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JUDICIAL APPOINTMENTS IN INDIA, UNITED KINGDOM AND UNITED STATES OF AMERICA: A COMPARATIVE STUDY WITH REFERENCE TO CENTRE AND COLLEGIUM¹

AUTHORED BY - JYOTSANA AGRAWAL

Abstract

The independence, impartiality and integrity of judges are highly important to the maintenance of public confidence in the system of government². The process of decolonization in India, which culminated in the 'transfer of power' in 1947, did not entail a radical rupture with the colonial past. Rather, independent India inherited and adapted many of the institutions, practices and values that had been shaped by British rule. This paper examines the case of the judiciary, which was modeled on the British and American systems, and which retained some of the powers and functions of its predecessors. The paper explores the implications of this continuity for the development of democracy and the rule of law in India.

It analyses the trend followed in India for the appointment process by looking into the various modes adopted by British rule, which was struck down by the Supreme Court in 2015. An era of discussions has laid down the lane of judicial world to unlock the code of appointments and make it systematic, but every now and then these implementations prove that politics is involved. The legal frontiers have made the system a web. We will try to provide the recommendations to improve the appointment process to uphold transparency and accountability.

Keywords: Judicial Appointments, Asia- Pacific region. USA, India, China, politics, NJAC, transparency, accountability

¹ By- Jyotsana Agrawal, 5th year, BA LLB, Presidency University, Bangalore, Karnataka

² Marilyn Warren, 'Unelected does not equate with Undemocratic: Parliamentary Sovereignty and the Role of the Judiciary' (2008) 13(2) *Deakin Law Review* 1,13

Literature review:

1. *Chapter 1, Asia- Pacific Judiciaries: Themes and Contemporary Perspectives, H.P. Lee and Marilyn Pittard, 3.*

The book titled “Asia-Pacific Judiciaries: Independence, Impartiality and Integrity” has devolved about an important aspect of judiciary, i.e. public trust. It does mean judges being famous in public and then gaining the public trust. But basically doing what is called impartial application of law. Chapter 1 of the book, reflects the ideas of judicial system in various Asia- Pacific region and put forth various questions on each aspects. The author, is of the opinion that in order to study the system of any country’s judiciary, the focus has to be upon broad themes initially and then studying each theme individually and applying it on country- country basis will give a detailed understanding of the said country’s system. The author mainly focuses on independence and impartiality and that how it is affected and threatened in various situations.

The authors have failed to be static on the aspect of the title they have chosen. The title reflects the idea that the discussion would be on independence of judiciary. But then further in the chapter, they have discussed about free speech and judiciary. Hence we will discuss about the independence of judiciary in the paper and reflects its difference with other nations.

2. JAISING, INDIRA. “National Judicial Appointments Commission: A Critique.” *Economic and Political Weekly*, vol. 49, no. 35, 2014, pp. 16–19. *JSTOR*, <http://www.jstor.org/stable/24480485>. Accessed 18 Sept. 2023.

Indian Politics and Society Since Independence: Events, Processes and Ideology

By Bidyut Chakrabarty

With seven chapters, the book is thematically structured and empirically elaborated, which discusses The text is about the history and challenges of democracy in India, from its independence and partition to its present-day diversity and coalition politics. It explores how India has managed to sustain and strengthen its democratic system despite its colonial legacy, communal conflicts, regional variations and ideological differences. It also analyzes the role of various political actors and institutions in shaping India’s democracy.

The article fails to The comparison and contrast of the different models and methods of judicial appointments in India and other democratic countries, and their implications for the independence,

accountability and diversity of the judiciary. The challenges and opportunities of coalition politics in India, in terms of managing the conflicts and compromises among various regional, ideological and interest-based parties, and their impact on the policy-making and governance. This book presents a historical analysis of the interplay between colonialism, nationalism and democratization in India, from the colonial period to the post-independence era. It argues that India's parliamentary democracy, based on the Westminster model, was not a mere copy, but a context-sensitive adaptation that reflected the specific challenges and opportunities of a newly decolonized nation. The book illustrates this argument by examining the constitution-making process of the Constituent Assembly, which aimed to embody the nationalist and democratic ideals of the Indian people.

The book also discusses the reasons why federalism was not considered a suitable form of governance for India, given the perceived threats to its national unity and security. The book suggests that the constitution-makers opted for a strong central government, as they believed that the constitutional structure of a country should serve 'the normative functional requirements of governance'.

