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# **JUDICIAL APPOINTMENTS – NAVIGATING JUDICIAL AUTONOMY THROUGH EVALUATING COLLEGIUM SYSTEM AND NJAC**

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## **ABSTRACT**

The glare with which the judges will see will ensure the foundations of democracy and constitutionalism in the country. If the glare get tainted with ideological paintings of the political parties then the constitutional interpretation will also be given meaning within the confines of the same ideology and thus ensuring judicial independence becomes very important. In democratic societies, selecting judges is crucial for ensuring fair justice and safeguarding rights. In India, the collegium system, where senior judges appoint lower-court judges, has been criticized for its closed room secret appointments and lack of accountability. In response, the National Judicial Appointments Commission (NJAC) was proposed to include government and legislative officials in the selection process. However, the Supreme Court struck down the NJAC as unconstitutional, citing threats to judicial independence. The ongoing debate centres around striking a balance between judicial independence and accountability in the judge appointment process. The paper traces the discussions from the constituent assembly debates, to the supreme court judgements. Critically evaluates the NJAC, and proposes ways of improving existing collegium system based on the recommendations of the eminent Jurists.

**Keywords – Judicial Appointments, Collegium System, NJAC, Independence of Judiciary**

## **INTRODUCTION**

The appointment of judges is an important aspect of any democratic society. The role judges play is incidental in upholding the rule of law and constitutionalism. In a country where the executive enjoys an uncontrolled power the result is the arbitrary decisions and fragmentation of the fundamental rights of the individuals. An appropriate system of checks and balances thus ensures that, the government does not go beyond the powers prescribe to it within the constitution and

does negatively infringe on the rights of the people. The constitution has embarked this role on the Judiciary which acts as a WatchGuard against any arbitrary action of the government and thus in order to fulfil this requirement its essential to maintain the independence of judiciary. The independence of judiciary can seriously impacted if the appointment of the Judges are made on the basis of political considerations rather than the merit seen in the individuals. “In order to preserve this sanctity of the judiciary and it people trust in it , the Indian Judiciary and the Exccutive have gone through a tussle, where with the interpretive power vested in the Judiciary the, judiciary passed the the torch of appointing authority to itself by giving the meaning of the word consultation to mean concurrence under Article 124(2) in the second judges case. Which was reaffirmed in third judges case and the collegium system was used as a means to appoint the judges. However this was not taken well by the Exccutive as the collegium system was fraught with lack of transparency and issues of brotherhood and lack of public scrutiny and thus in order to rectify that came up with a 99<sup>th</sup> constitutional Amendment and introduced NJAC a constitutional body responsible for appointing justices. However the ball was again throw in the supreme court and it re- capitulated its power by setting itself back on the throne through Supreme Court Advocates-on-Record Association v. Union of India), which ruled that the NJAC Act was unconstitutional because it compromised the independence of the judiciary and went against the division of powers principle, invalidated the law.”<sup>1</sup> “As new factors emerge, the discussion about how judges are chosen is changing. Those involved want to find a balance between giving judges freedom and making sure they are held accountable. The need for a strong and unbiased way to choose judges is still a top priority for India to maintain the rule of law and ensure the judiciary works well and represents diverse interests. This could involve changing the collegium system or looking into other options.”<sup>2</sup>

## **APPOINTMENT OF JUDGES – TRACING THE CONTEXT THROUGH CONSTITUTION ASSEMBLY DEBATES – DIFFERENCES OF OPINION BETWEEN POKER SAHIB AND BR. AMBEDKAR**

“The controversy and importance surrounding judicial appointments to higher courts stem from the fact that the real political influence on the judiciary primarily occurs there. These courts hold both the power and duty to rule on the constitutionality of government actions and interpret the

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<sup>1</sup> Chandra, Aparna, et al. “From Executive Appointment to the Collegium System: The Impact on Diversity in the Indian Supreme Court.” *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, vol. 51, no. 3, 2018, pp. 273–89.

