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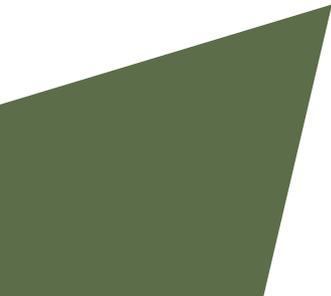
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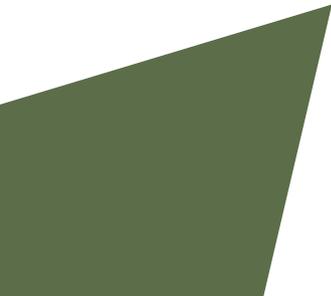
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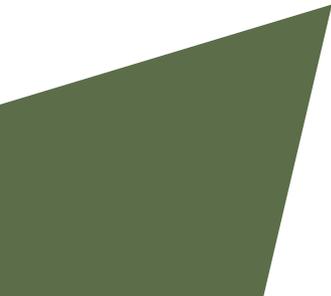
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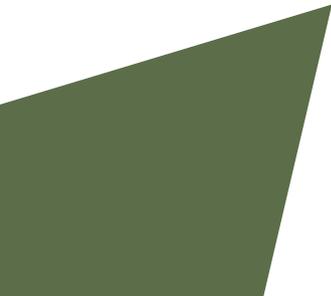
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INDEPENDENT JUDICIAL APPOINTMENTS

Sasikumar S. P.

INTRODUCTION

The Constitution of India provides the provisions for the appointment of judges to the Supreme Court, High Courts and District Judiciary. Article 124 states that the Judges of the Supreme Court shall be appointed by the President of India under his hand and seal after consultation with such judges of the supreme court. It also express that the Chief Justice of India should be consulted for the appointment of judges other than the office of Chief Justice. In the same manner the State Judiciary is governed under Article 217 of the Constitution.

A seven member bench of the Supreme Court held in the case S P Gupta V. Union of India, (AIR 1982 SC 149) that “the executive had the primacy over the appointments of judges to the High Court and Supreme Court and also had absolute power to reject the advice rendered by the Chief Justice of India for those appointments”. It reinstated the plain text of the Constitution which expressed that consultation does not mean concurrence.

The Constitution (99th Amendment) Act, 2014 and The National Judicial Appointments Commission Act,2014 passed by the Lok Sabha on August 13,2014 and passed by the Rajya Sabha on August 14, 2014. The Amendment seek to substitute the present collegium System with an National Judicial Appointments Commission for the appointment of judges to the higher judiciary.

Before 90's, there was a consensus that the word ‘consultation’ under 124(2) and 217(1) does not mean the concurrence. In the case of S P Gupta V. Union of India (1982 AIR SC 149), the Supreme court in 4:3 majority took the view that the opinion of the Chief Justice of India does not have the primacy over the matter of appointments to the higher judiciary and the Central Government has the primacy to appoint judges. However this vie was overruled in the case Supreme Court Advocates-on Record Association vs Union of India, (1993) 4 SCC 441, which held that though the appointment of judges is an executive act, the doctrine of judicial review does not justify the primacy of executive and the primary of the opinion of the Chief Justice of India is essential in view of the constitutional obligation of consultation with the Chief Justice.

This judgment is considered as the text which safeguards the independence of the Judiciary in the appointment of Judges even today. This judgement also states that the views of the other judges of the Supreme Court and High Court is an essential requirement under Article 214(2) and Article 217(1) respectively was sought to be met by the Chief Justice by consulting the two senior most judge of the Supreme Court for the Appointment of judges to the Supreme Court and the Chief

Justice e of the High Court with two senior most judge of that High Court for the Appointment of the Judges to that Court. In case of transfer of Judges of the High Court and Chief Justice of High Courts, the view of the Chief Justice of India was held to be determinative.

After four decade of framing our Constitution, the uninterrupted manner was followed in a decent manner with few controversial seasons. But after the the Second judges' case in 1993, the Supreme Court coined a new system for the appointment of judges namely "Collegium".

In the new system a panel headed by the Chief Justice of India with two other senior most Judges of the Supreme Court (later this number is increased to four by the Third Judge Case) would make recommendations for the appointment of Judges.

HISTORY OF JUDICIAL APPOINTMENTS

Over the years after the enactment of the Constitution, the appointment of judges was as per the constitution. We can trace the history of appointment process in the pre-independent era by looking into the Government of India Act, 1919 and the Government of India Act, 1935. In pre-independent judiciary the Judges of the Court were appointed by the Crown and have a tenure of the pleasure of the Crown.

After the independence there was a maximum debate in the Constituent Assembly regarding the process and procedure for the appointment of judges to judiciary. There were different proposals mooted for the mode of appointment of judges. Viz. i) The President should appoint Judges with the concurrence of the Chief Justice of India; ii) Appointment should be made with the consultation of the council of States; iii) Appointment should be made by the President subject to the conformation of 2/3rd majority votes by the Parliament. But Dr. B.R.Ambedkar, the Chairman of the Drafting Committee, replied to these proposals by saying that "there is no doubt that the Chief Justice is very eminent person, but after all the Chief Justice is a man with all the feelings, all the sentiments and all the prejudice which we as common people have: and that is why, to allow the Chief Justice practically a veto upon the appointments 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".

