

THE APPOINTMENT PROCEDURE INDIA'S HIGHER JUDICIARY: A LEGAL ANALYSIS

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Abstract: *Gender The French philosopher Montesquieu proposed the idea of an Independence judiciary. He adhered to the notion that the three branches of government have distinct powers from one another. Even though the Indian Constitution outlines each organ's authority and function in detail, there are nevertheless conflicts between these bodies. India is the only nation in the world where judges participate in the collegium system used to appoint judges. Due to their lack of openness, the Collegium panel has come under severe scrutiny and worthy individuals have been denied the opportunity to serve as judges on an equal basis without providing any justification. The Collegium system has numerous flaws. In order to address these extremely significant difficulties, the National Judicial Appointment Commission Act, 2014's provisions for higher judiciary appointment had been submitted before Parliament. The researcher intends to analyze the role of the Collegium panel in the appointment process of judges in India as well as the method of appointing judges in the higher judiciary.*

Keywords: Appointment of judges, Collegium system, Constitutional supremacy, Rule of Law, NJAC

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I. INTRODUCTION

The Indian Supreme Court is the Constitution's protector. Its only goal as a watchdog institution is to make ensure that the other two branches of government the legislature and the executive branch do not go beyond their boundaries while also preserving justice in society. To maintain the independence of the court, the problem of just judge selection is crucial. The procedure used to select judges in the higher judiciary is currently under heavy criticism. The judicial nomination process is flawed for a variety of reasons, including judge's political affiliation, their lack of accountability, the underrepresentation of underrepresented groups, and the appointment process's disregard for constitutional requirements.

II. HISTORICAL BACKGROUND OF APPOINTMENT PROCEDURE

There was no such clause mentioning a person to be consulted prior to the selection of Federal Court judges and High Court judges in the Government of India Act, 1935. The Act's Section 200(2) and (3) addressed the appointment of Federal Court Judges, explicitly stating that each judge would be chosen by His Majesty's order in accordance with the Royal Sign Manual and would serve in that capacity until he turned sixty-five. The Indian Federal Court was replaced on January 28, 1950, with the establishment of the Supreme Court of India. When the Constituent

Assembly began drafting the post-independence constitution, there was debate. Then a report on the responsibilities and composition of the Federal Court was presented. The group recommends against giving the executive branch unchecked influence over the judicial nomination process. However, it was also suggested for the first time that the President, after consulting among the Chief Justice, should make suggestion that at least seven of the eleven members who include certain Chief Justices, Union Officers, and members of the Central Legislature confirm.

III. PROVISIONS OF APPOINTMENT OF JUDGES UNDER CONSTITUTION

Sai The Constitution groups all of these articles under the heading "Judiciary of the Union," even though Articles 214 to 231 in Chapter V of Part VI under the heading "High Courts in the State" deal with the establishment of the High Courts, the appointment and conditions of a High Court Judge, their powers, rights, jurisdiction, and conditions of service including transfer from one High Court to another. The Supreme Court's establishment and constitution, as well as the nomination of judges and their qualifications, duties, and areas of jurisdiction, are all covered in these articles. The President of India appoints judges to the Supreme Court "after consulting with the Judges of the Supreme Court and High Courts in such States as the President may think necessary."

Similarly, the President appoint the judges of High Courts after consultation with the Chief Justice of India, governor the state and in case of appointment of a judge other than Chief Justices of the High Court must consult with the Chief Justice of concern High Court.

IV. A DISPUTES REGARDING THE APPOINTMENT OF JUDGES

When the post of Chief Justice of the Supreme Court fell vacant in 1968, the argument over the nomination of judges started with the J. Zafar Imam case. For personal reasons at the time, Chief Justice J. Zafar Imam was not named Chief Justice.

KS of the Supreme Court. Justice A.N. Ray, the fourth in seniority, was named Chief Justice of India again in 1973. Consequently, the judges who later resigned from the bench Justice Grover, Justice Shelatt, and Justice Hegde were not included. The 14th Law Commission questioned the practice of selecting senior judges for appointment as Chief Justices of the Supreme Court. The commission argued that the Chief Justice should be both a capable administrator and a capable judge, and that seniority should not be the only factor in determining the succession of the position. The government brought forward the 14th Law Commission's suggestion for implementation.