3. Weiden, David L. "Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia." *Political Research Quarterly*,³

This article presents a novel theory that challenges the prevailing view and claims that informal norms are more influential than formal mechanisms in cross-national comparison. While it is widely accepted that judicial appointment systems have a significant impact on state court judges in America, this article contends that in a cross-national perspective, the "selection culture" inherent in a modern democratic political system is more important than the formal selection methods. The selection culture refers to the extent to which the appointing executive relies on ideological and partisan criteria or on other factors, such as qualifications and merit, to select judges. In other words, a country's judiciary is highly politicized if the judges are chosen by the executive based on partisan considerations, while another country's judiciary is less politicized if the judges are selected based on nonpartisan factors.

³ Weiden, David L. "Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia." *Political Research Quarterly*, vol. 64, no. 2, 2011, pp. 335-47. JSTOR, <http://www.jstor.org/stable/23056395>. Accessed 13 Nov. 2023.

The logical implication of this argument is that judges in a highly politicized judiciary will tend to decide cases based on their ideology or attitudes, and judges in a less politicized judiciary will be less likely to do so. Therefore, the main proposition of the judicial politicization theory is that judges on a highly politicized high court in an established democracy are more likely to decide cases according to ideological/attitudinal factors, and will consequently be more likely to engage in judicial activism and invalidate acts of the legislature when the challenged law is contrary to the judge's ideology.

Hypothesis:

- 1) Does the concept of judicial accountability incompatible with the notion of judicial independence?
- 2) Are the judicial appointments dependent on the legislative framework?

Reasons for comparative study

1. To understand the different models of judicial appointments in different political and legal systems, and how they affect the independence, accountability and quality of the judiciary.
2. To evaluate the strengths and weaknesses of the collegium system in India, which is unique among the three countries, and compare it.
3. To explore the challenges and opportunities for judicial reforms in India, practices and experiences of UK and USA

Scope of the Research:

The research paper aims to conduct a comparative study of judicial appointments in India, UK, and USA, with reference to the center and collegium system.

Limitation of the Research:

The research paper is limited by the availability and accessibility of data and information on judicial appointments in the three countries, which may vary in terms of quality, reliability, and transparency.

The research paper is also limited by the time and resources available for conducting a comprehensive and in-depth analysis of judicial appointments in the three countries, which may require more extensive and diverse methods and sources.

The research paper is further limited by the scope and complexity of the topic, which may not cover all aspects and dimensions of judicial appointments in the three countries, such as historical, cultural, or institutional factors.

The research paper is therefore not intended to provide a definitive or conclusive answer to the question of judicial appointments in India, UK, and USA, but rather to offer a comparative perspective and insight into the issue.

Introduction

Three major ideological influences seem to have been critical in Indian politics: colonialism, nationalism and democracy. Indian politics has been shaped by three major ideological influences: colonialism, nationalism and democracy. These three ideologies have defined 'the political' in India both during and after the colonial period. However, two points should be noted. First, colonialism and nationalism were not simply opposed to each other, but rather colonialism created the conditions for the emergence of nationalism as a powerful ideology to express the voices of the colonized. Second, colonialism also initiated a gradual process of democratization by gradually involving people who were sympathetic to the foreign administration. The colonial state had allowed some forms of representation to carefully selected Indian interests. The 1935 Government of India Act, which was inspired by the British North America Act, 1867, that established the Canadian federation, was a significant constitutional intervention that the colonial rulers made to accommodate the nationalist fervour within, of course, the colonial administrative framework. This also shows the attempts to legitimize the growing democratic aspirations of the ruled in India through a constitutional intervention. Interestingly, the 1935 Act remained the strongest influence during the making of the 1950 Constitution for free India.

The power of judicial review, which is the authority of the courts to interpret the constitution and declare any law or executive action as unconstitutional, is influenced by the American model of constitutional supremacy and separation of powers

The system of judicial appointments in India affects the independence, accountability, and quality of the judiciary. The current system, called the collegium system, consists of a group of senior judges of the Supreme Court and the High Courts recommending candidates for judicial appointments to the President, who has a limited role in accepting or rejecting them. This system has faced criticism for being secretive, unrepresentative, and susceptible to nepotism and favoritism. However, it has also been praised for protecting the autonomy and integrity of the judiciary from political interference and pressure.