<sup>2</sup> KUMAR, ALOK PRASANNA. “Absence of Diversity in the Higher Judiciary.” *Economic and Political Weekly*, vol. 51, no. 8, 2016, pp. 10–11.

constitution. Therefore, it is essential that judges in these courts be unbiased, objective, and free from external pressures or biases that could compromise their ability to make impartial decisions. The scheme of appointment of Judges is given under Article 124(2) of the Constitution, the bare perusal of the Article locates the power to appoint the Judges in the hands of the executive as it states that the superior court judges will be appointed by the President on consultation with such Supreme Court Judges and High Court Judges as deem fit by the President and consultation with the chief justice of India as the necessary caveat in appointment of all judges except his appointment. And the Judiciary has been given the consultative role. However, the discussions surrounding the Independence of Judiciary have not just taken its manoeuvred shape through Supreme Courts Judgements but also has its roots in the Constituent assembly debates.”<sup>3</sup>

“The tussle to understand where the real power of appointments should lie whether the executive or the Judiciary can be traced through the discussion between Pocker Sahib and BR. Ambedkar. Pocker Sahib proposed an amendment to enhance the role of the chief justice in appointment decisions, from a mere advisory capacity to one that requires his approval. He argued that cases existed where recommendations made by chief justices of high courts were not forwarded to the Premier but instead were discussed at lower levels. Pocker Sahib sought to ensure that the President not only consulted with the chief justice on appointments but also obtained his express consent. This contention was however rejected by BR. Ambedkar on grounds that to give the power of concurrence to the chief Justice is assuming the fallacy that the Chief Justice cannot make any wrong decision and placing excessive value on his soundness of Judgement and impartiality. The chief justice, being human, has flaws, emotions, and biases like the rest of us. Giving the chief justice the power to veto appointments effectively transfers this authority to the chief justice, which is a problematic idea. We are not willing to give this much power to the President or the current government, so it should not be given to the chief justice either. This view of Ambedkar was also cited by the counsel of Union in the Second Judges Case. However, Ambedkar argued against giving the executive this power, unlike in countries like England and the United States. Ambedkar emphasized the differences in the Indian political context and expressed concern that leaving judicial appointments solely in the President's hands without restrictions could potentially create issues. And therefore a unique scheme was propounded which required the president to consult the CJI and other supreme court and High Court Judges, which

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<sup>3</sup> Dewan, Nakul. “REVISITING THE APPOINTMENT OF JUDGES: WILL THE EXECUTIVE INITIATE A CHANGE?” *Journal of the Indian Law Institute*, vol. 47, no. 2, 2005, pp. 199–223

is reflected under the language of Article 124 (2) of the Indian Constitution.”<sup>4</sup>

## **THE DEBACLE OF POWER THROUGH THE THREE JUDGES CASE – THE CHANGING MEANING OF CONSULTANCY TO CONCURRENCE OF THE CJI IN APPOINTMENT OF JUDGES.**

“In the First Judges case The petitioner argued that the temporary appointments of additional judges violated Article 224 of the Constitution and undermined judicial independence. They requested a declaration that the circular letter regarding these appointments was unconstitutional and void. Additionally, they sought a writ of mandamus compelling the Central Government to convert the temporary positions to permanent judgeships in various High Courts based on the workload and backlogs. It was the first time the constitutional validity of the appointment of Judges by the Central Government was challenged claiming such temporary positions will injure the judicial independence as it will come in the way of the Judges in dispensing its duty. The discussion circled to the issue that what role does the CJI and other Judges have during the appointment of the Judges, to which Justice Bhagwati J clarified that the real power is with the executive and the Justices are mere constitutional functionaries who should be consulted while making the appointments of the Judges and consultation does not means concurrence. As if it would be concurrence then the effect would be give primacy to the views of the CJI , not just over the executive but also other judges and such a scheme was not propounded by the Constitution makers. However, this did not give green flag to the executive to act arbitrarily they have to follow the constitutional requirement of taking the consultation from the CJI and other judges.”<sup>5</sup>

