Comparative Analysis of Procedure of Appointment of Judges in India and USA

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INTRODUCTION

In order for a democracy to survive, it is very essential that its people have faith in the judiciary. After the almighty, judges are trusted and given the power to order taking a human life or putting a person behind bars or punishing him, in order to ensure a just society where justice prevails. Judiciary plays a very crucial role of ‘dispensing justice.’ A decision by a judge not only has implications on lives of the parties to a conflict but also, the entire country is affected. Freedom and lives of millions rest on a ‘judgment’ of a judge therefore; he is not expected to make any ‘mistake’ in his judgment. Even in the Vedic and Ancient Hindu period, the standards of appointment of judges and magistrates were very high, judges were required to take oaths of impartiality and dishonesty was vehemently discouraged. The Brihaspathi Smirit states a judge should decide cases without personal gain or prejudice or impartially and in accordance of the principles of law. Brahmans of high wisdom, learning, righteous and just natures were appointed as judges.

APPOINTMENT OF JUDGES IN INDIA

In India many posts are vacant in the courts due to high standard of intake criteria and tussle over appointment between the Judiciary and the Executive.

“Not only in the name of poor litigants languishing in jail, but in the name of country and progress, I beseech you that it is not sufficient to criticize the judiciary, you cannot shift the entire burden on Judiciary. I feel that if nothing has helped in justice, an emotional appeal might. Thanks to the long time taken by the NJAC case, 434 vacancies are pending in the High Court. Once the litigation was over the concerned collegium cleared 54 pending cases of appointment in the six weeks, however, 50 percent of the proposals were turned down because we didn’t the slightest blemish on the judiciary. But around 169 proposals are pending before the Government to clear it. Now how long will you take? Jails are overflowing. In Allahabad High Court, 10 lakh cases are pending.”- Former CJI TS Thakur.

Provisions regarding appointment of judges of the Supreme Court and the High Court are given under articles 124 (2) and 217 (1) of the Constitution of India, respectively.

Article 124 (2) states that;

a. Every Judge of the Supreme Court shall be appointed by the President;
b. after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary;
c. Provided that in the case of appointment of a Judge other than the chief Justice, the chief Justice of India shall always be consulted.

Article 217 (1) states that;

a. Every Judge of a High Court shall be appointed by the President;
b. after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the chief Justice, the chief Justice of the High court.

Therefore, in appointment of judges, the executive had the last say because the constitutional provisions did not place an obligation on the executive to abide by the recommendation the CJI. The senior most judges were elevated to the next higher posts. But a controversy erupted when suppressing three senior judges, Justice Ajit Nath Ray was appointed as Chief Justice of the Supreme Court in August 1969. This case gave birth to a series of judicial pronouncements and acts of legislature to have an upper hand in the appointment procedure.


In this case the above stated appointment was challenged and the Hon’ble Supreme Court gave verdict in favour of upper hand in appointment given to the executive. The court stated that the constitution has provisions regarding ‘consultation’ with the CJI and judges of the SC and the HC and it does not imply ‘concurrence’ with the recommendation of the CJI. Hence, the executive continued to have final say in the appointment procedure.

3. Supreme Court Advocate-on-Record Association and another v Union of India (1993) - The Second Judges Case

This is the landmark judgment of the Apex Court that gave birth to the system for appointment of judges of the Supreme Court and the High Court, called the Collegium System.’

A nine judge Constitution bench over-ruled the verdict of SP Gupta case and brought the system of Collegium in place, whereby the CJI along with two senior most judges of the court was give
power to recommend the names for the appointment. According to the Supreme Court, this recommendation was to be given effect by the executive. However, the executive was authorized to question the recommendation once and thereafter if the same decision is reached by the collegium again, that was supposed to be declared final.

The court stated that, “The role of CJI is primal in nature because this being a topic within the judicial family, the executive cannot have an equal say in the matter. The word ‘Consultation’ should be understood as ‘concurrence.’


The decision of the constitution bench in the Second Judges Case was upheld by the Supreme Court. The court however increased the number of judges to be consulted by the CJI to four from existing two. The CJI was required to consult each and every one of the four judges and the same could be sent to the executive, only if passed unanimously.

