Jus Corpus Law Journal
Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rishikesh Dave; Publisher – Ayush Pandey

The Lacunas in Judicial Appointments

Pavitra Kumar Nim[a]

[a]Campus Law Center, Faculty of Law, University of Delhi, India

Received 27 September 2022; *Accepted* 10 October 2022; *Published* 19 October 2022

The appointment of Judges in the Constitutional Courts of India has been an issue of debate because of the uncertain practices and involvement of the Courts themselves in the appointment process. While the High Courts have been dominant in the recruitment of lower judiciary, the Collegium commands the appointments made in the higher judiciary. However, both methods have been marred by suspicion, mystery, and their lack of transparency. The goal of this article is to look at how the concept of independence of the judiciary has been so construed so as to allow the judges to get an upper hand in the process of appointment. The analysis of this process provides the picture that the current method of appointment is a failing system and any attempt to reform it, as made by constituting the National Judicial Appointments Commission has been duly rejected by the Apex court as unconstitutional and what could be the best possible way to replace the present ailing system.

Keywords: *appointment, judiciary, transparency, court, commission.*

INTRODUCTION

Perhaps the most important aspect of Courts is not the administration of justice, but the appointment of those who do that. While this can be argued, what is certain is that the process of appointment has a direct bearing on the independence of the judiciary and not vice-versa. If the judges are appointed through a rigorous process that is fair and transparent, it can be

ensured that they are impartial, of high moral character and integrity, and thus can impart justice without any pressure or influence. Therefore, in order for the judiciary to be independent, the appointment procedure shall not become a barter system where fear and favour govern the recruitments and the garb of secrecy is used to hide the malpractices.

That was probably the idea behind giving such regard to the judicial independence and separation of power that if people with high morality and integrity are allowed to work in sufficient isolation, other political and apolitical organisations would not be able to pressurize them and they can decide on legal issues that pertains from a minor dispute to national policy in a fair manner without any bias. However, the above two doctrines have been used by the Judiciary itself to maintain its exclusivity in matters of appointment.

HOW JUDGES ARE APPOINTED?

The Constitution of India under Article 233[1] and Article 234[2] provides for the appointment of District Judges and Judicial Officers in the Lower Judiciary respectively. Article 233 says that the district judges in any state shall be appointed by the Governor of the State in consultation with the High Court exercising jurisdiction in that state. However, Article 234 says the appointment of persons other than the district judges to the judicial service shall be made by the Governor after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in that State. While Constitution provides for consultation with the High Courts while making the appointment, the way "consultation" has been interpreted has given the High Courts a free hand in making appointments.

Judges of the higher judiciary, i.e., the Supreme Court and the High Courts are appointed under Article 124[3] and Article 217[4] respectively. Article 124(2)[5] 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 High Courts as the President may deem necessary for the purpose,

[1] Constitution of India, art 233
[2] Constitution of India, art 234
[3] Constitution of India, art 124
[4] Constitution of India, art 217
[5] Constitution of India, art 124(2)

provided that in case of appointment of a judge other than the Chief Justice, the Chief Justice of India shall always be consulted. And Article 217 provides that every judge of the High Court shall be appointed by the President after consultation with the Chief Justice of India, the Governor of the State, and in the case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court.

However, the President has a rather passive role in it and only makes the appointments that have been recommended by the Collegium system. The Collegium includes 5 senior-most judges of the Apex Court including the Chief Justice of India. The Collegium System is the system to appoint and transfer judges that have evolved through judgments of the Supreme Court and not by Legislation passed by the Parliament or by a provision of the Constitution.

DEVELOPMENT OF THE COLLEGIUM SYSTEM

S.P. Gupta vs President of India[6]: In Gupta v President of India popularly known as the First Judges Case, various petitions filed in different High Courts raising issues of great constitutional importance affecting the independence of the judiciary in matters of appointment of judges, were transferred to the Supreme Court under Article 139[7] of the Constitution. The Supreme Court observed that the President was obliged to consult the Chief Justice, but the opinion of the Chief Justice was not binding upon the President. It declared that the "primacy" of the Chief Justice of India's (CJI)s recommendation on judicial appointments and transfers can be refused for "*cogent reasons*." The ruling gave the Executive primacy over the Judiciary in judicial appointments for the next 12 years.

