MEMORANDUM OF PROCEDURE & INDIAN JUDICIAL APPOINTMENTS: IS THERE INSTITUTIONAL INDEPENDENCE?

Meera Mathew, Symbiosis Law School

ABSTRACT

An institution can work independently when there involves transparency and accountability in working. Judiciary as the flag bearer of justice, upholds constitutional goals and it thus necessitates to be free from external as well as internal influences. The 'separation of power' principle would be effective only if Judiciary is beyond legislative or executive control. More precisely, the constitutional philosophy of an independent judiciary cannot be diluted by acts of oblique interference or unwarranted meddling by Legislature or Executive in the unbiassed administration of justice, directly or indirectly. Simultaneously, if judiciary itself appoints own people, rupturing the until then prevailed Constitutional arrangement, it would then be judicial overreach paving the way for nepotism. Hence the question is: what would then be the ideal appointment process for judiciary? From the Presidential appointment to collegium system and then to National Judicial Appointments Commission (NJAC) and currently with the MoP based appointment, India had experimented with various appointment techniques for Judiciary.This paper dwells into the reasons for such testing with various appointment models l and examines the reasons for striking down of NJAC by the Supreme Court and rationale for the current appointment system by way of Memorandum of Procedure (MoP) by Department of Justice. Further this paper scrutinizes into the MoP procedure and explores if it could achieve the fundamental purpose of introducing transparency in the selection process of judges. Correspondingly, the paper also analyses if with lot many people involved in the selection process "would members reach at an agreement resolving their own differences" in MoP. The research shows that MoP is not being adhered to the timelines laid down by the Judiciary and the Executive. This has resulted in extraordinary delays in filling up of vacancies in both the Supreme Court and the High Courts. The need for constitutional entrenchment, requirement for describing the functions and operations under MoP, the necessity for a merit-based approach that encourages diversity, are some of the recommendations this paper moots for. Afterall, judicial independence cannot be bargained by a system that is opaque in nature or causes the undue delay!

Keywords: Indian judiciary, appointment of judges, Rule of law, Accountability

INTRODUCTION

The method of judicial appointments has always been an intriguing matter of deliberation since it has a direct nexus on the judicial independence and integrity. The mode of appointments needs to be upright and it should be devoid of partiality and arbitrariness. Unless the judges are of great eminence and integrity, the presumption is that they would fail to serve the best interest of the society rationally. Hence, the quality of judges always depend upon the method and standards of judicial appointments and the question is whether the appointments are made due to political pressure or judicial nepotism. This makes the difference in the quality of judges and judicial system by introducing the judges through the best method of judicial appointments. Perusing through the historical records, particularly the Puranas and Vedas, it can be observed that judiciary was a recognized wing during ancient period. All the religions had their own set of laws and in relation to those laws, judges symbolized justice. India with the numerable conquests and rulers, the standards of appointments had been different in each era. Slowly and gradually the system started to develop, thus the set of rules and ideals were made to recognize this work particularly post the British colonialism. The common-wealth model of laws and rules had a great impact upon Indian judicial system that paved the way for instituting courts and other judicial

establishments. The Crown was the Supreme authority to deal with the judicial appointments with the help of Lord Chancellors.

One of positive things about the British regime was that they established the proper judicial system in India and even better than their own judicial system. The only problem was that there was always a preference to British born judges and they treated the Indian judges as mere clerks. During the British regime, Qazis and Pandits were appointed as the assistant to the judges to help them in the personal laws and religious maters. The Supreme Court was also established by the British regime in 1774 for the first time in Calcutta Presidency. The Chief Justice and other three judges were appointed by the Crown in this respective court. Later on the Supreme Court was also established in Madras and Bombay in 1800 and 1823 respectively. The Government of India Act, 1935 also mentioned about the judicial appointments and most of the provisions of the Indian Constitution with regard to the judicial appointments are based on that Act of 1935.