<sup>6</sup>In the second Judges case the question of consultation was again brought up The 9 judges Bench ruled that opinion of the CJI should be given prominence and coined the collegium system for the first time, the composition of such collegium system was still unclear. The Pandian J Judgement reflecting the majorities view was that They centre around the superior judiciary's functioning, with the key aims of Reducing the executive branch's excessive influence in appointing judges and shaping the judiciary's structure. Giving the Chief Justice of India's opinion

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<sup>4</sup> Ibid.

<sup>5</sup> Supra note 1

<sup>6</sup> Sathe, S. P. “Appointment of Judges: The Issues.” *Economic and Political Weekly*, vol. 33, no. 32, 1998, pp. 2155–57.

greater weight, if not supremacy, in all judicial matters. Ensuring the judiciary's independence and integrity are preserved by protecting it from external interference. The majority judgment also pointed out that primacy should be given to the person whose opinion can act as an expert opinion and thus clearly giving primacy to the CJIs opinion on appointments drawing collary to his opinion as that of an experts opinion. This view was criticised on the ground that collegium system was introduced without a constitutional amendment, and some called it judicial overreach a step by the Judiciary to usurp the power of the executive, to bring reign to its own hat. The union in the judgment also contended that was there really a requirement of such a power arrangement as the executive have been appointing the judges with due consultation with only a few exceptional cases where the consultation was given primacy.<sup>7</sup>

“In the "third judges case" (1998), the Supreme Court (SC) defined the duties of the collegium and established rules for its operation. The CJI and the four most senior SC judges would make up the collegium. Critics have claimed that the collegium system operates in secrecy because it does not reveal the reasons for decisions or the selection process. For instance, there have been no recommendations for the SC for the past two years. Reportedly, this is because Justice R.F. Nariman, a collegium member since March 2019, insisted on promoting Senior HC Judge Kureshi J first, potentially due to disagreements among other members. In 2014, Parliament passed the National Judicial Appointments. Under the Act, the collegium was replaced by a commission headed by the Chief Justice of India (CJI) that included the two senior SC judges, the Minister for Law and Justice, and two distinguished individuals (chosen by the CJI, the Prime Minister, and the Leader of the Opposition). Its purpose was to involve non-judicial individuals in the nomination process and to curtail the judiciary's power.

But in 2015, the NJAC was overturned after a Supreme Court petition. The Court found that the NJAC had infringed the judiciary's independence, invoking it once more. India is still the only constitutional democracy in which the judiciary selects its own judges thanks to the revival of the collegium system.”<sup>8</sup>

## **CRITICAL EVALUATION OF THE NJAC- THE POLITICAL THREAD ENVELOPING THE JUDICIAL APPOINTMENTS WILL**

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<sup>7</sup> Ibid.

<sup>8</sup> Dewan, Nakul. “REVISITING THE APPOINTMENT OF JUDGES: WILL THE EXECUTIVE INITIATE A CHANGE?” *Journal of the Indian Law Institute*, vol. 47, no. 2, 2005, pp. 199–223

## **IMPACT THE TRANSPARENCY AND INTEGRITY THROUGH WHICH CONSTITUTION NEEDS TO BE INTERPRETED.**

**Composition** – “The primary concern regarding the National Judicial Appointments Commission (NJAC) is its composition, particularly the selection process. The proposed composition includes the Chief Justice of India (CJI), two senior Supreme Court judges, the Union Law Minister, and two other eminent individuals chosen by a committee consisting of the CJI, the Prime Minister, and the leader of the opposition or the largest opposition party in the Lok Sabha. Critics argue that this structure allows the NJAC to operate in secret and make decisions without providing any reasons or safeguards to ensure that appointments are based on merit rather than personal connections. This raises concerns that nepotism and underhanded dealings could influence the selection process.”<sup>9</sup>

