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RESEARCH ARTICLE

COMPARATIVE ANALYSIS OF JUDICIAL APPOINTMENTS WITH REFERENCE TO USA, AUSTRALIA AND INDIA

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Abstract

Appointment of judges in India in higher judiciary have been an issue since independence where even constituent assembly while drafting the constitution was in dilemma as to what method should be adopted to appoint a judge in the Supreme court and High Court. Ultimately, the power to appoint judges was given to executive to keep a check on higher judiciary to prevent nepotism and increase accountability and transparency. But this trend was reversed in 2nd judges' case in 1993 when collegium system was formed by Supreme Court and President became bound to accept the recommendation of collegium system in the appointment of judges. Even SC struck down National Judicial Appointment Commission Act, 2014 (NJAC) to uphold judicial independence. In this paper author will study the judicial appointment process of 3 countries i.e., USA, Australia and India and will try to analyze the trend followed in India for appointment process by looking into the landmark cases and NJAC Act which was struck down in 2015 by SC and lastly giving recommendations to improve the appointment process to uphold transparency and accountability which is considered as sine-qua-none for good governance.

Introduction:-

According to the Thomas Paine, "Law is the King! And there can be no one above the law."

From the above-mentioned phrase, we can understand that there should be a 'Rule of Law' which can be traced back to the great thinkers like Aristotle who said "Law should Govern" meaning there should be no one above the law and every person should abide by its statutory law of the land. But this seems to be lacking if we see the current system of judicial appointments which is made by the Collegium System.

In a democratic country like India, the process of appointment of judges is cardinal which must be done with utmost care and caution. Executive interference after the fourth judge case (NJAC Judgment) came to an end and the only alternative left is the appointment of judges by the collegium. But now, even the collegium is under several allegations of being non-transparent and people are raising questions over the working process of collegium system. Collegium as mentioned have been alleged to be non-transparent and non-accountable and the corruption charges have been levied.

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Since India has created an activist judiciary, it was important to ensure its independence and professionalism. The system of appointment has been a matter of debate in the constituent assembly itself where the 3 methods were considered:

1. Appointment by executive
2. Judges appointing judges.
3. Appointment by executive and ratification by legislature as found in USA

Out of three lesser evils, lesser evil appeared to be when executive makes appointment with consultation of judiciary. Dr. BR Ambedkar was strongly against judges appointing judges. According to Ambedkar, there cannot be imperium in imperio (i.e., there cannot be state within state). This is the reason due to which Constitution went for appointment of judges by executive, however executive has not been given free hand for sake of independence and professionalism.

Framework For the Appointment of Judges In USA,Australia and India:

In India, time and again the issue of appointments of judges in higher judiciary and transfer of judges from one High Court to another has surfaced due to lack of transparency for the appointment procedure.So, we shall look for the best practice adopted by other civilized developed and developing countries in respect to the judicial appointments.

United States of America:[1]

In United States like the Federal Government in Centre and 50 States there exist two distinct forms of judicial system i.e., Federal Court and State Court. There is variance of hierarchy of Courts in the State level. A typical judicial hierarchy in the states would include the Justice of Peace also known as Magistrate or Squire at the bottom, at the next level would be the Municipal Court, next would be the County Court and at the topmost ladder would be the State Supreme Court.

At the federal level there are two types of courts, constitutional courts, and legislative courts. The constitutional courts are established under Article III of the United States constitution whereas the legislative courts are established under Article I of the constitution. The purpose of legislative courts is to help in the administration of statues. The legislative courts are basically quasi-judicial or non-judicial bodies while the role of constitutional courts is purely of judicial nature.

The constitutional courts comprise of the three main courts, the Supreme Court, United States Court of Appeals, and the United States District Courts. Judges of Constitutional courts hold the offices till their death or until they vacate their office by resignation or is impeached by the House of Representatives and convicted by House of Senate.

