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THE INDIAN JUDICIARY: NAVIGATING THE APPOINTMENT LANDSCAPE

AUTHORED BY - ISHITA PANDEY & ARUSHA PANDEY

Legal Article submitted to,
Hon'ble Justice Anish Kumar Gupta
High Court of Judicature at Allahabad

ABSTRACT –

The most significant and vital component of a democratic system is an independent judiciary. Separation of powers[1], written constitutions, and democracy are all interrelated. The aforementioned ideas are upheld by the judiciary in both theory and practice.

India, the largest democratic republic in the world with the longest constitution, has a distinctive appointment process. The Constitution states that the President of India in consultation with the Chief Justice of India shall appoint the judges for the Supreme Court and the High Courts. After the Constitution has been in effect for thirty years, it is unclear what the Constituent Assembly had in mind when it came to judicial selections. The Judges case and NJAC rulings provided India's judicial appointments a fresh perspective. Despite the Hon'ble SC's clear and expansive interpretation of Articles 124[2] and 217[3], which gave the CJI and the collegium the upper hand, the matter was not resolved. The current process is criticized for having a delayed and opaque appointment system. In addition to establishing swift appointments to fill open seats and lessen the large number of pending cases nationwide, this paper seeks to propose an appointment process that is best suited to supporting an independent, effective, and transparent court.

Key Words- Independent Judiciary, Collegium, NJAC, Seperation of Powers

[1] (Constitution of India, 1950, art. 50)
[2] (Constitution of India, 1950, art. 124)
[3] (Constitution of India, 1950, art. 217)

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INTRODUCTION

India's system for appointing judges has undergone significant changes and discussions since the country gained independence. In the wake of independence, India initially aimed for a cooperative method in selecting judges, seeking to create an equilibrium between the Executive and the Judiciary. The system appeared to function effectively, following a widely accepted procedure until 1973. Traditionally, the senior-most judge of the Supreme Court was appointed as the Chief Justice of India. However, in 1973, this long-standing custom encountered an unexpected disruption. In a surprising decision, the government overlooked the three most senior judges and opted for the fourth in line for the position of Chief Justice.

THE EVOLUTION OF JUDICIAL APPOINTMENT IN INDIA-

The judicial plan was first passed by Warren Hastings, the first Governor General of India in 1772, which is also known as the first legal reformation plan[4] through which a uniform judicial system was established in India.During that period, two additional acts were occurring: the Regulatory Act of 1773[5], which established the Supreme Court in Calcutta with one Chief Justice and three other judges, and the Government of India Act of 1935, which established the Federal Court in Delhi in 1937 with one Chief Justice and three other judges.

The first chief justice of Independent India' SC was Justice Harilal Jekisundas Ji Kania. The constitution was adopted and implemented in 26th January 1950 and it was also the same day of working of Supreme Court, the day SC's full strength 8 judges were appointed and the appointment of these 8 judges was influenced by Justice Kania and Vallabhbhai Patel. And since then, the SC's senior most judges they become Chief Justice of India.

After the death of CJI HJ Kania, PM JawaharLal Nehru and Attorney General M.C. Setalvad wants to appoint the Chief Justice of Bombay High Court MC Chagla the next CJI of India. As soon as the other Supreme Court Judges get to know this news, they threatened that if executive do this they all will resign. They suggest to appoint CJI solely on the basis of seniority and by adopting this way, Patanjali Sastri becomes the next CJI of India.

But in the Indian history there has happened 3 times when the seniority rule was not followed:-

[4] https://www.legalserviceindia.com/legal/article-10515-warren-hasting-s-judicial-plan-of-1772.html
[5] Regulating Act of 1773 - INSIGHTS IAS - Simplifying UPSC IAS Exam Preparation

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I. When Justice Imam's health was not good and then by suspending him Justice Gajendragadkar was made the next CJI of India.
II. During 1970s in the Indira Gandhi administration, two times, intentionally the seniority rule was not followed-

(a) After Keshvananda Bharti case[6]
(b) During emergency

Due to this on judicial appointment the conflict between the judiciary and executive starts. In the Keshvananda Bharti case, 13 judges bench were constituted and Judgement came in 7:6 majority in which it was said that parliament does not have unlimited power to amend the constitution which was basically against the Government but a dissenting opinion came from the Justice AN Ray who said that Parliament should have the unlimited power to amend the constitution. After this judgement by superseding 3 senior judges Justice AN Ray was appointed the next CJI and after this these three judges resigned as a sign of protest but after this incident there was question began to arise on judicial appointments.