After independence, lot of discussions and debates happened on the method of judicial appointment and the work done by various committees, commissions and Constituent Assembly during the drafting of the Constitution of India were commendable. Each provision had been discussed backed by the intellectual views of the various organs of the government for the establishment of a strong and independent judiciary which is an essential feature of democracy. The more powers were granted to the judicial organ but the framers of the Indian Constitution gave the power of judicial appointment to the executive or the President with the consultation of Chief Justice of India and High Courts for the judicial appointment in the Supreme Court and High Courts as the case may be. The written provisions of the Constitution made the judiciary more powerful and independent and separate organ from the influence of the other organs. In the initial years after the independence, it can be seen that the judiciary was not so active. However, with the passage of time especially after 1970s, judiciary took up its role as the real protector of the people as per the principles envisaged under the Indian Constitution. Though the appointments were primarily in the hands of the executive, judiciary was evidently playing the role better. However, the real blow to the judicial institution and its power happened during the period of emergency. The judicial powers were undermined by the ruling government then with opacity and contentious transfers of judges happened during that period. This questioned the until prevailing appointment process and resulted in judiciary taking over the power of judicial appointments in its own hands besides interpreting the provision of the Constitution in different manner. With the series of judgments over decades, judiciary itself had a monopoly on judicial appointments by establishing the *Collegium system* where Chief Justice would have primacy and Executive has merely a signatory role. However, with the rising corruptions and nepotism in judicial appointments, the Legislature came up with National Judicial Appointments Commission (NJAC) through the Constitution Amendment Act, the National Judicial Appointments Commission Act, 2014. But the same was struck down and held as unconstitutional by 4:1 majority judges of Constitution Bench of Supreme Court on 16 October 2015 via S*CAOR* v *UOI* WP (Civil) 2015 paving the way for Memorandum of Procedure (MoP),the document agreed upon by the government and the judiciary on appointment of judges. It serves as a crucial text not mandated through legislation or text of the Constitution. However, this procedure still turned out to be disappointing for the impending appointments in Judiciary. These series of events illustrate how much tussle Legislature and Judiciary have on judicial appointments issue in India unlike any other countries. It also questions the promptness of appointment and the paper thus critically examine the ongoing online hearings of judiciary in cases due to pandemic surge. For arriving at conclusive suggestions, this research paper critically analyses judicial appointments procedure that had been happening in India by providing a snapshot of the

procedural history of judicial appointments so as to come up with the best practices. Further, the very jurisprudential and constitutional aspects of separation of powers, judicial independence, principles of accountability, transparency in appointments, the judicial over-reach from what the Constitutional debates had focused on until the present scenario will be critically examined. In its conclusion, this paper conveys that judicial independence and judicial accountability are not antithetical to each other rather they are complementary and supplementary to each other and for this reason, effective mechanism needs to be provided.

JUDICIAL APPOINTMENTS AND THE CONSTITUTION

The good governance principle has its foundation from the concept of separation of power. It is the right of every citizen to be tried by independent, unbiased and self-directed judges. The security of the rights of the people for an impartial interpretation of the laws is assured when Judicial appointments and functions are independent in nature. If the judiciary play the pro-active role in a democratic setup, then the other organs will surely think twice while taking any further step to achieve the development agenda. Dealing with the Indian aspect, undoubtedly, to achieve the targets and goals specified in the Preamble of the Indian Constitution, the judiciary should be independent enough to listen the grievances of the people and must be able to provide the proper remedies and other safeguards to the people during the situation socio-economic chaos. Citizens are always under the continuous affliction that, a political power will take away their rights and liberties by their illegal actions. At the time of adoption of the Indian Constitution, it provides the express power in the hands of the Executive *i.e.* President to appoint the judges with the consultation of the Chief Justice of India'. To dwell into this, it is pertinent to analyse the documents, starting from the Constitutional Assembly Debates.

CONSTITUENT ASSEMBLY DEBATES

The assembly more or less wanted to give the power of appointment of judges to the Executive and not to the judicial members because of the democratic structure of the Indian democracy. They were of the view that the representatives are elected by the majority of the people and they must have power to express their will during the appointments and they have an obligation to represent the sovereign will of the people. They hardly though the situation that this particular appointment procedure will take so much concern and attracts the controversies regarding the separation of powers and other things.

