Why changes are needed in system of appointing judges

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Controversies have, of late, erupted over the system of appointing judges. But before going into the problem, let us see what our Constitution says about nomination of judges and how the law has been changed.

According to Article 124 (2), the President nominates the Supreme Court judges after holding consultations with the judges and with the High Courts of their respective States. Article 217 (1) says that the President appoints the High Court judges after

consulting the Chief Justice of India and the Governor and the Chief Justice of the States concerned. Apart from these provisions, the Constitution has no clause whatsoever regarding the appointment of judges. In fact, no larger issues cropped up in the 20 years after the Constitution came into effect.

State intervention

Way back in 1973, the union government skipped the names of three senior judges and instead, appointed Justice A. N. Ray for the post of the Chief Justice of India, who had actually been in the fourth slot on the list. Hence, in a huff the three senior judges resigned.

A concept has since started gaining ground that the State's intervention in the judicial postings must be stalled.

The Supreme Court, for its part, started delivering verdicts, treating this issue as part of public interest litigation. Three landmark judgments were delivered. The Supreme Court gradually increased the judiciary's control through the cases germane to the appointment of judges.

Through the last two cases (1993 and 1998) involving appointment of judges, the judiciary not only retained its powers of appointing judges but also dispensed with the government's role in this regard. The verdicts made it mandatory for the government to accept the names recommended by the judges for judicial appointments and give advice to the President in this regard. For the first time, collegium system was put in place for appointment of judges.

Functioning of collegium

The collegium consists of the Chief Justice of the High Court and two top judges next in order to the CJ when it comes to appointing the HC judges. It is the collegium which alone can recommend a list of names for appointment of the HC judges and the State

government may express its views about it. The Intelligence Bureau will send a report to the union government on the names on the list. The names sent by the HCs will be reviewed by the Supreme Court collegium. The views of the SC judges belonging to the states concerned will also be elicited. In case of objections, the union government will send the names back to the SC collegium for review. If the SC sticks to its guns, insisting on the names recommended by it, there will be no option for the union government but to toe the SC's line.

Similarly, for the appointment of judges in the Supreme Court, the apex court has its own collegium consisting of its top five judges.

It is to be noted that the Constitution has not mentioned anything about the collegium system for appointing judges. It is a power that the apex court took upon itself through its verdicts. It was projected as an arrangement intended to "safeguard the independence of the judiciary."

Change brought in by government

After the BJP formed its government at Centre in 2014, it changed the procedures wrought by the Supreme Court's verdicts and followed in appointing judges. The change was effected through the 99th amendment to the Constitution. Then, the National Judicial Appointments Commission (NJAC) was set up through Article 124 (A) and through a change to the Article 217.

The government said the NJAC is permanent. A chief secretariat for the commission consisting of six members – the CJI, two senior judges of the SC, the union Law Minister and two eminent law experts one of whom will be from Scheduled Castes or Scheduled Tribes, or OBCs or from minorities or a woman. The tenure of the eminent law experts will be three years and a three-member committee consisting of the Prime Minister, the CJI and the Leader of Opposition in Parliament will choose the two eminent law experts. It was also announced that the amendment would come into effect from 13.04.2015.

SC verdict

Subsequently, a case was filed in the Supreme Court, challenging the government's move. Out of the five judges, who heard the case, four delivered a verdict declaring the 99th amendment as null and void and saying that the NJAC would deprive the judiciary of its independence. On the contrary, the dissenting judge Chelameswar, who held the amendment as valid, remarked in his minority judgment that the collegium system was not satisfactory. He pointed out that on several occasions the HC collegium-recommended names had been rejected by the SC and that the reasons for the rejection could not be understood because of the strict confidentiality of the relevant documents. Hence the dignity of the judiciary is undermined and it is not for the good of the people, he commented.

A topmost judge, if found erring and delinquent, can be dislodged from his post only through an impeachment motion passed in Parliament. But, before that, a three-judge committee should investigate the charges levelled against the judge concerned. Unless there is prima facie evidence for the charges, Parliament will not take up the impeachment motion. Moreover, if the motion is to be taken up, Parliament must have the presence of two-thirds of members and a majority of them must vote. Otherwise, the judge concerned cannot be impeached and removed from the post.

In view of the cumbersome procedures of removing an erring judge, it is better to set right the anomalies in posting of judges in the initial phase itself.

Change needed

Now two prominent voices are heard demanding space for the government representative in the committees for appointing judges; they are none other than those of Union Minister of Law

Kiren Rijiju and Vice-President Jagdeep Dhankar. That the BJP is very much behind their war cries is hardly anybody's guess.

A section of people argues that the judiciary will also be saffronised ultimately by formulating new procedures for appointing judges in the wake of these war cries. On the other hand, another section says that the National Judicial Appointments Commission, which was scrapped by the Supreme Court way back in 2015, must be sanitized of its defects pointed out by the apex court and a new version of the commission must be put in place.

All said and done, there cannot be two opinions about the imperative need to avoid an ad-hoc approach to the vital issue of appointment of judges and adopt a permanent approach and also to set right anomalies and errors that have plagued the collegium system for the past 30 years. To be fair, a permanent and valid system must be put in place for appointment of judges, giving no room for political colours and at the same time, error-proof rules and regulations must be drawn up to protect the independence of the judiciary.

Translated by V.Mariappan