Constitutional Law and Public Administration in India

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Week- 08

Lecture-03

Introduction to the Indian Judiciary

The Indian judiciary is an important organ of government. There are three organs of the government, and the judiciary is the critical organ of the government, which is in place to adjudicate disputes, and to tell the government the final opinion of law that is required. Sometimes the judiciary may be required to determine whether the formation of the government is constitutional or not. And hence, the judiciary is the critical component in any democratic system. The Indian judicial system is borrowed from the American judicial system.

The basis of the establishment of the Supreme Court of India comes from the Government of India Act of 1935, which had what is known as the Federal Court of India, then we called it the Supreme Court of India. The Supreme Court of India replaced the British Privy Council. The Privy Council used to hear all appeals coming from all kinds of forums and courts in India and the Privy Council was then the most superior council. However, that all changed when the Supreme Court was inaugurated on January 28, 1950. So, the constitutional articles 124 to 147, which is Part V deals with the organization, independence, jurisdiction, powers, procedures of the Supreme Court. The parliament is authorized to regulate it. If you compare the Indian judiciary to the American judiciary, there are certain interesting features in the American judiciary. In the United States, there is no single system of court. They have what is known as the Federal Judiciary and the State Judiciary. The Federal Judiciary is supposed to be responsible for implementation and adjudication of federal laws.

The State Judiciary is there to implement and adjudicate state laws. This system of courts that is there in the US is called the double system of courts. Whereas in India, there is a hierarchy between the higher courts and the lower courts or also called subordinate courts. We have a single system in which the district court is accountable to the high court and all high courts are accountable to the Supreme Court. And the high courts that are established in different states have the constitutional authority to not only interpret and adjudicate central laws, but also state laws.

So, it is not like these state courts are independent and they are only there to adjudicate state legislations. That is the system existing in the United States. Though India is, a federal country like the United States, our judiciary is a unified judiciary, and we have one system of fundamental law and justice. This one system of fundamental law and justice is also very important because the principles of justice, the principles of legal interpretation are unified in India. They will be applied uniformly across all high courts and all district courts because that is where you have what is known as the law of precedence.

So, the law of precedent or precedence as it is, is a law where the lower courts are bound to follow the judgments and the interpretations of the higher court. So, there is that uniformity, there is that consistency of how law will be interpreted, and any judgment order or direction of the Supreme Court of India is also considered the law of the land and it must be followed by all courts in that unified system. So, it is one judicial system with one judicial institution that is accountable and responsible in India. If you see, the most important process in the Supreme Court of India, which is the apex court of highest court of India is about the composition and its appointments. In 2019, the Union increased the number of Supreme Court judges from 31 to 34.

This is the sanctioned strength of the Supreme Court, it is 34. It was followed by the enactment of what is known as the Supreme Court number of judges amendment Act of 2019. The original strength of the Supreme Court was just 8 with one Chief Justice and seven judges. Today, we have 33 judges and one Chief Justice, and the parliament has been increasing progressively the number of judges from 8 it increased to 10 in 1956 to nearly 13 judges in 1960 to 17 judges in 1977 and to 25 judges in 1986. And finally, the number to 30 was brought about in 2008 and 33 in 2019.

That is the composition that we have in terms of the sanctioned strength of the Supreme Court. Supreme Court is a big body with 34 judges, 33 judges and one Chief Justice. So, it is a big institution. The judges of the Supreme Court are appointed by the President and the Chief Justice is appointed by the President after consultation with the judges of the Supreme Court and the High Court as it deems necessary. And the other judges are appointed by the President after consulting the Chief Justice.

This consultation process is very important and there is a lot of controversy regarding this consultation. This controversy becomes necessary for us to declare and debate because in what is known as the first judges' case that happened in 1982, there were three such cases, first, second and third judge's case. In the first judges' case, the court held that this consultation process on appointment of judges, is not like a consultation just for the namesake and is not a lip service.