Hence, this collegium system is still in practice.

5. National Judicial Appointment Commission

In December 2014, the 99th Constitutional (Amendment) Act and the National Judicial Appointment Act were passed by the parliament. This piece of legislation sought to substitute NJAC for the collegium system in appointment and transfer of Judges in the higher judiciary.

The act provided for setting up of a constitutional body composed of

1. The Chief Justice of India- Chairman, ex officio
2. Two senior most judges of the Supreme Court, after the CJI- ex officio
3. The union minister of Law and Justice- ex officio
4. Two eminent persons.

   ✓ Out of these two persons one was to be either a person belonging to Schedule Cast or Schedule Tribe or Other Back word Class or be a woman.

   ✓ These two were to be appointed by a committee consisting of;

   a. The Chief Justice of India;
   b. The Prime Minister; and
   c. The Leader of Opposition

6. Challenge to the NJAC Act before the Supreme Court and later developments

The National Judicial Appointment Act and the Constitutional (Amendment) Act, 2014, were challenged in a series of petitions before the Supreme Court.
The Court in a majority of 4:1 rejected the NJAC Act and held it ‘unconstitutional and void.’

“It is difficult to hold that the wisdom of appointment of judges can be shared with the political-executive. In India, the organic development of civil society has yet not evolved. The expectation from the Judiciary to safeguard the rights of the citizens of this country can only be ensured by keeping it absolutely independent from the other organs of governance.” - said the Constitutional Bench of five Judges.

7. Memorandum of Procedure

After almost two months of this judgment in December 2015, the Supreme Court directed the Government to prepare a draft Memorandum of Procedure for appointment and transfer of Judges of the Supreme Court and the High Court. The court issued the following guidelines as to what the Memorandum of Procedure can or may include;

a. Eligibility Criteria;
b. Transparency in the appointment procedure;
c. Secretariat;
d. Complaints; and
e. Miscellaneous

Thereafter the government submitted its draft Memorandum of Procedure but the same was rejected. The differences between the Executive and the Judiciary are prevailing till date and hence they have not agreed upon a Memorandum of Procedure yet. In April 2018, the Government rejected the MOP prepared by the Collegium.

Therefore, the Collegium system governs the appointment and transfer of Judges of Supreme Court and the High Court.

**APPPOINTMENT OF JUDGES IN THE UNITED STATES OF AMERICA**

USA has dual system of Courts namely the State Courts and the Federal Court. The federal Courts consist of the Supreme Court of USA, the Court of Appeal and the District Court.


Section 2, Article II, the United States Constitution states that;

The President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Judges of the Supreme Court and all other Officers of the United States”. Justices of the
Supreme Court, judges of the Circuit Courts of Appeals and the District Courts all are appointed by the President of the United States with the advice and consent of the Senate. These justices and judges are appointed for life, and they can only be removed through impeachment by the Congress.

2. Procedure of Appointment

Whenever any vacancy comes up in the federal courts, the Department of Justice with the White House sends recommendations for nominating persons for the same posts, to the President.

On approval, these recommendations are sent to the Senate. The senate refers these recommendations to the Senate Judicial Committee. If the committee passes nomination with majority, the President gives final approval by signing the nominations.

CONCLUSION

Comparison between procedure of appointment of Judges in India and the USA

1. In United States of America, the President nominates judges and appoints them with the approval of the Senate while in India recommendation is sent to the President by the Collegium of Four senior most judges of the Supreme Court along with the Chief Justice of India.

2. In USA, if the Senate (house of the parliament) passes the candidacy of persons nominated by the President by a majority vote, then only the President can appoint the person so selected while in India the parliament has no such role to play.

3. The Indian system of appointment of Judges has evolved over years from the entire power being vested in the Executive till 1993 to the birth of Collegium system after Second Judges Case to the National Judicial Appointment Act and now constant attempts to reach to a Memorandum of Procedure which accommodates proposals of both; the Judiciary and the Executive. But there is no such tussle or confusion in appointment in USA.