The Constituent assembly established a special committee to discuss the powers of the Supreme Court as well as the appointment procedure, seniority norms, age, tenure and salaries etc. B. N. Rau suggested substituting the word "panel" from both the alternative methods with the "council of states" to secure the better independence of judiciary in judicial appointment mechanism for the betterment of an independent and sensible judiciary. On that basis, the assembly suggested a precious proposal to nominate the "distinguished jurists" as the judges of the Supreme Courts by the President of India and executive has full authority to nominate the name of the jurist for the appointment of judge of the Supreme Court and after that the final assent would be made by the executive itself. The assembly after taking the views of every member came up with the following amendments:

- The first proposed amendment was to give more powers to the Chief Justice of India in which it was stated that he will not only be consulted but his decision shall be binding one and consultation amounts to concurrence;
- The second amendment that had been proposed was to follow the procedure of two-third majority of the Parliament after the recommendations made by the Chief Justice of India. The final approval of the Parliament should be favoured;

- The final proposal was appointment of the judges by consulting the Council of States as already discussed above by one of the members of Constituent Assembly.

These were the main proposals of the committee, but Dr. B.R. Ambedkar was not happy with all the proposals and he wanted to opt a midway for the judicial appointments in India and as an intellectual person he found the right path for the judicial appointments. All the amendments were denied by Dr B R Ambedkar. He stated that by giving all the powers to the President or executive without any limitations or reservations would definitely hurt the democratic structure in which we follow the principle of equal participation. It would be treacherous to give unfettered powers to the executive. He further observed that by including the legislative participation in the appointment procedure is also a vague idea and not suitable one. The method of appointments of the judges is not subjected to the discussions of the legislature and legislature cannot intervene in the administrative functions. Dr Ambedkar expressed that by converting the consultation into concurrence is also not a satisfied opinion because after all the Chief Justice is a human being and human error is possible.

APPOINTMENT OF JUDGES OF SUPREME COURT: CONSTITUTIONAL PROVISIONS

Constitution of India provides that every judge of the Supreme Court shall be appointed by the President by consulting the judges of Supreme Court and High Courts and by giving the due regards to the recommendation of the Chief Justice of India after making the consultation. Further, it is stated that every judge of the Supreme Court shall hold the office till the age of 65 years and not more than that. The provision was very clear and the participatory model was there in which both the institutions i.e. executive and judiciary had equal role to play in judicial appointments. The consultation word was included by the framers to give equal respect to both the institutions and has not given the powers in single hands to prevent the abuse of power or misuse of power. But the expression 'deem necessary' is not so perfect one because here, the discretion has been granted to the President in the consultation process. The Chief Justice of India has to discharge its duty with full responsibility and he has to assure the objectivity in the appointment process by giving the recommendation for the best available person for the appointment without any biased opinion. The qualifications are provided in the Constitution very clearly for the appointment of Judges in Supreme Court. The provision of acting Chief Justice is also there where the President has power to appoint any other judge of the Supreme Court for the post of Chief Justice of India if the current Chief Justice is unable to perform the functions or it not available in the Court for some time. Similarly, there are qualifications for the candidates, want to become the judges of High Courts of India in various states.

Ironically, the term "judicial office" is not defined anywhere in the Indian Constitution and proper guidelines are also not there that what is meant by the "judicial office". This expression is vague one, but Supreme Court of India has given the interpretations from time to time. Supreme Court held that the term "judicial office" under Art. 217 (2) (a) should be interpreted by giving the due regard to the provision incorporated under Art. 236 (b). So, the expression "judicial office" is a part of "judicial service" and the office of the district judge or session judge is the part of judicial office which should be free from the interference of the executive. Further, on the practical note, very rare elevations are there so far from the judicial officers.

JUDICIAL APPOINTMENTS AND THE COLLEGIUM

Judicial appointments of higher judiciary took further departure from the very established procedure under the Indian Constitution as framed by the framers of the Indian Constitution.

Fourteenth Law Commission Report

The report was the first report on the reforms of the judicial administration in India in 1958 under the chairmanship of M.C. Setalvad. The commission observed that the judicial appointments took political colour and many appointments of the judges were made on the basis of community, political interference and by taking the regions into consideration by the executive. The sole criteria of merit were totally absent in the appointment procedure which is very much important to secure the judicial independence and to make a responsible and efficient judiciary of the country.