It is not just a consultation to send a file and take deemed approval. So, in the first judges' case in 1982, the word consultation itself was to be interpreted by the court and the court

said that consultation is not meaning like concurrence, it only implies exchange of views. So, in 1982, the judiciary allowed the executive some kind of freedom. They said that if consultation is done by mere exchanging of views and names of the judges between the government and the judiciary, between the president and the judiciary, then the consultation process is almost complete. And it does not mean concurrence.

Neither vote nor consent is mandatory. So, it just means exchange of views. This was what was held in the first judges' case in 1982. However, in 1993, when the second judges case came about, the court in 1993 reversed the 1982 judgment in the first judges case stating that the word consultation means concurrence, which means if the judges of the court do not concur, then there is no question of appointment at all. It ruled in 1993, that the advice tended by the Chief Justice of India is binding on the president in the matters of appointment of judges and this advice is mandatory. The court now has come up with what is known as a collegium system. And it is important that if you go to the third judges' case of 1998, the court said the consultation process by the Chief Justice must consult at least four senior most judges of the Supreme Court. And if out of four senior most judges two do not agree or have an adverse opinion, then that decision should not be sent to the president at all. So, the collegium system took upon itself the discretion to decide about appointment of judges.

The executive must follow the advice of the collegiate system. The executive can make some remarks, but once the judiciary sends the file back, it is binding on the executive to issue the appointment order. The collective consultation process in the judiciary itself has been established, that the Chief Justice just cannot decide on his own. He cannot merely seek advice or merely send the file, he must get the concurrence, he must get the consent. And this is compulsory consent.

The third judges' case that was decided in 1998 very clearly held that if the Chief Justice does not follow this process of consultation or concurrence from the other four judges who form the collegium system, then what the Chief Justice has sent to the government is not binding. And there is a norm that ought to be fixed of this consultative process and the judges have a say in the same as a collective body or institution. So, the kind of collegium of judges who want to recommend the names of judges is something that is very clearly laid out in terms of the appointment process. In 2014, the 99th Constitutional Amendment Act was brought into place.

This is a very significant development in the appointment of judges, wherein in 2014 through the 99th Amendment to the Constitution, the National Judicial Appointment Commission Act was attempted to be brought in force. This Act called the National Judicial Appointments Commission Act wanted to replace the collegium system of appointment. It wanted to bring in a body called the NJAC, that is National Judicial Appointment Commission wherein, the executive branch of the government and the judicial branch both

would form a part of this commission and then would make recommendations on appointment of judges. So, instead of the collegium system, which is an exclusive body of judges, the NJAC wanted to balance the equations between the judiciary and the executive and bring in a fair bit of accountability in terms of who shall be recommended for appointment of judges. However, the Supreme Court in 2015 declared the NJAC Act as unconstitutional and void.

And the earlier collegium system was retained by the Supreme Court on the ground that the NJAC may infringe what is known as the most important principle of the judicial system in India called the independence of the judiciary. Judicial independence is a basic structure of the Constitution that cannot be amended or changed and that is something essential, was held in this case. And this verdict was delivered by constitutional bench and very clearly the attempt of the government to rationalize the process of appointment of judges in terms of an executive decision making was held to be unconstitutional and void. And that is how the system has been brought into place.

And it has been a long kind of a process, a process from where the executive at one point of time had the complete say on appointments to a time when the judges wanted to branch out their independence. So, there was a transition phase, then there was a complete independence to judiciary, which completely gave control. And hence, once the judicial appointment of judges, judges appointing themselves came into place, they broadened the democratic process, they helped the collegium system of four judges to advise and with the Chief Justice to form a process to recommend the appointment of judges to a time when the government wanted to come back with the NJAC law. We continue with the process that in India, judicial independence in judges' appointment is continuing to be in place. Constitutionalism clearly means that appointment of judges is completely with the consultation of the judges, it is with the concurrence of judges and without the concurrence of the judges and the collegium, appointment of judges cannot be made.