Justice Beg was appointed Chief Justice again by the Government in 1976, overriding Justice Khanna's seniority. The concept of a "committed judiciary" served as the driving force behind this divergence from the established constitutional norms. There have been significant constitutional disputes resulting from these types of appointments. The concept of a devoted judiciary has had difficult and detrimental effects for India's judicial independence foundation. Various alternative models have been offered to address these unwelcome difficulties, such as the appointment of judges by an all-judge panel or by an independent commission. A constitutional amendment is necessary for any changes to the legislation pertaining to judicial nominations. After Parliament was unable to reach a conclusion, the Indian Supreme Court decided in the 1980s to use judicial legislation to amend the Constitution's judicial nomination clauses. The Supreme Court of India actually played active role in judicial activism in order to change the laws pertaining to the appointment process for judges. This trend can be broadly divided into three phases, each of which is associated with a significant ruling from the Court.

First Stage: These phases are connected to S.P. Gupta v. Union of India which also known as the Judges Transfer Case. The primary issue raised in this case was whether the President is bound to follow the Chief Justice of India's advice when appointing new Supreme Court judges. According to article 217 of the Indian constitution every High Court judge "shall

be appointed by the President." Chief Justice of the High Court may also be consulted in the nomination of a judge other than the Supreme Court judge. The Constitution's Article 212 and Article 222 both define "consultation" in the same way, as the Supreme Court clarified when interpreting Article 124(2). The government's choice can only be contested on the grounds that it was made in ill faith and without due thought, i.e., when constitutional bodies expressed their opposition to the appointment. Consequently, it is evident that the Executive has the final say when it comes to selecting judges, whose supremacy and deference it was intended to be shielded from. The Supreme Court said that the Central Government is "solely and exclusively" empowered to nominate judges, with constitutional functionaries having only a consultation role. Second Stage: Subhash Sharma v. Union of India involved arguments regarding the appointment of judges at the second stage of the case. The Supreme Court has criticized the growing trend of the government recommending candidates for High Court appointments directly to the Chief Justice of that particular High Court. The Supreme Court holds that this is wholly inadmissible since it violates the constitution. The Supreme Court noted that when it comes to the selection of High Court judges, the Chief Justice of India's recommendation is the one that counts. The Supreme Court stated that a sizable bench ought to consider SP Gupta's case in this instance.

By that time, the Supreme Court had ruled in favor of Supreme Court advocates on Record Association v. Union of India, also referred to as Judges Transfer Case II. This landmark decision overturned S.P. Gupta's case by a majority of 7:2, giving rise to the Collegium system, which is the system for appointing judges in the higher judiciary. A written PIL petition, signed by a Supreme Court advocate, brought the case before the court seeking the appointment of judges. The petitioner argued that the executive was not competent to select the best candidate for the position or to carry out the duties of the higher judiciary in a timely manner. The Chief Justice of India should be appointed through a consultative, participatory process, with the executive having the authority to act as a simple check on the Chief Justice's exercise of power. In order to fulfill "the constitutional purpose of selecting those most suitable for the composition of the Supreme Court and the Supreme Court, which is so essential to ensure the independence of the judiciary and thus to the preservation of democracy," the Apex Court notes that this issue needs to be taken into consideration.

Third Stage: The Apex Court provides an advisory opinion on the President's application in pursuant to Article 143 of the Constitution In Re: Special Reference 1 of 1998. Regarding the selection of judges for the Supreme Court and High Court, the Apex Court made the following claims:

1. A group of the Supreme Court's four most senior judges should advise the Chief Justice of India before proposing judges to appointment. The Chief Justice of India should transmit the collegium panel's written opinion to the president in addition to his own recommendations.

2. Recommendation of the Chief Justice which "refers to the opinion of the Judges which means that it must necessarily have an element of plurality in its formulation, has "precedence" when it comes to the appointment of a High Court Judge.

3. Until the other four Supreme Court judges' opinions are unrelated to the information provided to the President of India with the intention of not appointing a judge who has been recommended for appointment, the Chief Justice of India's consultation does not qualify as a meaningful individual consultation.