The appointments to the Federal Courts are pure political appointments. Under Articles II of US constitution, the President has the power to choose the candidates for the judicial offices; the choice of the President to the judicial office is subject to confirmation of the choice by the Senate. The Senate has the power to veto the choice made by the President. Usually, the Presidents choose Judges who tend to have an ideology like that of his own.

The appointment of judges differs from State to State. At some States judges are appointed by legislature while at other they are appointed by election. In some of the States even the Governor has full discretion in the appointment procedure.

Judicial Appointment: Merit Plan or Missouri Plan:[2]

Merit Plan or Missouri Plan is popularly the process of appointment of judges in the US State of Missouri which depicts the fine balance between the elective process and executive process of appointment of judges. Nonpartisan nominating boards or commissions take the initial step in the nomination process. These boards usually consist of the Chief Justice of the state Supreme Court as Chairman, three lawyers appointed by the state bar representing the states appellate districts and three laymen appointed by the Governor. The members of the board are unsalaried and serve for staggered six-year terms of office, the commission members nominate three candidates for every vacant

[1] Tracy Beattie, A Comparative Study of JudicialAppointments to the High Court of Australia and the United States' Supreme Court," Cross Sections, no XII (2017).

[2]Mary L. Volkcansek, Exporting the Missouri Plan: JudicialAppointment Commissions,74, Missouri lawReview (2009).

judgeship to the governor, who is obliged to choose one of them to serve for one year. After this one-year period the appointed judge faces the electorate, without any political affiliations. The question on the ballot is whether the judge should be retained or not. If he is elected, he can continue in office. The judge then serves a definite term of twelve years.

Judicial Appointments: California Plan:[3]
Under the California Plan Governor of the State have full discretion to choose the nominee for judicial offices which is subject to the approval of 3 member committees comprising of Chief Justice of State Supreme Court, the Presiding officer, and Attorney General of State.

The Governor nominates one individual per vacancy. The nomination is then deliberated by the three-member committee. The nomination once approved by the committee, the nominee is declared to be appointed for a provisional period of one year. At the year's end the appointee stands for popular election on a nonpartisan, non-contested ballot after winning it he is allowed to work for a full term usually of 12 years.

Australia:[4]
The new process for appointment of judicial officers was implemented by Australian Government in early 2008.

The evolution of this new process was aim to ensure:
To maintain the confidence of public by making the procedure of appointment of judges transparent.

Appointments to be based on merits.

The person to be qualified as a judge or magistrate if he has the qualities to be appointed as one.

It is the duty of Attorney General, country's first law officer for recommending judicial appointments to cabinet and the Governor-General. Before the process of appointment Attorney General should consult with the courts and his department. Vacancies may result from a judge retiring or resigning.[5]

Appointment process for Federal Court, Family Court, and Federal Magistrate Court of Australia:
1. In the first step vacancies are identified in the above-mentioned court.
2. In the second step advertisement is published related to vacancies in newspapers and Attorney General's website where the criteria for selection is mentioned.
3. Next through Attorney General's office letter are sent to various heads of the courts, tribunals and various other legal bodies seeking for nomination of names of candidates suitable for the position.
4. The Advisory Panel is created by the Attorney General in front of whom the list of nominated names is place who can interview the candidates suitable for appointment. Then the report is presented by Advisory Panel to Attorney General that would have names of candidates highly suitable for the post. Attorney- General considers report and writes to the Prime Minister seeking his and/or Cabinet approval.[6]
5. The Governor General then makes the appointment of the candidates selected once the approval has been made by the Cabinet on the recommendation of Governor General through the Federal Executive process.

Appointments to the High Courts and Head of Courts:[7]
The appointment procedure for High Courts of Australia is slightly different from other federal courts as it acts as Apex Court of Australia's judicial system. Appointments to the positions of Chief Justice of the Federal Court or Family Court and Chief Federal Magistrate are likely to come from the serving judiciary and would therefore already be known to government.