So, it is not that the president or the government thinks what is deemed necessary, it is what the judges think and deem it as necessary. On the appointment of the Chief of the Supreme Court or as we call the Chief Justice of India, he is given this designation, not that he is the Chief Justice of the Supreme Court of India, he is the Chief Justice. Now, this also has got into some progressive thought and development. In 1950, the practice that grew till around 1973 was very clear that the senior most judge of the Supreme Court, who is yet to retire and who is the senior most in the rank and file of the judges who are already in place will be the Chief Justice of India. The 1970s was a very turbulent time in this country. There were a lot of ups and downs in terms of emergency, so on and so forth. And this also rocked the vote of the Supreme Court. So, in 1973, this convention of making the senior most judge, this Chief Justice of India was deviated when A.N. Ray was appointed, and he was made the Chief Justice and his appointment superseded three other senior judges. Again in 1977, this convention was breached. Here was when A.N. Ray was appointed as the Chief

Justice by superseding the other senior most judges. So, the kind of issues that happened with the judiciary was very important.

However, again in the second judges' case of 1993, this precedent of senior most judges of the Supreme Court alone being appointed to the office of the Chief Justice was reiterated, and re-established. And this norm has not been violated. So, that is how the senior most judge becomes the Chief Justice of India. A person who seeks to be appointed as a judge of the Supreme Court should have the following qualification. First, he ought to be a citizen of India. Second, he should have been a judge of the High Court at least for five years. And he should have been an advocate of the High Court because sometimes from the bar that is a direct elevation and that kind of a practice before the High Court ought to be for not less than 10 years. And he should be a distinguished jurist. These are all things in terms of or in the opinion of the president of India.

So, from the above, it is very clear that the constitution has no age for the appointment of judges, but it has an experience in terms of having practiced law for 10 years in the High Court, being a distinguished jurist, or he has been a judge for five years, or the final thing is obviously he should be the citizen of India. Also, every judge must take an oath or affirmation. And this is done before he enters his office. And he must swear that he will bear true faith and allegiance to the Constitution of India. That he will uphold the sovereignty and integrity of India. He will duly and faithfully to the best of his ability and knowledge and judgment perform his duties of the office without fear or favour, affection, or ill will. And finally, he will uphold the Constitution and the law. So, this is the oath that the judges ought to take before they assume the office. The salaries and the privileges of the Supreme Court are determined from time to time by the parliament. The retired chief justice of India and the judges are entitled to 50% of their last drawn salary as monthly pension as well. They have quite a bit of allowances, rent free accommodation, medical aid, car, and telephone. So, these are certain privileges that are granted. And hence the salary of the judges varies from time to time.

For example, in 2018, the Chief Justice was receiving a salary of 2.8 lakhs per month, and the judges of the Supreme Court were receiving 2.5 lakhs per month. This has of course been amended from time to time. Now, the tenure of judges, unlike in the United States, which is for life, the tenure of judges in India is up till the judge attains the age of 65 years. This is only to the Supreme Court. Whereas in the High Court, it is 62 years. So, a judge can resign from his office by writing to the president. Can he be removed from his office by the president on the recommendation of the parliament? This is also possible. So, the removal of judges has always been a controversial issue. The grounds for removal are only proved misbehavior or incapacity.

And there is something called the Judges Inquiry Act of 1968, which regulates the procedure in terms of removal of judges, which is called the process of impeachment. Now

to impeach a judge, at least 100 members in the Lok Sabha or 50 members in the Rajya Sabha must give a motion. The speaker or the chairman may admit the motion, then he will constitute a three-member committee to investigate the charges. The committee should consist of the Chief Justice or a judge of the Supreme Court, or the Chief Justice of the High Court and a distinguished jurist. If the committee finds that the judge is guilty of misbehavior or is suffering from any kind of incapacity, the house can take that up for consideration.

However, that motion shall be passed by a majority, a special majority in the parliament, and then it will be given to the president and presented to him so that the judge can finally be removed. And the president then passes an order of removal of the judge as an impeachment. The first case of impeachment was of Justice Ramaswamy of the Supreme Court in 1991 till 1993. The Inquiry Committee found him guilty of misbehavior. However, he could not be removed as the impeachment motion was defeated in the Lok Sabha, the Congress Party abstained from voting. So, this has been the history vis-a-vis removal of judges.