The merits and demerits of the collegium system can be evaluated based on four criteria: transparency, representation, diversity, and efficiency. Transparency denotes the degree of openness and accountability in the selection process, such as the criteria, methods, and outcomes of the recommendations. Representation denotes the extent to which the judicial appointments reflect the diversity and interests of the society, such as the regional, gender, caste, and religious backgrounds of the judges. Diversity denotes the variety of perspectives and experiences that the judges bring to the bench, such as their legal education, professional expertise, and social awareness. Efficiency denotes the speed and quality of the judicial appointments, such as the timeliness, accuracy, and fairness of the recommendations.

The collegium system has been found to be deficient in transparency, as there is no clear or consistent basis for the selection of candidates, no formal or public consultation with stakeholders, and no mechanism for review or appeal of the recommendations. The system has also been found to be unrepresentative, as the judges tend to nominate candidates from their own regions, communities, and networks, resulting in a homogeneous and elitist judiciary that does not reflect the diversity and aspirations of the society. The system has also been found to be inefficient, as the collegium often delays or fails to fill the vacancies in the courts, leading to a huge backlog of cases and a loss of public confidence in the judiciary. The system has some advantage in terms of diversity, as the judges may have a wider and deeper understanding of the legal issues and challenges facing the country, and may be more independent and impartial in their judgments.

The alternative models of judicial appointments that can balance the interests and roles of the executive, the legislature, and the judiciary are based on the principle of separation of powers and checks and balances. These models include the parliamentary model, the presidential model,

the commission model, and the hybrid model. The parliamentary model involves the executive and the legislature having a greater say in the selection of judges, such as by proposing, vetting, or confirming the candidates. The presidential model involves the executive having the sole authority to appoint judges, subject to the approval or rejection of the legislature. The commission model involves an independent and diverse body of experts and representatives from various sectors and institutions recommending candidates to the executive, who has a limited power to accept or reject them. The hybrid model involves a combination of these elements, such as by having a commission propose candidates to the executive, who then nominates them to the legislature for confirmation.

The potential and desirable reforms that can enhance the judicial appointments system in India are based on the principle of judicial independence and accountability. These reforms include the following:

- Establishing a transparent and objective criteria for the selection of candidates, such as their qualifications, experience, integrity, and suitability for the judicial office.
- Creating a judicial appointments commission that is independent, diverse, and representative of the society, such as by including members from the judiciary, the executive, the legislature, the bar, the academia, and the civil society.
- Providing a formal and public consultation process with stakeholders, such as by inviting nominations, applications, comments, and feedback from the public and the relevant institutions and bodies.
- Instituting a mechanism for review and appeal of the recommendations, such as by allowing the executive, the legislature, or the candidates to challenge or question the decisions of the commission or the collegium.
- Reducing the delays and vacancies in the judicial appointments, such as by setting a time limit for the completion of the selection process and filling the existing and anticipated vacancies in the courts.

Constitutional aspect of appointments in UK, USA and India:

UNITED KINGDOM:

The UK model of appointments was the main source of inspiration for the Indian model. In the

UK, the Queen appoints judges on the advice of the Prime Minister, who receives recommendations from an independent Judicial Appointments Commission (JAC). The JAC is a statutory body established by the Constitutional Reform Act 2005, which selects candidates for judicial office based on merit, fairness and diversity. The JAC consists of 15 members, including judges, lawyers and lay members. The JAC is responsible for appointing judges to the High Court, the Court of Appeal, the Supreme Court and other tribunals in England and Wales. The JAC also assists the Lord Chancellor in appointing judges to the lower courts, such as the Crown Court and the County Court. The JAC does not have any role in appointing judges to the courts in Scotland and Northern Ireland, which have their own separate systems of judicial appointments.

United States of America: The judicial appointments in the USA are made by the President, with the advice and consent of the Senate. The President nominates candidates for federal judgeships, including the Supreme Court, the Courts of Appeals, the District Courts and other specialized courts. The Senate Judiciary Committee conducts hearings on the nominees and votes on whether to report them favorably to the full Senate. The Senate then debates and votes on the confirmation of the nominees. The President also appoints judges to the territorial courts and the Court of Appeals for the Armed Forces, but these appointments do not require Senate confirmation. The President does not have any role in appointing judges to the state courts, which have their own systems of judicial selection, varying from state to state.