[3]Reece Trevor, JudicialSelection in California, Stanford Law School (Law and Policy Lab) (2017).
[4]Tracy Beattie, A Comparative Study of JudicialAppointments to the High Court of Australia and the United States' Supreme Court," Cross Sections, no XII (2017).
[5] Lenny Roth, JudicialAppointments, NSW Parliamentary Library, Paper no.3 (2012).
[6] Id.
[7] Id.

Here instead of publishing in newspaper for the appointments, Attorney General consults widely with interested bodies seeking nominations of suitable candidates.

Attorney general also consults by writing to:[8]
1. State Attorneys-General
2. Chief Justice of the High Court
3. Justices of the High Court
4. State and Territory Chief Justices

Then after the seeking of approval from the Cabinet and Prime Minister, Attorney General recommends names to Governor General who makes the appointment.

India:

Supreme Court:

Article 124 to 147 of India Constitution lays down the provision for the Composition, establishment, and jurisdiction of Supreme Court.

The Chief Justice and the judges of Supreme Court are appointed by President. President while appointing Chief Justice should consult with judges of Supreme Court and High Court as he may deems necessary for the purpose. While appointing the other judges of the Supreme Court, President is bound to consult with the Chief Justice of India.

The appointment related to Supreme Court judges are laid under Article 124 (2) which reads as:
"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 High Courts in the States as President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years"9

High Courts:

The appointment of the Chief Justice and other judges of High Courts of various States are done by the President of India. President can make the appointments as he may deems necessary since the Constitution does not fix any maximum number of judges of High Court. Article 216 reads as follows:

"Every High Court shall consist of a Chief Justice and such other judges as President may from time to time deem necessary to appoint"10

Every judge of High Court is appointed by President of India. Chief Justice of High Court is appointed by President after consultation with Chief Justice of India and the Governor of State concerned. In case of appointment of judge of High Court other than Chief Justice even the Chief Justice of High Court is consulted.

The Three Judges Case:

The procedure laid down under the constitutional text for making appointments of Higher Judiciary underwent a change after the three pronouncements of the Supreme Court, which need to be considered for better understanding of the present scenario and its effect on the selection and appointment of judges.

In the case of S.P. Gupta v. Union of India[11](First Judge case) while deciding upon the word "consultation" under Article 124 and 217 the majority holds that the word consultation did not mean 'concurrence', declared that the executive could appoint a judge even if Chief Justice had different views in the matter. In the case while answering the issue of appointment of High Court and Supreme Court Judges, the Court said that it is the President (which in effect and substance means the Central Government) who have final voice in the appointment process. It is clear on plain reading of the two articles that the CJI, Chief Justice of High Court and other Judges of High Court and Supreme Court are merely constitutional functionaries having a consultative role and the power of appointment lies

[8] Id.
[9] INDIAN CONST. art 124, cl. 2.
[10] INDIAN CONST. art. 216.
[11] S.P. Gupta v. Union of India, AIR 1982 SC 149.

solely and exclusively with the Central Government.[12]And while replying to the meaning of the term 'consultation,' the Court said that question is no longer res integra and it stands concluded by the decision of this court in Sankalchand Seth case. In Sankalchand case[13]Krishna Iyer J. said, "consultation is different from consentaneity. They may discuss but may disagree; they may confer but may not concur."[14]

In Second judges case i.e., SCAORA v. Union of India[15]SC overruled first judge case and held that the word consultation would mean concurrence. The reason given by Supreme Court to held this position was that, they were of the view that the judiciary are well qualified than the others to appoint the judges. Supreme Court not only overruled its earlier stance but also devised a specific procedure for appointment of judges in the Supreme Court in the process of protecting "integrity and independence of judiciary." For this reason, the primacy of Chief Justice was held to be essential. It was also held that the recommendation for appointment should be made by Chief Justice in consultation with two of his senior-most colleagues and that normally such recommendation shall be given effect by the executive.