79th Report of Law Commission

The Law Commission of India again presented its opinion with regard to the appointment procedure in India in that report of 1979 under the chairmanship of Justice H.R. Khanna. The report suggested that the Chief Justice should consult at least his three senior judges before making a final recommendation and it would help to encourage the judicial independence and kind of judicial security is there.

80th Report of Law Commission

After 79th report of Law Commission, the commission again came up with new 80th report on the method of appointment of judges, 1979 under the chairmanship of Justice S.N. Shankar and again suggested some new reforms in the judicial appointment procedure. The 80th report of Law Commission expressed the formation of a commission for the appointment of judges having five members i.e. Chief Justice of India, Law Minister of India and three other members those have been served as the chief justices or judges of the Supreme Court of India. The report proposed a new mechanism for the judicial appointments but again turned down by the appropriate authorities because of the inclusion of more judicial members as compare to the executive members. The law minister was the only person, mentioned in the report and four judicial members were introduced. The judiciary during the period of 1977 to 1979 was “committed judiciary” and judges were under the coercion of political parties. They did everything according to the directions of the government and whenever a judge tried to go against the will of the government, was debarred from the future privileges.

121st report of Law Commission

Law Commission again went into the matter in 1987 and gave another recommendation to establish an independent National Judicial Appointment Commission for the judicial appointments in higher judiciary. The Commission recommended that the judges of the higher judiciary should be elected by the Commission consisting of members from the organs of the government. The Commission suggested for the eleven members composed of Chief Justice of India, three senior most judges of the Supreme Court, immediate predecessor to the Chief Justice of India, three senior most Chief Justice of High Courts, Minister of Law and Justice, Attorney General of India and an outstanding law academician.

The composition recommended by the Law Commission is not so bad but inclusion of executive organ in the form of law minister can frustrate the very objective of the appointments but overall the composition is up to the mark.

S.P. Gupta v. Union of India: Critical Analysis

The case was the first in itself having the issue of judicial appointments and judicial transfers of judges. There were regular instances that lead to this case. Firstly, two judges of different High Courts were transferred from one place to another after introducing the new policy of transfer in which it was stated that no judge can serve in the same High Court where he already served as the puisne judge. Secondly, the reshuffling of the judges' at large scale was held in that time and that was the main concern at that time which burnt the whole tragedy of judicial appointments in India. It was held that the new transfer policy was framed and circulated just to undermine the guidelines of the judiciary in the case of *Sankal Chand Sheth.* The issue was mainly concern with the new transfer policy and the transfer policy was challenged by the lawyers on the behalf of the judiciary. Court formed the six questions and out of them the question of primacy of Chief Justice of India over the judicial appointments was the most important out of them and whether 'consultation' amounts to 'concurrence' or not? The issues were well settled and the judgement of this case is one of the lengthiest judgements in India and longest decision written by the Supreme Court of India. The seven judge bench had been formed and the decision held by the Court was five to two. The question regarding the judicial appointments was attached with the primacy of the institution of the executive. On the contrary, the interpretation of the word 'consultation' was on stake. The Court answered that the decision of the executive while making the judicial appointment would be final and cannot be turned down by any other authority. It was held that before making any final consideration on the names of the judges, President has to consult three functionaries:

- The President of India should consult Chief Justice of India before making any final appointment of any judge of the Supreme Court as well as High Court;
- The Chief Justice of the concerned High Court in case of the appointment of judges at the same High Court by the President;
- The Governor of the State should also be consulted by the President before the final decision.

So, the decision was given by the majority but it was also stated that in case of any controversy or dispute regarding the any judicial appointment between the functionaries then the primacy should be given to the opinion of the executive and not to the other functionaries. The observation made by the majority bench faced heavy criticism from the whole legal fraternity from all over the country. The primacy was given to the executive in case of judicial appointments. It clearly indicates that the independence of judiciary was nowhere existed at that time and the executive was so powerful that he could do anything by way of coercion or force. H.M. Seervai rightly pointed out that during that period the judiciary was a kind of "committed judiciary".