According to *Article II, Section 2, Clause 2*⁴ of the United States Constitution, the Appointments Clause grants the President of the United States the authority to propose and, with the approval (advice and consent) of the United States Senate, to appoint public officials, including justices of the United States Supreme Court. The Constitution does not specify any criteria for serving as a justice, therefore the president has the discretion to nominate any person to the Court. The nomination and confirmation process consists of several stages, such as the pre-hearing investigation, public hearings, committee decision, and Senate vote. The process usually lasts for several months, but it can differ depending on the situation. The process for replacing a

⁴ He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Supreme Court justice receives significant public interest and is closely examined.

This article argues that in cross-national perspective, formal selection mechanisms are less important than the “selection culture” inherent in a modern democratic political system. The selection culture refers to the extent to which the appointing executive relies on ideological and partisan factors or on other factors, such as qualifications and merit, to choose judges. In other words, a country’s judiciary is highly politicized if the judges are chosen by the executive based on partisan considerations, while another country’s judiciary is less politicized if the judges are selected based on nonpartisan factors. The logical implication of this argument is that judges in a highly politicized judiciary will tend to decide cases based on their ideology or attitudes, and judges in a less politicized judiciary will be less likely to do so.

India:

The constitutional provision of judicial appointment in India is based on Articles 124⁵ and 217 of the Constitution, which state that the judges of the Supreme Court and the High Courts are appointed by the President in consultation with the judiciary. However, the Supreme Court has interpreted the word "consultation" to mean that the judiciary has the primacy in the appointment process, through a system of collegiums. The collegium system is a method of collective decision-making by the senior-most judges of the Supreme Court and the High Courts, who recommend the names of suitable candidates to the President for appointment⁶. The collegium system has been criticized for being opaque, arbitrary, and nepotistic, and several attempts have been made to reform it. One such attempt was the National Judicial Appointments Commission (NJAC), which was a constitutional body proposed to replace the collegium system with a more transparent and accountable mechanism involving the executive, the judiciary, and the civil society. However, the NJAC was struck down by the Supreme Court as unconstitutional, on the ground that it violated the independence of the judiciary. The President is bound by the recommendations of the Collegium, unless there are valid reasons for returning them for reconsideration. The President also appoints the Chief Justice of India, based on the principle of seniority. The President does not have any role in appointing judges to the subordinate courts, which are under the control of the respective High Courts.

⁵ Article 124:

⁶ Judicial Appointments in India - Study IQ Education. <https://www.studyiq.com/articles/judicial - appointments-in-india/>.

Provisions taken from UK and USA model by India:

India has borrowed some features of the UK and USA models of judicial appointments, while also developing some unique elements of its own. Some of the provisions taken from the UK model are:

- The appointment of judges by the President, who acts on the advice of the Prime Minister or the Cabinet, similar to the role of the Queen in the UK. However, unlike the UK, where the Prime Minister receives recommendations from an independent JAC, the President of India receives recommendations from the Collegium, which is a body of judges.
- The appointment of judges based on merit, fairness and diversity, as stated in the Constitution of India and the judgments of the Supreme Court. However, unlike the UK, where the JAC has a transparent and objective process of selecting candidates, the Collegium system in India has been criticized for being opaque and subjective.
- The appointment of judges by the President, with the advice and consent of the Parliament, similar to the role of the Senate in the USA. However, unlike the USA, where the Senate has a significant role in scrutinizing and confirming the nominees, the Parliament of India has a limited role in the judicial appointments process. The Parliament can only impeach a judge for proven misbehavior or incapacity, but cannot reject a nominee on any other grounds.
- The appointment of judges for life, subject to retirement age, as provided in the Constitution of India and the judgments of the Supreme Court. However, unlike the USA, where the judges of the Supreme Court and the Courts of Appeals have life tenure, the judges of the Supreme Court and the High Courts in India have a fixed retirement age of 65 and 62 years respectively.

How far are we following the UK model?

India is following the UK model of judicial appointments to some extent, but with significant differences and deviations. Some of the similarities and differences are:

- Both India and the UK have a system of appointment of judges by the head of the state, on the advice of the head of the government, who receives recommendations from a body of experts. However, while the UK has an independent and statutory JAC, which consists of judges, lawyers and lay members, India has a non-statutory and self-

regulating Collegium, which consists of only judges.

- Both India and the UK have a system of appointment of judges based on merit, fairness and diversity, as per the constitutional and legal principles. However, while the UK has a clear and objective criteria and process of selecting candidates, which involves public advertisement, application, shortlisting, interview and consultation, India has a vague and subjective criteria and process of selecting candidates, which involves no public disclosure, nomination, consultation and recommendation.