“The purpose was to unhearl the ‘brotherhood’<sup>10</sup> of the collegium system , but since there are three posts that could be unions representatives , the Union law Minister and the two other eminent jurists appointed by the Prime minister , leader of opposition and CJI , the composition still does not ensure qualifications based on merit and factors of political influence can still be very well playing in the appointments of the Judges which could have a hampering effect on the justice delivered by the Judges based on the principles of independence of the Judiciary and upholding constitutionalism.”<sup>11</sup>

In the realm where maximum litigation is against the actions of the government , as India has adopted a welfare model , its very important to have independent judiciary for example what if the factory workers want to raise a writ against the arbitrary action of the administrative authorities , if the judiciary will not be independent there is a chance that they will enhance the agenda of the ruling party , which could be exploitation of workers , more hours of work for developmental purposes or any corrupt agenda and collusion between the judges and executive will falsify the promise of the constitution to its people by failing to uphold the fundamental rights and constitutional guarantees.<sup>12</sup>

## **NEW TECHNIQUES DEVELOPED – EXECUTIVE SITTING ON THE RECOMMENDATIONS HAMPERING THE INDEPENDENCE OF**

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<sup>9</sup> “No Cure for the Malaise: A Law Passed in Haste Will Replace the Flawed Judicial Collegium with yet Another Flawed System.” *Economic and Political Weekly*, vol. 49, no. 34, 2014, pp. 7–7

<sup>10</sup> “Closed Brotherhood.” *Economic and Political Weekly*, vol. 44, no. 12, 2009, pp. 6–6.

<sup>11</sup> JAISING, INDIRA. “National Judicial Appointments Commission: A Critique.” *Economic and Political Weekly*, vol. 49, no. 35, 2014, pp. 16–19

<sup>12</sup> Ibid.

## JUDICIARY

“The Supreme Court has expressed concern over the delay in appointing judges recommended by the Collegium. The Court noted that the government has selectively approved names suggested by the Collegium, even for transferring judges from one court to another. The Bench emphasized that the government should not be worried about where a judge sits, especially after they have already been appointed. The Court warned that they want to avoid a situation where the Supreme Court or Collegium makes a decision that the government may not like.”<sup>13</sup> “A new weaponised method of not allowing certain judges to be transferred to a particular state, can be considered as a distasteful political effort by the executive to control the appointments of the judges. What the executive cannot do directly they are now trying to do indirectly as by sitting on the recommendations the candidates that they think can ideologically conflict with the decisions that they want to be delivered are sat on, so that those recommendations just suffocate and lose their value, this will negatively impact young lawyers who will get demotivated to take up the roles of judges.”<sup>14</sup>

### COLLEGIUM SYSTEM – NOT PANACEA FOR ALL PROBLEMS

Collegium system is often criticised for its clear lack of transparency, Transparency can be increased by making the judicial appointment process open and clear. The collegium system faced criticism for its lack of transparency because members outside the collegium had no idea about how the appointments are being made and their reasons for decisions were not made public. The collegium system needs to go through an overhaul process to make it in tune with the democratic values of the Indian constitution.

- **“A fair and transparent process of appointment of judges** – the procedure of appointment should become fair and transparent at all stages, and the information to some extent should be made public, so that it can go through the rigours of public scrutiny, this measure will ensure that no appointment is made in an arbitrary manner. Like all other institutions of the state the judiciary should also go through the rigours of the test of

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13 <https://www.scobserver.in/Journal/Supreme-Court-Pulls-up-Union-Government-for-No-Response-on-Collegium-Recommendations/>.