In the third judge case, Re: Presidential Reference[16]the number of judges forming collegium increased from two to four. Further the court iterated, if majority of collegium is against a particular appointment or in maximum two judges of the Collegium is against it and gives good reason to it then Chief Justice of India should not push further for such appointment. For the appointment of judges in High Court, process should be initiated by Chief Justice of High Court who must ascertain his views in consultation with two other senior-most judges of High Court. Before making any recommendation for appointment of High Court judges, the Collegium must consider the opinion of Chief Justice of High Court concerned and such other judges who may be aware and conversant of that High Court. In case of disagreement between the President and Chief Justice of India, the will of latter will prevail.

NJAC Act, 2014:

In 2014 NJAC Act was brought by way of 99th Constitutional Amendment Act to increase transparency and accountability in judicial appointments which was absent in collegium system. But on 16th October 2015 Judiciary took a tough stand and stuck down the 99th Constitutional Amendment Act in the case of Supreme Court Advocates on Record Association v. Union of India[17]also popularly known as 4th Judge Case. The Amendment Act was stuck down by the majority of 4:1 and Justice Chelameshwar giving dissenting opinion in favor of NJAC. This move by Supreme Court was celebrated by many who was in favor of independence of Judiciary and was frowned by those who believed democracy to be the heart and soul of our constitution.

Although this judgment paved the way for the Collegium System upholding its validity in furtherance of Independence of Judiciary which is the basic structure of Constitution, but it raised the few extremely important questions to be considered. One view holds that this verdict upholds an extra constitutional device created by the Supreme Court's own members to meet its own ends rather than accepting a system lawfully enacted by a popular elected Parliament.[18]

The judgment of the 4th judge case may be lauded which upheld the independence of judiciary which is the basic structure of constitution and is a well-established fact that the basic structure of constitution cannot be violated or taken away even by way of amendment.[19] However the doctrine of basic structure itself remains in very flimsy ground. Since the judiciary itself has taken the responsibility of deciding the elements of basic structure[20] hence the unease of Parliament is not unjustified.

[12]1981 (Supp) SCC 87 at 226.
[13]Sankalchand Seth, (1977) 4 SCC 193.
[14]Id.
[15]SC Advocates on Record Association v. Union of India, AIR 1994 SC 268.
[16]In Re: Presidential Reference, AIR 1991 SC 1.
[17]Supreme Court Advocates on Record Association v. Union of India, (2015) 11 Scale 1.
[18]SuhrithParthasarathy, "An Anti-ConstitutionalJudgment," The Hindu, Oct. 30, 2015.
[19]Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[20]Minerva Mills v. Union of India, AIR 1980 SC 1789.

Coming to the judgment, Khehar J. along with Lokur J., Kurian J. and Goel J. has heavily relied on the combined reading of the case of Samsher Singh v. State of Punjab[21]and SankalchandHimatlal Sheth v. Union of India.[22]Kheher J. relied on the former case where Supreme Court held that while making appointment of Judges of Supreme Court and High Court President must compulsorily follow the recommendation of Chief Justice of India. The same position was iterated in Sankalchand case.[23] But this precedence was very conveniently ignored in the First Judge case. But the Supreme Court again restored the primacy of Chief Justice of India in the recent judgment by relying upon the Constituent Assembly Debates and has upheld the interpretation granted to them in 2nd Judge and 3rd Judge Case.

Khehar J. plied heavy reliance on the Memorandum of Procedure on the Appointment of Judges, 1999 which involves a highly interactive role of the Executive during the process of selection of a judge. However, the inadequate participation on the part of the executive has led to this affair becoming a judiciary dominated sphere. But executive is the only one to be blamed for its inaction despite the participative role they have been assigned with.[24]

The Dissenting Opinion:
By giving dissenting opinion Chelameshwar J. states that regarding non-reviewable status of the Second and Third Judges Case, "It appears to have been a joint venture in the subversion of the law laid down by the 2nd Judges case and 3rd Judges Case by both the executive and the judiciary which neither party is willing to acknowledge."[25]

Justice Chelameshwar by going through the case raises two important questions that whether there is difference between basic Structure and Basic Feature of Constitution. And he stated that there is a clear distinction between the two concepts. He states that these two expressions i.e., Basic Structure and Basic Feature constitute two different set of ideas. The basic feature is a component of basic structure. It also follows the idea that a set of articles in the Constitution can be a basic feature of a constitution. Amendment of one or more articles in the constitution constituting a basic feature may not result in the destruction of the basic structure of the Constitution. It all depends upon the context.