Supreme Court Advocates-on-Record Association v Union of India[8]: In 1993, this decision was overruled in Supreme Court Advocates-on-Record Association v Union of India known as the Second Judges Case which held that in the case of a difference of opinion between the Chief Justice and the President, the opinion of the Chief Justice shall prevail and no judge should be appointed without the concurrence of the Chief Justice. The Chief Justice, however, should

[6] *SP Gupta v President of India & Ors* [1982] AIR 1982 SC 149
[7] Constitution of India, art 139
[8] *Supreme Court Advocates-on-Record Association & Anr v Union of India* [1987] Writ Petition (Civil) 1303 of 1987

consult the next two senior judges of the Supreme Court. Thereby, the SC introduced the Collegium system, holding that "consultation" really meant "concurrence". It also added that it was not the CJI's individual opinion, but an institutional opinion formed in consultation with the two senior-most judges in the SC.

In Re Special Reference 1 of 1998[9]: In July 1998, the President of India asked for the advisory opinion of the Supreme Court on various areas of the judgment of 1993 including the issue of consultation. In October 1998, the Supreme Court in its advisory opinion confirmed the primacy of the Chief Justice's opinion over that of the President in appointing judges. The Court, however, observed that the 'sole, individual opinion of the Chief Justice of India' does not constitute 'consultation' within the meaning of Article 217 and Article 222(1)[10] of the Constitution. In appointing judges to the Supreme Court, the Chief Justice must make a recommendation in consultation with the four most senior puisne judges of the Supreme Court. In the case of appointments to the High Courts, the Chief Justice must consult the two most senior puisne judges of the Supreme Court.

PROBLEMS IN THE APPOINTMENT OF LOWER JUDICIARY

While the Collegium System has been criticised by a lot of many people, the ill-designed appointment of the lower judiciary has been less talked about. If we look at any of the government functionaries that are directly appointed, one similarity among them would be that all of them are recruited/appointed by a centralised body or autonomous body, or a constitutional body so that the recruitment is fair, transparent, and without any political influence. However, when it comes to the lower judiciary, the High Courts being the institution that is in direct contact with those appearing as candidates and also where those recruited will eventually have the seat, it is not just involved in the process of recruitment but significantly controls the whole process, from the formulation of exam and framing of question papers to evaluation, and the State Commission just becomes a body that conducts the process but is not at all involved in it. Although it is obvious that the High Court exercises jurisdiction over the

[9] *In Re: Under Article 143(1) of the Constitution of India v Unknown* [1998] AIR 1999 SC 1
[10] Constitution of India, art 222(1)

lower courts which is by nature, very wide but it shall not become a tool to be used by the High Courts for interfering in the appointments/recruitment of judicial officers in order for the process to be fair and transparent.

THE COLLEGIUM SYSTEM AND ITS FAILINGS

No Standardised System or Information in Public domain: When we move towards the Higher Judiciary, the picture becomes even grimmer, where the sole authority appointing and elevating/promoting the judges is the Judiciary itself with no mechanism for transparency and accountability. The embodiment of this entailment is the Collegium system shrouded in darkness and secrecy, beyond the scope of any scrutiny.

Conflict with the Principles of Natural Justice: what is of utmost concern is the utter disregard and blatant violation of the principle of natural justice – "*Nemo judex in causa sua*" i.e., No one should be a judge in his own cause and the rule against bias. And while certain norms like the Chief Justice naming his successor and the senior most judge of the Supreme Court becoming the Chief Justice of India have been made to avoid this criticism, even that facade did not help to maintain the sanctity of the highest institution as those norms were breached too at certain times. The Judiciary which preaches to follow the principles of natural justice and has often time stood out to protect them appears to be reluctant when it comes to following them.