Second Judges Case

This case seems to be more appropriate to deal with the issue of judicial appointments and Collegium had been formed by the majority opinion of nine judge bench. The bench had fully justified the whole issues related to the judicial appointments and transfers if the judges in higher judiciary. The issue in the case of *Subhash Sharma* v. *Union of India* actually laid down the foundations of this particular case where the issue was related to the transfer of judges and it was recommended that the issue should be taken up by the larger bench of the Supreme Court and the *First Judges Case* should be reconsidered because

independence of judiciary lacks somewhere in the judicial system of India. The nine judges bench took over the power of judicial appointments in India. The nine judge bench had established a Collegium of two senior most judges along with the Chief Justice of India for the judicial appointments in higher judiciary and primacy had been given to the opinion of the Chief Justice of India in case of consultation.
It was held that 'consultation' amounts to 'concurrence' and the weight age should be given more to the opinion of the Chief Justice of India because at last he is the main who actually knows the judges well and he is equipped with the legal assets and great calibre and he can better choose the persons, having integrity, honesty and legal skills. The government had criticized the interpretation given by the judiciary on the word 'consultation'and Collegium because no such expressions are there in the Indian Constitution. So, whether the evolution of such expressions "Collegium" and "concurrence" is legitimate one or not? It is a problematic issue and no one had focused upon this specific concern. Everybody talked about the strict, grammatical and liberal interpretation but real debate upon the originalism and living Constitution was missing. It is fact that Apex Court had evolved such concept through the activism and by doing the liberal interpretation to the expressions. But we have to analyse the dynamics of law. Whether the interpretation is legitimate or not, can be discussed with the theories of "originalism" and "living Constitution".

Third Judges Case

The issues arisen in the *Second Judges Case* had been sorted out by the nine judge bench decision. During 1993 to 1998, government was not established properly by securing the proper majority. In these years, judiciary had also evolved many cases of corruption and was doing the job pro-actively in saving the interests of the people. In 1998, BJP government had some issues with the judicial appointments because of the recommendations made by the Chief Justice of India. M.M. Punchhi J. (then Chief Justice of India) forwarded names for the judicial appointment in Supreme Court and executive alleged that the Chief Justice did not follow the proper procedure by not consulting the other two senior judges of the collegium and same was denied by the Chief Justice of India. Chief Justice further stated that the executive could not make the proper inquiry of the recommendations. On the issues again raised by the government, Presidential reference had been made to the Supreme Court for the clarification on the judicial appointments and its procedure. The Supreme Court made three issues in the reference i.e. (a) nature of the consultation between the Chief Justice of India and other judges (b) judicial review and (c) seniority norms in the judicial appointments. The nine judge bench was appointed and most senior most judges were appointed in the composition of the bench. Court while dealing with the first issue made the significant change and increased the number of judges in the collegium. Even, the Attorney General of India, representing the government at that time contended that the number of judges should be increased. Chief Justice of India should consult four senior most judges as compare to the two senior most judges because it would act like a check upon the discretionary powers of the Chief Justice of India for betterment of the process of judicial appointments. In this reference, it was also stated that the decision of the Court shall be binding one and nobody can challenge after the due consideration of the reference and Court put the things into the notice of the government that they are not asking for the review and reconsideration but simply asking for the clarification. After put the references on all the issues, decision of the court shall be accepted and binding one. In *Third Judges Case*, the power has been taken away by the judiciary and it was stated that the President can only refuse the recommendation of the Chief Justice of India, if the proper consultation is not there with the other judges. In the case of appointments in Supreme Court, the Collegium should consist of four senior most judges

of the Apex Court along with the Chief Justice of India but in case of High Court, the Collegium should consist of two senior most judges along with the chief Justice of India.

The difference is very disturbed one. More vacancies are there in the High Courts as compare to the Supreme Court. If we go by the data of Law Ministry then, more than 300 vacancies are vacant in the 28 High Courts of India and five vacancies in the Supreme Court. It clearly shows that the Collegium has more responsibility to share while appointing the judges of the High Court's because of the more numbers of judges. So, in that case, the decision made by the nine-judge bench is quite disturbed one. The appointment of High Courts requires more judges in the Collegium as compare to Supreme Court because Collegium has to appoint the number of judges from the district bar or state bar associations. But in case of appointments in Supreme Court, the number of vacancies is not so much. The strength of the Collegium could have been better in the case of High Court appointments. The great talent or competent elevation to the Supreme Court is premised upon the service of the judges of High Courts. The Apex Court also observed that the seniority norms are very important in judicial appointment of Chief Justice of India and more weight age should be given to the seniority norms. This particular weight age had been given by the judicial interpretation to the seniority norms as compare to the appointments on the basis of merit. Kuldip Singh J. made the opinion in *Second Judges Case* to give more weight age to the selection on the basis of merit as compare to the seniority norms. So, the fixation of these seniority norms by the Collegium is problematic and sometimes it restricts the way of a competent and more eligible candidate as compare to the senior judges.