14 Roy, Radhika. “Sitting over Judicial Appointments New Weapon in Executive’s Arsenal : Gopal Subramaniam.” Live Law, Live Law, 25 Nov. 2020, [www.livelaw.in/top-stories/sitting-over-judicial-appointments-new-weapon-in-executives-arsenal-gopal-subramaniam-166396](http://www.livelaw.in/top-stories/sitting-over-judicial-appointments-new-weapon-in-executives-arsenal-gopal-subramaniam-166396).

arbitrariness, this will provide for the institutional backing of a system of appointments based in the rule of law.”<sup>15</sup>

- **“Standard competency requirements for appointment should be evolved** – This will ensure transparency as the appointments will then have to stand the test of these standards and cannot be on elusive and arbitrary considerations.”<sup>16</sup>
- **“Diverse appointments should be the top most priority** – The appointments should be made as diverse as possible. Starting from gender diversity, the System should ensure that women judges are appointed in proportionate no.s to their male counter parts. It took 37 years to have the first female supreme court judge, in the discussion made in the parliament, the ministry of Justice recorded that till 2009 out of 649 judges there are only 51 female judges in the higher courts. So only about 8 percent and thus steps need to be taken to ensure diversity is reflected in the appointments which can be achieved through having one female judge in the collegium who will be involved in making decisions regarding appointments, a fast track of promotions of the existing judges of the high courts so that they can be considered for promotion in the Supreme courts. CJI can also set up a gender task force comprising of female judges, eminent female jurists, female academicians to work on improving the appointment of female justices. And law schools should also play a role in encouraging female students to take jobs in the judiciary.”<sup>17</sup>
- **“Developing methods to settle the Conflict of Interest** – A process should be developed to ensure that when the collegium includes a panel of judges from a particular high court considering recommendations of the appointment of judges from that high court, then a situation of conflict could arise, promoting appointments not on merits but on friendships, comradery, and brotherhood, another possible conflicting situation can arise when lawyers who are being considered for promotion had worked in the junior years in the judges chamber.”<sup>18</sup>
- **New criteria for the selection of the judges** - Considering all of these points there should be a new criteria or standard should be evolved for the appointment of judges apart from the ones that have informally being recognized. Apart from the constitutional requirements, judges for the Supreme Court are selected based on additional criteria: Age: Candidates must be at least 55 years old. \* Experience: Candidates should be senior

<sup>15</sup> KUMAR, C. RAJ. “Future of Collegium System: Transforming Judicial Appointments for Transparency.” *Economic and Political Weekly*, vol. 50, no. 48, 2015, pp. 31–34

<sup>16</sup> Ibid.

<sup>17</sup> Valdini, Melody E., and Christopher Shortell. “Women’s Representation in the Highest Court: A Comparative Analysis of the Appointment of Female Justices.” *Political Research Quarterly*, vol. 69, no. 4, 2016, pp. 865–76.

<sup>18</sup> Supra note 11

judges of a high court, or more commonly, Chief Justices of high courts, especially in the past two decades. Diversity: The composition of judges should reflect the geographic and, to some extent, demographic diversity of India. These criteria have developed informally over time and exist alongside the formal requirements outlined in the Constitution.<sup>19</sup>

- **“The Collegium has never considered appointing an eminent jurist , academician as a judge, why has this been under utilised as an option despite being constitutionally recognised option.**
- **Formation of an independent Judicial office Body** – the purpose of which would be to routinely classify the recommendations, various judgements following a proper established protocol on the basis of which scrutiny of recommendations should be done for the final perusal of the collegium , the collegium is overworked and thus cannot dedicate complete time for the this process and this will be an important step in governance reform of the process of appointment of Judges and a way forward towards independence.”<sup>20</sup>

