintain eligibility records of each and every judge of the higher judiciary, as well as judges, senior advocates and others who apply for judgeship in the higher judiciary.
14. Suitable criteria must be proposed by the Supreme Court Collegium, made into an enactment after passing through the houses of Parliament, and scrupulously implemented by the Collegium Secretariat and Ministry of Justice. Making the criteria a law would serve as a way to prevent "moving goal-posts" for favouring some candidates.
15. Suitable rules, laws and formats may be evolved for receiving complaints against individual judges, and integrating it into the eligibility criteria so as to prevent frivolous complaints against judges by parties with vested interest, but also to facilitate the independent investigation of complaints if found to have substance.

Conclusions:-

The majority in the Constitution Bench, in spite of striking down the constitutional amendments and the NJAC Act, however, noticed with grave concern the deficiencies and shortcoming in the working of the prevalent system of the appointment of judges through the collegium, and therefore, views and opinions for the much-needed removal of malaise and infusing transparency in the working of the collegiums system. In the fourth judges case, the prayer for revisiting the second Juges' case and third judge' case at the hands of a larger Bench was rejected. Constitution postulates a consultative and participatory process between the constitutional functionaries for appointing the best possible person as a judge of HC and SC.

The judiciary in India enjoys power more than ever before and is the most powerful judiciary of the world. Its work is not just limited to the judicial review as provided in the Constitution. Judiciary interferes in every aspect of the social and political life through the tool of judicial activism. It enjoys immense public authority. The fact is that in a democratic republic, power with accountability of the individual enjoying it is essential to avert disaster for any democratic system.

India is the only country of the world where judges possess the right of appointing themselves in the name of independent of judiciary and basic structure of the constitution of India. The framers of our constitution decided not to give the ultimate power to the judges. From the year 1993, the collegium has enjoyed the power of appointing judges in Supreme Court and High Court. Until then, the Union Executive had enjoyed the privilege of doing so. The Supreme Court had overruled the NJAC in doing so, in some way; it also overruled the basic fundamentals of the constitution and democracy of India. To be precise, a group of five senior-most judges who constitute the

collegium are the final deciding factor as they not take any sort of advice from the Executive as elected by the people of India. In the fourth judges case, the Supreme Court had itself asked for suggestions from the members of the Bar and other stakeholders. A reform in the collegium system to increase the number of judges in the colegium is also the need of the hour. The Central Government supports this reform to include in the collegium, the present judges of the High Court, Senior lawyers, Advocate General and Attorney General of India thus creating a democratic and transparent collegium system.

References:-

1. MANU/SC/0065/1977: (1977) 4 SCC 193
2. Article 124(2) of the Constitution of India
3. AIR 1982 SC 149
4. Rogers v.Home Secretary, 1973 AC 388[HL];Conway v. Rimmer, 1968 AC 910 [HL]
5. State of Rajasthan v.Union of India, AIR 1977 SC 1361
6. 1990 SCR Supl. (2) 433
7. 1993)4 SCC 441, AIR 1994 SC 268
8. In Re: Special Reference No. 1 of 1998, MANU/SC/1146/1998 : (1998) 7 SCC 739
9. www.thehindu.com/specials/in-depth/nja retrieved on 15.05.2017.
10. MANU/SC/1183/2015:(2015) 6 SCC 408
11. http://www.thehindu.com/news/national/supreme-court-verdict-on-njac-and-collegium-system/article7769266.ece retrieved on 25 April2017