NATIONAL JUDICIAL APPOINTMENTS COMMISSION (NJAC) ACT

The procedure for appointment of judges still not a comprehensive one and needs many new reforms in the current scenario. The various debates and developments have been made by the executive as well as by the judiciary to improve the appointment process. After the *Third Judges Case***,** the process was running very smoothly, and appointments were made by the judiciary itself under the Collegium system. These specific instances degrade the credibility and accountability of the judiciary in the eyes of the government and as well as in the eyes of the public. The different allegations undermine the judicial integrity and ethical standards. Hence, different types of debates were started to improve the appointment procedure in the higher judiciary. Debates had happened in the Parliament regarding the process of judicial appointment and eventually the standing committee after considering the views of the members of Parliament in both the houses prepared a report and submit it to the government of India for the proper consideration. This was 64th report of the Parliament on Judicial Appointment Commission Bill, 2013 leading to NJAC 2014. The standing Committee appreciated the initiative of the government by introducing this bill into the Parliament and stated that it is an important one and will enhance the credibility of the judiciary. The process is participative one and both the organs have equal participation in the process of judicial appointments which will be good enough to remove the opaqueness and non-accountability in the appointment procedure. The committee further observed that it will make the proper equilibrium between the executive and judiciary but committee suggested that the number of eminent persons should be increased to three instead of two persons. Out of these three eminent persons, one person should be from the SC/ST/OBC/Women/Minority and it will give more effectiveness to the procedure and develop the equal participation of civil society as well. Hence, the committee observed that the criterion for the eminent person should also be prescribed in the Act to remove the vagueness of this expression. The National Judicial Appointments Commission Act, 2014 incorporated these suggestions and witnessed the continuous deadlock between the executive and judiciary that, both the new provisions

were challenged in the Supreme Court by the Advocates on Record. The petition was filed on the basis of the inclusion of executive in the new 99thamendment i.e. inclusion of Law Minister and two eminent persons in the composition of National Judicial Appointment Commission despite the same composition was prescribed by the Venkatachaliah J. report during the tenure of BJP government. However, the validity of the Constitutional Amendment was challenged because of the appointment of "eminent persons" by the body composed of Prime Minister of India, Chief Justice of India and Leader of opposition for the governmental or political involution in deciding judges' appointment. It demanded the greater transparency, accountability, representative judiciary and women participation in the higher judiciary. The petition challenged all these provisions and contended that, the inclusion of the members from executive clearly encroach upon the work of the judiciary and undermine the independence of judiciary. The petition was heard by the five judge bench of the Supreme Court headed by the J.S. Khehar J.

The several issues were there regarding the assurance of independency of judges through the NJAC, assurance of transparency and accountability through the amendment. One of the Petitioners contended that the role of the President is not clear. Whether President will act in the individual capacity or on the behalf of the Council of Minister, is a challenging issue. The another problematic situation was inclusion of the "two eminent persons" in the composition of Commission and it was contended that the veto can be conferred upon these two members also which would be very dangerous in the judicial appointment process and role of the executive would arise as compare to judiciary which is not an acceptable view. The concept of "institutional participation" is not where existed in this act and both the institutions are neglected by the authorities in the consultation process and consultation process is mandatory one.