During the time of emergency when majority of peoples were being arrested and against this unlawful detention the landmark case of ADM Jabalapur[7] was filed and in this case judgement came in the majority of 4:1 and court said that the government without any tension and without any judicial oversight can detain common people. In this case, the sole dissenters was Justice H.R. Khanna who said that article 21[8], the right to life to individuals can't be suspended even during the time of emergency now Justice HR Khanna was meant to be next CJI but because of his judgment, Indira Gandhi administration by superseding Justice Khanna made Justice M.H. Beg the next CJI and then Justice Khanna resigned and then after many years his nephew Justice Sanjiv Khanna becomes 51st CJI. In order to maintain harmony between executive and judiciary **the four judges case[9]** came into light.

[6] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225
[7] ADM Jabalpur v. Shivkant Shukla (AIR 1976 SC 1207)
[8] (Constitution of India, 1950, art. 21)
[9] S.P. Gupta v. Union of India, (1981) 2 SCR 88
Supreme Court Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441
In Re Special Reference 1 of 1998, (1998) 7 SCC 739
Supreme Court Advocates-On-Record Assn. v. Union of India, (2015) 6 SCC 408

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CONSTITUTIONAL PROVISONS FOR THE APPOINTMENT-

In India, the selection of judges is a matter of great constitutional, legal, and political significance. The Indian Constitution envisioned for the judiciary and executive branches to work together.

Article 124[10] of the Constitution of India provides that every Judge of the Supreme Court shall be appointed by the President "after consultation with such of the Judges of the Supreme Court and the High Courts in the States as the President may deem necessary"; and "in case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted". Article 217[11] requires that every Judge of the High Court shall be appointed by the President "after consultation with the Chief Justice of India, Governor of a State and in case of appointment of the Judge other than the Chief Justice, the Chief Justice of the High Court". These provisions, in clear terms, say that the appointing authority is the President; however, before the appointment, the President is required to consult the members of the judiciary. The aforesaid provisions are in contrast with the provisions of Articles 103[12] and 192[13] under which the President/Governor is required to decide the questions of disqualification of members of Parliament/State Legislatures after obtaining the opinion of the Election Commission of India and "shall act according to such opinion". The President/Governor has no discretion to decide the question of disqualification contrary to the opinion of the Election Commission. Thus, the Constitution has used separate expressions, namely, "consultation", and "shall act according to such opinion" for different purposes in different provisions. It is difficult to say that the Founding Fathers were oblivious of the meaning of these different expressions and the word "consultation" means "shall act according to such opinion".

THE FIRST JUDGES CASE –

As the first of its type to delve into the interpretation of the balance envisioned in the Constitution, the case of S.P. Gupta v. Union of India[14], also known as the First Judges Appointments case, was brought before the seven-judge Constitutional Bench through a public interest litigation.

[10] Supra.
[11] Supra.
[12] Constitution of India, 1950, art. 103
[13] Constitution of India, 1950, art. 192
[14] (1981) 2 SCR 88

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The case addressed two issues: the transfer of High Court judges, including the Chief Justice, and the initial and subsequent appointment of additional judges.

The case revolved around the interpretation of the word "consultation" in Article 124(2) and Article 217(1) of the Constitution, which deal with the appointment of judges to the Supreme Court and High Courts respectively. The Court held that the President is only required to consult the Chief Justice of India and others, but is not bound by their opinion — i.e., consultation does not mean concurrence.