4. The recommendations and the Collegium's written opinion on each consultation should be sent to the Government of India.

5. A person will not be appointed if the majority of the Collegium panel disapproved of their selection.

Although the current collegium system has the final say when it comes to appointing judges, the appointment process is opaque. There have been new initiatives implemented to improve the efficiency and transparency to the system. The National Judicial Appointments Commission (NJAC), established by the 99th Amendment to the Constitution, became embroiled in a significant dispute later on. With regard to the judge transfer amendment, it gave the president the authority to form a high-level judicial commission that would recommend candidates for appointment of higher judiciary as well as judges transfer between High Courts to another. Following this revision, the president will no longer need to confer with the chief justice of the High Court and the Supreme Court.

National Judicial Appointment Commission

The National Judicial Appointments Commission was created by the 99th Constitutional Amendment Act, 2014, and went into effect on April 13, 2015, with the goal of ensuring accountability and transparency within the collegium system. Article 124 para 2 and Article 217 para 1 of the Constitution, which address the nomination of judges to the higher court and lower courts, are intended to be amended by this constitutional amendment. It also called NJAC and establishes the fundamental guidelines for it by appending new Articles 124A, 124B, and 124C in the constitution after article 124.

Supreme Court Advocates and Ors. Vs. Union of India had ruled that the 99th Constitutional Amendment and the National Judicial Appointments Commission Act were unconstitutional. A Constitution Bench of the Supreme Court upheld the

collegium system by a 4:1 majority. The fourth Judge case is this one. In this instance, a few significant difficulties surface:

- The Court held that judicial primacy is not only necessary by the Constitution but also a component of the unchangeable fundamental structure since it is a part of the independent judiciary. Secondly, the Court held that the Constitution permits the appointment of individuals.

- Third, in light of earlier rulings, it was determined that the NJAC was unconstitutional because it disregarded the demands of judicial independence and supremacy.

Newly suggested amendments that would have improved accountability were rejected by the Supreme Court. The administration was directed by the court to draft a memorandum of agreement that would incorporate enhancements to the current collegium system shortly after the NJAC ruling was issued. In addition to other changes, the government suggested that the collegium require opposing judges to submit written objections to nominees, provide written justifications for their nominations, and give senior judges preference when it comes to selections. All of the government's motions were ignored by the court. The NJAC ruling further said that any form of political meddling in the nomination process would compromise the judiciary's independence. That's an astonishing assertion, particularly considering that, up until the Supreme Court's establishment of a collegium system in the Second Judge case in 1993, the president essentially held the final say when it came to judicial appointments.

CONCLUSION

The successful operation of the Constitution and the Rule of Law depends upon division of powers among the various governmental bodies. It was not the aim of the Constituent Assembly to appoint judges on their behalf. Despite being a well-known person, Dr. B. R. Ambedkar was also rejected to give the Chief Justice of India exclusive power to choose judges. There were no issues when the President appointed judges until 1993. However, the political landscape in India has drastically transformed lately. The Supreme Court of India established the collegium system, which was an original idea. But as time went on, it began to be associated with a lot of uncertainty. Lack of transparency, opacity and unknown appointment procedure are the major defects of the collegium system.

NJAC was formed to address these shortcomings within the collegium framework. In order to guarantee that a candidate is selected based on merit, skill, and diversity, NJAC itself has intervened. Since the government is the nation's largest litigant, its ability to designate judges to hear cases it owns puts the judiciary's independence in jeopardy. In that

event, the judiciary would be unable to fairly rule against the executive for breaking the law or if it infringes on citizen's fundamental rights.

The only way to maintain the supremacy of the Constitution is to implement a system of checks and balances in addition to the division of powers. The judiciary must be held constitutionally accountable to the people without compromising its ability to administer free and impartial justice in a democratic country where the legislature is answerable to the citizen and the administration is answerable to the legislature. It is a well-trusted statement that "absolute power corrupts absolutely." As residents of this wonderful nation, it is our collective duty to be watchful, make sure that the three main branches of government operate in unison, and rigorously adhere to the rules of the Constitution. In particular, the development of democracy depends greatly on an independent judiciary.

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