Provisions taken from USA model by India:

India has adopted some features of the USA model of judicial appointments, but with significant modifications and adaptations. Some of the provisions taken from the USA model are:

- The appointment of judges by the President, with the advice and consent of the Parliament, similar to the role of the Senate in the USA. However, unlike the USA, where the Senate has a substantial role in scrutinizing and confirming the nominees, the Parliament of India has a marginal role in the judicial appointments process. The Parliament can only impeach a judge for proven misbehavior or incapacity, but cannot reject a nominee on any other grounds.
- The appointment of judges for life, subject to retirement age, as provided in the Constitution of India and the judgments of the Supreme Court. However, unlike the USA, where the judges of the Supreme Court and the Courts of Appeals have life tenure, the judges of the Supreme Court and the High Courts in India have a fixed retirement age of 65 and 62 years respectively.

Applicability in today's era:

The current system of judicial appointments in India is not very applicable or suitable in today's era, as it suffers from various problems and challenges, such as:

- **Lack of transparency and accountability:**

The Collegium system is shrouded in secrecy and opacity, as there is no public disclosure of the names, criteria, process and reasons for the selection of candidates. There is also no mechanism for public feedback, complaints or review of the decisions of the Collegium. The Collegium is not accountable to anyone, except itself, for its actions and outcomes.

- **Delay and deadlock:**

The Collegium system is prone to delay and deadlock, as there is no time limit or deadline for the Collegium to make recommendations, or for the President to accept or return them. There is also no provision for resolving any disagreement or conflict between the Collegium and the President, or within the Collegium itself. This leads to a huge backlog and vacancy of judicial posts, affecting the functioning and efficiency of the judiciary.

- **Nepotism and favoritism:**

The Collegium system is susceptible to nepotism and favoritism, as there is no objective or uniform criteria for the selection of candidates, and the Collegium members may have personal or professional biases or preferences. There have been allegations and instances of the Collegium recommending relatives, friends or associates of the judges, or overlooking merit and seniority of other candidates.

Whether there is need of reform in these system or not?

There is an urgent need of reform in the system of judicial appointments in India, as the current system is not consistent with the constitutional values, democratic principles and contemporary realities. Some of the possible reforms are:

- Establishing a statutory and independent Judicial Appointments Commission (JAC), which would consist of judges, lawyers, eminent persons and representatives of the executive and the legislature. The JAC would be responsible for selecting and recommending candidates for judicial appointments, based on merit, fairness and diversity. The JAC would also have a transparent and objective process of selection, which would involve public advertisement, application, shortlisting, interview and consultation. The JAC would also have a mechanism for public feedback, complaints and review of its decisions.
- Setting a time limit or deadline for the JAC to make recommendations, and for the President to accept or return them. There should also be a provision for resolving any disagreement or conflict between the JAC and the President, or within the JAC itself, through dialogue, mediation or arbitration. This would ensure a speedy and smooth process of judicial appointments, and reduce the backlog and vacancy of judicial posts.
- Introducing a system of parliamentary scrutiny and confirmation of the nominees for judicial appointments, similar to the role of the Senate in the USA. The Parliament would

have the power to question, debate and vote on the confirmation of the nominees, based on their qualifications, integrity and suitability. The Parliament would also have the power to reject a nominee on valid grounds, such as lack of merit, misconduct or incompatibility.

Conclusion

The judiciary is an important pillar of democracy, as it upholds the rule of law, protects the rights and freedoms of the people, and checks and balances the other branches of government. However, the judiciary also faces various challenges and pressures, such as political interference, corruption, inefficiency, and lack of diversity. Therefore, the system of judicial appointments, which determines how judges are selected, appointed, and removed, is crucial for ensuring the independence, accountability, and quality of the judiciary. Different countries have different models of judicial appointments, reflecting their historical, constitutional, and political contexts. This research paper aims to conduct a comparative study of judicial appointments in India, UK, and USA, with reference to the center and collegium system. The paper will examine the advantages and disadvantages of each system, and explore the possibilities and challenges for judicial reforms in India, drawing from the practices and experiences of UK and USA. The paper will also address the research questions of whether the concept of judicial accountability is incompatible with the notion of judicial independence, and whether the judicial appointments are dependent on the legislative framework. The paper hopes to contribute to the academic and public debate on the issue of judicial appointments, and to provide some suggestions and recommendations for improving the system in India.