After enactment of the Constitution of India, the judicial appointments were followed by the well established principle of Constitution. But in the year 1977 then senior most judge H.R.Khanna was suppressed to the post of Chief Justice of India, where his junior judge was made Chief Justice in part of the political-executive act. During the years 1982-99, the issue of methods of appointing

judges of higher judiciary was examined and interpreted by the Supreme Court. As part of the examination the Judiciary has cam across the many events which affects the independence the Judiciary. They are:

- Non- Confirmation of appointments
- Transfers
- Suppression

In the Second Judges case in 1993, the Supreme Court ruled that the power of appointment of judges to the higher judiciary is with the Supreme Court the other branches of state cannot interfere in it. It was hoped by the legal fraternity that the quality of judges and timing of appointment would improve tremendously after this judgement.

In Re Presidential reference made under Article 143 of the Constitution seeking clarification with respect to the meaning ‘Consultation’ as in article 124(2) laid down by the Supreme Court in the Second Judges Case, the Supreme Court gave its advisory opinion on 28th October, 1998 interpreting Article 124 and the judgement of the court, that The Chief Justice of India will form a Collegium of senior most Judges for consultation regarding the appointment of Judges or transfer of Chief Justice or Judges of the High Courts. It is also held that the opinion of the Chief Justice of India would have primacy. This Judgement resulted in a Memorandum of Procedure laying down the detail process and procedure for the appointment of Judges to the High Court and the Supreme Court, which is following still now.

COLLEGIUM

After the third Judges Case the Supreme Court formed a panel named “Collegium” headed by the Chief Justice of India with four other senior most Judges of the Supreme Court to recommend the Government for the appointment, transfer of judges to the High Courts and Supreme Court. The Ministry of Law and Justice in consultation with the Chief Justice of India formulated a Memorandum of Procedure to appoint the judges to the Supreme Court and High Court which is still followed.

As per the Memorandum, The Chief Justice of India in consultaion with four other senior most judges of the Supreme Court would recommend for the appointment of the persons as a Judges of the Supreme Court to the Ministry of Law and Justice which in turn forward that to the Prime Minister who advice the President in the matter of appointment.

For the appointment of judges to the High Court, The Chief Justice of India seek the recommendation from the Chief Justice of the High Court who with the consultation of two senior most judges of the High Court would recommend the name of the persons to the Chief Justice of India.

After the President gave his nod and signed the warrant of Appointment, the order of appointment will be published in the Gazette of India and in case appointment of Judge to the High Court in the Gazette of the State too.

DIFFERENCE OF OPINION BY THE GOVERNMENT

Then if the question be arised what would the consequence if the Central Government has difference of opinion in the appointment. The Supreme Court in its judgment in the Third Judges Case also stated that the Central Government veto power. That is to say that the recommendation made by the Collegium for appointments, transfer of judges may be sent to reconsideration of Chief Justice if the Government is not satisfied with that recommendation. But when the Collegium recommend the same the Centre has the duty to do with the same as recommended. In the recent times the Judges who are not in favour of the Centre Government were not elevated to the Supreme Court even though they have the inter-seniority in the High Courts.

NATIONAL JUDICIAL APPOINTMENTS COMMISSION

Through the 99th Amendment Act, 2014 and National Judicial Appointments Commission Act, 2014 the central government inserted Article 124A in the Constitution of India which provides provision for the Commission. The amendment replaces the present Collegium System to the Appointments Commission head by the Chief Justice of India. The National Judicial Appointments Commission will be consist of six members including the Chief Justice. In the commission there will be interference of an executive that is the Minister in charge of the Ministry of Law and Justice will be a member to the Commission. The Supreme Court of India in its Judgement in the Advocates on-Record Association V. Union of India dated 1st October 2015 declared that the 99th Amendment Act and the National Judicial Appointments Commission Act as unconstitutional and ultra vires to the Constitution.

CONCLUSION

The Separation of power in a democratic state does not mean that there are watertight compartments in which each organ of the state is independent and the other branch cannot interfere in the functioning of the other branch.

If we closely examine the current system of appointment to higher judiciary, it appears that the system evolved by the Supreme Court in the Second Judges Case is totally failed to fulfil its purpose. The performance of the Collegium during the last few years has been hardly creditable, rarely prompt and often surprisingly ignorant. It is replacement of executive favouritism by a judicial alternative, the choice being never based on rational principle or comprehensive investigation or opportunity for the opinion of the Bar or the public.

The collegium is a creature of a judicial precedent. It has no constitutional provision or foundation unlike the National Judicial appointments Commission which has the Constitutional Provision under Article 124A. It amounts to rephrase the existing provisions of articles 124(2) and 217(1) in the guise of independence and excluded interference of the executive from the matter of appointment in the Higher Judiciary which was originally the prerogative of the Head of the Executive.

The framers of the Constitution which includes great scholars such as Dr.B.R. Ambedkar, Alladi Krishnaswamy Iyer, K M Munishi, Gopalswamy Iyengar etc.. had a great vision of the nation and so advocated that the Judiciary must be independent. Dr. B.R.Ambedkar, the Principal and Chief Architect of the Constitution declared in the Constituent Assembly that Article 32 which provides the Judicial review is the Heart and Soul of the Constitution and without it the Constitution is nothing.

We therefore conclude that the the present Collegium System is the vision of the Constitutional framers and the independence of judiciary should be increased at the high level.The Collegium System should be given Constitutional status and the Independence of the Judicial should be declared as the basic structure of the constitution.