THE CURRENT APPOINTMENT PROCESS AND MEMORANDUM OF PROCEDURE

The Judgment whilst struck down NJAC paved the way for memorandum of procedure [*hereinafter* 'MoP'] for the appointment of judges in higher judiciary. The MoP was adopted to ensure the eligibility criteria for the appointment of judges and other important formalities those are necessary to fulfil the target of judicial appointments. MoP was approved after the *Third Judges Case* for the first time in the history of Indian judicial system to secure the credibility and independence of judiciary. Discussions were thus initiated again to formulate a new MoP after the decision given by the Supreme Court on the constitutionality of the NJAC. After the decision, Supreme Court asked the Union government to come up with the new MoP that specifies the procedure of appointment in higher judiciary. Due to the shortcomings in the Collegium system, the Supreme Court directed the government to formulate the newer one and submit it to the Chief Justice of India as soon as possible to run the process of judicial appointments. It was expected that the new MoP could include the 'merit and integrity' as the eligibility for the judicial appointment in higher judiciary for the first time. However there exists no consensus. Additionally with no time limit being fixed by the Court, the undue delay in finalising the MoP is a cause of concern. For knowing the appointment for High Court judges appointment as per the MoP , see the diagram below.

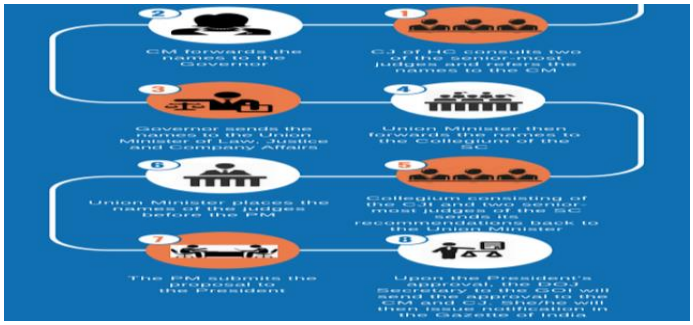

Figure 1
Appointment Procedure Under The Mop

The recommendation process given under the MoP "begins from the chief justice of an individual high court and passes through several checkpoints of state and central executives before it finally lands with the collegium". Despite this time-consuming process, the conclusiveness of decision-making and its application lies with the Centre. The Supreme Court recently remarked on the "inordinate delays in appointment of judges by the executive". With the lack of information in the public domain, it is mysterious whether any progress happens with the vetting of MoP. Neither there exists, any scientific method to assess the procedure nor there exists any time-bound procedure to expedite the process. With such a clandestine procedure, how can independence be assured?

NECESSARY REFORMS WAY FORWARD

The most important reforms suggested by everybody are transparency in the system of judicial appointments. 'Democracy' and 'Secrecy' cannot move parallelly as transparency in democracy does not come without the right to know. Either the information should be given by the no right to information [*hereinafter* 'RTI'] before making the appointments or after making the appointments regarding the adopted process and procedure for the appointments. The information should be shared on a public platform and people must have right to know about the process of appointment and the grounds of the selection. Democracy has many aspects, but transparency and openness are the utmost important. However, the MoP too does not come with any clarity. Neither it serves the purpose for striking down the NJAC nor it demonstrates any effectiveness. Hence what are the fixing attributes to make the system working proficiently, here are the points:

Judicial Accountability

Accountability simply means responsibility towards own decisions and actions and judicial accountability means the responsibility of the judiciary towards their own work. Accountability is sine qua none of democracy and similarly, we can say that judicial accountability is sine qua none of efficient judicial system. The accountability should be there in strict sense. Other two organs are accountable for their very act or omission. Judiciary is also an organ of government and strongest pillar of democracy. So, the accountability of the judicial institutions is important to ensure the independence, transparency and objectivity in the appointment procedure. MoP thus should deal with accountability process.

Judicial Diversity

Diversity in the judiciary is another important factor which needs to be highlighted in the light of Collegium system. The judicial diversity is basically dealt with the under representation of the other groups of the society except men. The women and the persons from SC/ST and OBC category are not properly represented in the higher judiciary in India. The representation of the women is very much low in the higher judiciary and if we analyse it until 2018 then there was just single women judge in the Supreme Court of India out of 28 sitting judges. And presently too, there is only one judge that is Justice Indira Banerjee. There is lack of gender diversity and more preference is given to the male candidates instead of the females. So with the MoP no changes have been initiated so far.

Judicial Neutrality: Competence and Objectivity

There also requires competency and objectivity in the appointment process. The competence should also be promoted and established for the judges to be appointed in the higher judiciary. Many judges including Justice Ruma Pal (former member of the Collegium of Supreme Court) stated that there exists zero objectivity in the judicial appointments. She further added that the independence of the higher judicial institution of the India is compromised with the process of lobbying and sycophancy and it all happens within the institution.