"The consultation has to be meaningful, purposeful, result oriented and of substance. All the parties involved in the process of consultation must put all the material at its command relevant to the subject under discussion before all other authorities to be consulted. Nothing can be kept back. Nothing can be withheld. Nothing can be left for the eye of any particular constitutional functionary." – Justice Desai[15]

Justice Venkataramiah, in his verdict, wrote that under the scheme of Article 217 the power to appoint a Judge of a High Court is vested in the President. However, If there are conflicting opinions the President has to weigh them after giving due consideration to each of them and take a decision on the question. He said: "While he is bound to consult the authorities mentioned therein and take into consideration their opinions, he is not bound by their opinions. Ordinarily one does not expect the President to make an appointment by ignoring all the adverse opinions expressed by the functionaries mentioned in Article 217."[16] It was, however, clarified that the President will have the right to differ from the other constitutional functionaries i.e. Chief Justice of India, Chief Justice of the concerned High Court and the Governor of the State, for cogent reasons and take a contrary view.

BIRTH OF COLLEGIUM-

The current system of judicial appointment is based on the idea of "Judges appointing Judges". Although the Supreme Court of India may hold that the judiciary should have the sole authority to nominate judges and that the administrative branch should not meddle too much, there is a

[15] https://www.scconline.com/blog/post/2022/10/26/appointment-of-supreme-court-and-high-court-judges-need-for-a-fresh-look/

[16] https://www.scconline.com/blog/post/2022/01/18/a-walk-down-the-memory-lane-on-sp-guptas-senior-advocate-90th-birthday/

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theory that contends otherwise. In reality, the court acknowledged that there were some "serious issues" with the current collegium system when it struck down the NJAC system. The collegium system was opaque and closed-door. Accordingly, judges who hoped to advance to the higher judiciary would turn to appeasing the collegium. In contrast to the executive branch, which at least appoints judges in a transparent manner, collegium appointments to the judiciary can occasionally be a flagrant act of partisanship. The Collegium system strengthens the separation of powers and forbids meddling in court decisions by protecting judicial appointments from political or executive control. It ensures neutrality in judicial selection and serves as a protection when the government itself frequently litigates in court. Collegium appointments are unaffected by popular opinion or transient political goals, promoting a judiciary that opposes populist tendencies and defends the rule of law, as demonstrated by seminal decisions like the Puttaswamy (privacy)[17]. The lack of an established evaluation procedure, eligibility matrix, or merit-based ranking is one of the disadvantages. Collegium members hold confidential meetings before making decisions. Proposed or rejected names are made public without providing written explanations. Many times, even reconsiderations that are forwarded to the government are completed without providing an explanation for the initial justification. There have been claims that elite lawyers or judges' families are frequently given preference.

THE SECOND JUDGES CASE –

The Second Judges Case (1993) is formally titled Supreme Court Advocates-on-Record Association vs. Union of India[18]. This case emerged from a constitutional dispute regarding the procedure for the appointment of Supreme Court and High Court judges in India. The judgement in SP Gupta was overturned by a nine-judge Constitution Bench. The bench established a specific procedure called the "Collegium System" for the selection and advancement of High Court and Supreme Court judges. "Protecting the integrity and guarding the independence of the judiciary" is essential, according to the ruling in the Second Judges Case. Since this is a matter within the judicial family and the executive cannot have an equal voice in it, the CJI's role is fundamental. The word "consultation" would mean concurrence in this context. The court said in its ruling that "if the executive had an equal role and diverged from many proposals, indiscipline would grow in the judiciary."The majority decision in the

[17] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1
[18] (1993) 4 SCC 441

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case gave the CJI priority in decisions on appointments and transfers, and it held that the Constitution's use of the term "consultation" would not lessen the CJI's principal role in appointing judges. The verdict in the Second Judges Case said that the recommendation should be made by the CJI in consultation with his two senior-most colleagues and that such recommendation should normally be given effect by the executive. In addition, it said that though the executive might request a re-examination if it had a problem with the recommended appointment, the executive was bound to proceed with the appointment if the re-examination resulted in the collegium repeating its recommendation.