## CONCLUSION AND INTERNATIONAL VIEW

“The recurring theme in the process of assigning judges to the higher courts in most of the countries is not only that the executive is the entity that makes the appointments, but also that it is heavily involved in the selection process. In England, the Lord Chancellor serves in three capacities simultaneously, one of which is cabinet minister in the government; in Canada and New Zealand, the executive is significant, however in New Zealand, the Attorney General is the one who submits the recommendation. This is similarly the case in Australia, where the Attorney General transmits the name following state-level consultation with other AGs. The senate, which serves as the executive branch, has an almost unparalleled role in American politics.”<sup>21</sup> “India is the only country where the appointment of the judges is the prerogative of the judges itself by the collegium. India unlike the other countries had followed a different scheme where the appointment was done with a balance approach by giving the role of consultation under the Article 124(2) to the CJI and other supreme court and high court judges as the president may deem fit.”<sup>22</sup> “However , this approach was challenged and in the second judges case, and the word consultation was interpreted to mean concurrence. Now this change has received both criticism

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<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> KUMAR, C. RAJ, and KHAGESH GAUTAM. “Questions of Constitutionality: The National Judicial Appointments Commission.” *Economic and Political Weekly*, vol. 50, no. 26/27, 2015, pp. 42–46.

and acclaim from the constitutional law experts, jurists and international opinions by the various commentators. Seervai, made a scornful remark that whether Humpty Dumpty can make the word mean so many different things, whether a man has can be interpreted to mean what a man thinks he has, according to him this cannot be done. The usurption of power against the constitutional meaning of consultation was it justified was scorned upon by Seervai.”<sup>23</sup>

“The dissenting judgement of the second judges case, by Ahmadi and Punchi JJ also noted that there had likely only been three Supreme Court nominations made without the chief justice's approval—a figure that was not concerning enough to overrule the opinions of seven judges in the Judges'. The judges also made comparisons with other countries appointment system have found that executive played a major role in appointing of Justices and India has a taken a mid route of allowing consultation with the CJI, so there was involvement of the CJI so this move of reading concurrence into consultation was not warranted.”<sup>24</sup> “The inconsistency in the NCRWC report raises important questions regarding whether the chief justice's concurrence could have been achieved through a judicial process of interpretation or if a constitutional amendment was necessary. The NCRWC report highlights the 67th Constitutional Amendment Bill's proposed amendment to replace the word "consultation" in the Constitution with the word "concurrence," but it also acknowledges that the Second Judges' ruling fulfilled the original intent of the Amendment. It is obvious that interpreting consultation to mean concurrence seems contradictory if at one point it was thought that a constitutional amendment was required to replace the phrase consultation with the word concurrence.”<sup>25</sup>

However, it has also acquired praises despite the arguments by the Critics that the majority decision broadened the meaning of "consultation." “Yet, given past attempts by Indian executives to influence the judiciary and Pakistan's successful efforts to control it, as well as the challenges faced by U.S. Supreme Court judges appointed by the President with Congressional approval, the Indian Supreme Court's majority decision in the Advocates on Record case represents a necessary step to ensure judicial independence and merit-based appointments, setting a positive precedent.”<sup>26</sup>

“However, in India we have a collegium system of appointment of Justices, still has not solved all the problems and have plagued the judicial appointment system with problems of transparency

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<sup>23</sup> H. M. Seervai, III Constitutional Law of India, 4th ed.

<sup>24</sup> Court vs Government: Independence of the Judiciary Is Not the Issue in the Current Stand-off; It Is Control over Appointments.” *Economic and Political Weekly*, vol. 50, no. 43, 2015, pp. 8–8.

<sup>25</sup> Dewan, Nakul. “REVISITING THE APPOINTMENT OF JUDGES: WILL THE EXECUTIVE INITIATE A CHANGE?” *Journal of the Indian Law Institute*, vol. 47, no. 2, 2005, pp. 199–223.

<sup>26</sup> Lord Templeman, "The Supreme Court and the Constitution", Oxford Handbook, 2015

and nepotism and brotherhood which needs to be reformed and thus governance reform in the collegium system is required, and the selection process to some extent should stand the test of public scrutiny.”<sup>27</sup>



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<sup>27</sup> “For Justice Concerns Us All: We Need a Public Debate on Guidelines for Appointing Senior Members of the Judiciary.” *Economic and Political Weekly*, vol. 48, no. 32, 2013, pp. 9–9.