Integrity and Ethical Standards

The debate is also going on the integrity of the judges and many scholars are of the view that ethical standards should be there for better judiciary in India at higher level. The judges should have ethical standards including honesty, diligence, rectitude, impartiality, neutrality, patience, open minded, social sensitivity, mental ability and many more. MoP should ensure that it would appoint the judges those possess these potentials and then the judicial integrity of the judges will automatically enhance. Integrity should be the foremost aspect in deciding the names of the candidates for the appointment in higher judiciary. Judicial conduct in good sense is *sine qua non*e of judicial appointment. A person having any allegations pertaining to judicial integrity should not be appointed as judge, but prior record shows that these matters are disregarded. So, now it is the time to improve the system and to rectify the older slip-ups.

Seniority Norms and Selection on Merits

Another important debate is going regarding the imitation of seniority norms during the judicial appointment. Kuldip Singh J. in the *Second Judges Case* clearly stated that during the appointment of judge in the Supreme Court, seniority norms should not be taken into consideration and the selection should be made on the basis of merit. The Hon'ble judge also mentioned during his tenure that how the seniority of two candidates is made by the Collegium those apply on the same day for the same appointment. This is the most surreptitious part which needs to be reformed and seniority norms should not be followed by the MoP because it will suppress the judicial talent and qualified persons for the worthy appointments.

Conflict of Interest

There shall be objectivity when the candidates apply for the judicial appointments. The MoP should ensure that it fixes some rules and regulations to prevent the conflict of

interest. In the conflict of interest, sometimes the members of the Collegium have diverse opinions on the same name and sometimes, the consideration regarding the inclusion of other judicial members from the Bar and from the High Courts will be taking place. In that case, the Collegium must specify the proper rules and precautionary steps if they want to include any other member outside the purview of Collegium.

Reflective Judiciary

Attention needs to be paid to upsurge judicial representativeness by promoting equal opportunities for women and members of ethnic, religious, and linguistic minorities in access to judicial careers. There should be proper geographical distribution, cultural traditions and values and other ethnic compositions in the judiciary and process of judicial appointments must have these principles. Prof. Henry Abraham in his writings stated that the balancing representation in the judiciary is necessary and religion, geography, race and sex plays an important role in the appointment of judges. MoP must take this into consideration. The reflective judiciary can better understand the problems of the society and overall character of the various societal groups.

JUDICIAL AUDITING

The other important facet of the discussion is regarding the auditing of the judges. Judicial auditing can be done on two issues:

Personal Auditing: In this category, by appointing any judicial panel consisting of lawyers or academicians or retired judges, MoP must audit the personal character of the candidate and proper scrutiny should be there regarding the judicial behaviour or judicial attitude of that person.

Professional Auditing: In this category the audit of the judges should be there based on their work. Some sort of check over the professionalism of the judges should be there and there shall be audit of their judgements for last five years and the sense of responsibility, the approachability and the judgement delivery attitude should be properly scrutinised by the independent panel of the candidates recommended for the judicial appointments in the Supreme Court and High Courts.The impression of the judgements and the ideology behind the given decision should be checked by the panel which is very important these days because judiciary is also a responsible organ of the government.

CONCLUSION

The standstill between the judiciary and executive regarding the judicial appointments is still there and it is hard to remove that deadlock. Both the organs grabbed the powers from time to time and used in their own manners. Executive exercised the powers to give the primacy to the executive organ and judiciary promoted their rights through the judgements and we they all have got is only futile continuous attempts to create the hegemony over the institution of judiciary in a democratic set up. The interference and interruption in the work of another person will always lead to the frustration and disregard. Similarly, obstructions in the way of judicial functions by the executive will degrade the system of judicial appointments one day. No system is perfect, and nobody can be perfect. There are always certain discrepancies existed in every field of study and research as well as in every administration. It does not mean to take away the powers for our own predilections. A sick man needs a medicine to cure its disease. Similarly, if there is something vague or ambiguous in the procedure or any doubt in the system, we can make it efficient by the way of removing grey areas of that

system. This new hope and transmission give the curable treatment to the procedure as well as the system. With the MoP giving a ray of hope, it should come with proper standards and efficacy for ensuring judicial independence and accountability.

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