THE THIRD JUDGES CASE –

Another dispute between the executive and the judiciary over judicial appointments occurred between 1997 and 1998. In re: Special Reference 1 of 1998[19] is known as the Third Judges Case. This case reiterated the supremacy of the judiciary over the executive in the course of judicial appointment. The CJI, Justice M.M. Punchhi, recommended the names of five people for appointment to the Supreme Court. The executive declined to do so by expressing questions regarding the eligibility of the individuals it had proposed for Supreme Court appointments. As a result, President K.R. Narayanan sought the Supreme Court's opinion under Article 143 on nine questions, covering three broad issues: (1) Consultation between the CJI and his fellow judges for deciding on appointments to the High Courts and the Supreme Court, (2) Judicial review of the transfer of judges, and (3) The relevance of seniority of high court judges in making appointments to the Supreme Court. In addition to increasing the number of senior judges participating in the judicial nomination screening process, this specific step made it clear that the Chief Justice's position requires the consultation of the majority of judges. The Supreme Court ruled that the phrase "consultation" with the Chief Justice of India in Articles 124, 217, and 222 of the Indian Constitution necessitates consultation with the majority of judges in order to form the Chief Justice of India's opinion, and that the Chief Justice of India's personal and individual opinions do not qualify as legitimate consultation. The four of the Supreme Court's most senior judges would serve as a collegium for consultation. Strict rules for selecting judges for the Supreme Court and lower courts were also established by the Supreme Court. Today, these rules are referred to as the Collegium System.

[19] (1998) 7 SCC 739

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THE FOURTH JUDGES CASE –

The Fourth Judges Case, also known as the Supreme Court Advocates-on-Record Association vs. Union of India (2015)[20], is a historic ruling by the Indian Supreme Court that upheld the independence of the judiciary and emphasized the separation of powers enshrined in the Indian Constitution. This case looked at whether the National Judicial Appointments Commission (NJAC) Act, 2014 and the 99th Constitutional Amendment Act, 2014, which aimed to replace the current collegium system of judicial appointments with a new mechanism involving the executive and legislature, were constitutional.

The Supreme Court Advocates-on-Record Association and others filed a number of petitions challenging the constitutionality of the NJAC Act and the 99th Amendment Act before the Supreme Court. These petitions aroused doubts that the proposed NJAC would undercut the judiciary's independence and contravene the basic structure of the Constitution.

By a majority vote of 4:1, the Court declared the NJAC Act and the 99th Amendment to be invalid and unconstitutional. The majority, which included Justices Khehar, Lokur, Goel, and Joseph, concluded that the executive's involvement in the appointment of judges contradicted the fundamental constitutional principle of the separation of powers between the executive and judiciary and infringed upon the judiciary's primacy and supremacy. Justice J. Chelameswar, however, disagreed that the NJAC was unconstitutional in his dissenting opinion and observed that the present collegium system lacks transparency, accountability and objectivity, and barring occasional leaks, the public had no access to information relating to it. He noted that the proposed composition of the NJAC could have acted ‘as a check on unwholesome trade-offs within the collegium and incestuous accommodations between Judicial and Executive branches.’

In this case illustrates the that the Chief Justice of India, who leads the country's legal system, needs to do more than merely consult. According to the ruling, in order to maintain judicial independence and credibility, the Chief Justice must have a major say in who gets appointed and transferred to the bench. Therefore, the Fourth Judges Case acts as a constitutional check on executive overreach, even though the collegium system may need to be improved.

[20] (2015) 6 SCC 408

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THE NATIONAL JUDICIAL APPOINTMENTS COMMISION (NJAC) –

The NJAC was a proposed constitutional body which was designed to replace Collegium system of judicial appointment in India. It was implemented with the intention of increasing the transparency, accountability, and participation of the Supreme Court and High Courts' hiring and transferring of judges. The Constitution (99th) Amendment Act, 2014[21] was created to give constitutional status to National Judicial Appointment Commission. The National Judicial Appointments Commission Act of 2014 was also designed to fundamentally alter the process for selecting judges for the Supreme Court and High Court.121st amendment bill became the 99th Constitutional Amendment Act,2014 which sought to amend Article 124,127,128, 217,222 and article124A 124B and 124C has been added to the Constitution of India, which provides for the National Judicial Appointments Commission consisting of the Chief Justice of India, two other senior Judges of the Supreme Court, the Union Minister of Law & Justice and two eminent persons nominated by a committee consisting of the Prime Minister, the Chief Justice of India and the Leader of the Opposition in the House of People or if no such Leader is there then the Leader of the single largest Opposition Party in the Lok Sabha[22].