Abrogation of a basic feature of constitution will not be considered as void-ab-initio like the basic structure of constitution. He stated that the basic feature of the Constitution is not the primacy for the Chief Justice of India but rather that no Constitutional functionary vests with the absolute power, be it the President of India or Chief Justice of India.

This judgment indicates the growing power of judiciary which is unchecked, unhindered where judiciary has sole power to create laws and strike down laws according to its own discretion. With judiciary usurping role of the sole interpreter of the Constitution, it lacks an effective system of Checks and Balances which poses fundamental questions about the democratic set up and separation of powers which is the beauty of the Constitution. The majority of the judges in this case expressed serious concern over the issue of appointment of judges since they were aware of the defects in the Collegium System and hence, they called for the opinions in improving the Collegium System.

Suggestions:-

1. A judge should be given an opportunity for making an application to get selected or elevated in higher posts by making formal application to the Collegium with full formal and official bio-data and CV.
2. Decision made by collegium must reflect the best method and practice adopted so therefore all the meetings of the Collegium should be video-graphed with good quality audio.
3. In the present Collegium system, there should be members which should also consist of present senior judges of High Court, Attorney General of India, and Advocate General of India (in case of appointment of HC judges) to make collegium system more democratic and transparent.

[21]Samsher Singh v. State of Punjab, AIR 1974 SC 2192.
[22]Sankalchand H. Sheth v. Union of India, AIR 1977 SC 2328.
[23] Id.
[24]Supreme Court Advocates on Record Association v. Union of India, (2015) 11 Scale 1.
[25]Id.

4. The chairman of the collegium shall have the powers to recommend the names for the appointment or transfer purpose but to prevent him for abusing his position all the members of collegium system should scrutinize the candidates proposed individually and their opinions must be placed on record (whether in favor or against).
5. Candidates should be selected depending upon certain verifiable factors such as length of tenure in the present and previous position, rate of case disposal, complaints, etc.
6. The income of judges of Supreme Court, High Court and their family members must be appraised by the Comptroller and Auditor General of India (CAG) to ensure that the true accounts are being rendered and growth in income or asset resources are within bound by the official income. Judges who would raise red flag against CAG, he must be considered ineligible for the appointment in higher post or if the questions of CAG are not satisfactorily answered.
7. Judges who are found to be lobbying with influential persons like engagement with any person of political party who is influential or trade or favors any influential person for preferential treatment then he must be send a warning letter from the Chairman of Collegium System. He should be disqualified for 3 year to apply to collegium if he repeats the offence for the second time and be debarred from applying if he repeats the offence for the third time.
8. Selections should be made by a set of independent verifiable process which will prevent any condition of favoritism or nepotism.
9. All the documents i.e., the suggestions or opinions given by members of Collegium and audio recordings of the Collegium shall be made available to public under Right to Information Act. These documents or information should rather be uploaded in websites of High Courts and Supreme Court which should be available by easy net search.

Conclusion:-

India is the only country in the World where judges are appointed by judges in the name of independence of judiciary and basic structure of Constitution. The framers of the Constitution decided not to give ultimate powers to the judges. However, from the year 1993, the trend changed and judges started appointing judges by way of Collegium system which came into light for its non-transparent process many a times.

After the 4th Judge case the only choice left is the Collegium System for the appointment process. The judges while making appointments should always remember that an independent judiciary enjoying public confidence is the necessity of the 'Rule of Law.' Any conduct on the part of judge, which demonstrates a lack of integrity and dignity, will undermine the trust reposed in the judiciary by the citizens. The conduct of the judge should therefore, always be above reproach.