UNCONSTITUTIONALITY OF NJAC –

Following an uphill battle, the 99th constitutional amendment was presented to the parliament. The bill was quickly approved by the NJAC and became a constitutional body, but it was later contested in a number of public interest litigations before the Supreme Court. In a concurring ruling, a 4:1 majority of the bench ruled that it was unconstitutional. J. Chelameswar was in dissent from the constitutional bench, which was presided over by J. A.K. Goel, J. Kurien Joseph, J. Chelameswar, J. Mahan B. Lokur, and J. J.S. Khear. The verdict of the court concluded that it did not provide adequate representation to the judicial minds & the principle of independence of the judiciary was being compromised. While another major significant thing is the reason of Justice Chelemeswar, he had criticized the collegiums system of appointing judges, which he said has become “a euphemism for nepotism” where “mediocrity or even less” is promoted & a “constitutional disorder” does not look distant[23].

[21] (Constitution (Ninety-Ninth Amendment) Act, 2014)
[22]https://www.manupatrafast.in/NewsletterArchives/listing/ILU%20RSP/2015/Aug/The%20National%20Judicial%20Appointment%20Commission%20-.pdf
[23] *IJNRD2306622.pdf

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SHORTCOMINGS OF NJAC-

The Court determined that the NJAC jeopardized the judiciary's independence, which is a fundamental component of the Constitution. The NJAC was seen as giving the executive excessive control over judicial selections by incorporating the Union Law Minister and two distinguished individuals, which might have an impact on judicial independence.

The 99th Amendment's addition of Article 124C to the Constitution is the first that can be mentioned. The article's language alone conveys the idea that executives have a disproportionate say in appointment-related concerns. According to Article 124C, the Commission will be empowered to establish by regulations the process for carrying out its duties, the way in which candidates are chosen for appointment, and any other matters that may be deemed necessary by it. Parliament will also be responsible for regulating the appointment of the Chief Justice of India and other Supreme Court judges as well as Chief Justices and other High Court judges by enacting statutory provisions.

However, this is not the sole justification offered by proponents of judicial independence for opposing the commission's establishment. The National Judicial Appointment Commission Act, 2014's Sections 5(2)[24] and 6(6)[25] states that if two Commission members disagree, the proposal will not be made. It also breach the basic structure of the Constitution with reference to Independence of Judiciary and Seperation of Power[26] and section 5(2) and 6(6) are therefore ultravires the Constitution. Conveniently, it left unanswered the subject of the Chief Justice of India's stance on the suggested person's appointment or non-appointment.

In other words, if the law minister and the other three collegium members make recommendations regarding a potential judge's suitability, the two distinguished members—who might not have a background in law—may counter those recommendations. This veto has the power to control the judicial process of appointing judges by influencing extralegal or non judicial matters.

[24] (The National Judicial Appointments Commission Act, 2014, S. 5(2))
[25] (The National Judicial Appointments Commission Act, 2014, S. 6(6))
[26] Supra.

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CONCLUSION–

The journey of judicial appointments in India, from a constitutionally mandated consultative process to the Collegium system and the attempted shift to the NJAC, reflects a deep and ongoing tension between institutional autonomy and democratic accountability. The Supreme Court's landmark decisions, including the NJAC judgment and the Three Judges Cases, have solidified judicial primacy in appointments as a fundamental element of the Constitution's fundamental framework, protecting the judiciary from political influence and guaranteeing its ability to function as an unbiased arbiter. Although the government has not yet prevailed, the court has firmly maintained that the judiciary's independence and priority in judicial selections are fundamental aspects of the constitution rather than the collegium system. This illustrates that a new commission may still be established, provided that it adheres to the guidelines established in the ruling.