No System of Checks and Balances: Judges appointing Judges is a practice that has serious implications not just on the functioning of the judges but also on the overall machinery of justice delivery. The Second Administrative Reforms Commission, under the Chairmanship of Mr. Verappa Moily, also pointed out that, "Perhaps in no other country in the world does the judiciary have a final say in its own appointments. In India, neither the executive nor the legislature has much say in who is appointed to the Supreme Court or the High Courts."

Lack of Representation: It is for this reason that often referred to as the "*Old boys' club*", Judiciary has largely been dominated by a very specific section of society. It has become an exclusive club, the membership of which is only provided to those coming from a certain family, which co-incidentally have some or the other member as sitting or a retired judge. While this could be

subject to debate, the implication is not to undermine the talent and integrity of an individual coming from a certain family but to question the process and manner of appointment.

With a country such diverse, having a very limited and restricted representation of the population at the apex institution in the country has only marred its reputation and weakened people's faith in it, and proved that the top court has been following, either knowingly or unknowingly, a constant system of quota not just for their kith and kin but also for the privileged upper castes, especially the brahmins and the marginalised communities have no place in the elitist club of our country. This can be seen from the data on the Judges of the Supreme Court where out of 49 Chief Justices of India till date, 14 have been Brahmins and the next Chief Justice of India will also be a Brahmin what is even more bizarre is that there has been no judge at the Apex court from the Scheduled Tribes.[11]

NATIONAL JUDICIAL APPOINTMENT COMMISSION - TURNING A BLIND EYE

Although the general public of the country have been aware of the glaring defects in the process of judicial appointments, there is hardly anything that they can do to curb it with the limited information in the public domain and empowering mechanisms such as the Right to Information (RTI) being rendered useless in such cases by the Judiciary itself. However, despite the reluctance of various stakeholders, the government set up the National Judicial Appointment Commission (NJAC) in 2014 but as expected it was declared unconstitutional and the Apex Court strike it down in 2015 saying that it violates the doctrine of separation of powers as it included the Minister of Law and Justice (who is a part of the Executive) and two eminent persons to be selected by a committee comprising the Prime Minister, the Chieh Justice of India and the Leader of Opposition in the House of People, and thus is a threat to the independence of the judiciary.[12]

---

[11] Namit Saxena, 'Disproportionate Representation at the Supreme Court: A perspective based on Caste and Religion of judges' (*Bar & Bench*, 23 May 2021) <https://www.barandbench.com/columns/disproportionate-representation-supreme-court-caste-and-religion-of-judges> accessed 25 September 2022

[12] *Supreme Court Advocates* (n 8)

In the same judgement, Justice Chelameswar, who gave the dissenting opinion stated that there is no accountability in regard to the decisions of the collegium and the records are beyond the reach of any person including the judges of the Supreme Court itself. This is in clear violation of the democratic principle of transparency and accountability. He also went on to state that there were sufficient safeguards in the form of three senior-most judges of the Supreme Court against any attempt of the Executive to thwart the Judiciary if ever attempted, and assuming that primacy of the judiciary in the appointment of judges is a basic feature of the Constitution is empirically flawed.[13] Although the NJAC could have been sustained by making certain amendments, the court chose to strike it down in order to shut the door of reform of the Collegium System. Ironic in the sense that the Court that wants and suggests other ailing institutions to reform does not wish to reform itself. Perhaps the NJAC was laying the first stone for a centralised, fair, and transparent process of appointment of judges at the lower as well as the higher judiciary.

WAY FORWARD

The idea of a centralised judicial service is not new and dates back to 1958 when the Law Commission in its 'Report on Reforms on Judicial Administration' first put it out. Any statutory, autonomous or constitutional body, such as the UPSC can conduct a standard, centralised exam to recruit judges and provide them with training was discussed. The idea was proposed again by the Law Commission in its Report of 1978, where the pendency of cases in lower courts was highlighted. Also, the idea of an All India Judicial Services (AIJS) has also come up in various debates, articles, and drafts. And those in support of it have argued that if a centralised exam framework can work for the Indian Administrative services, then it can work for judicial services too. The Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice in 2006 backed the idea of a pan-Indian judicial service in its 15th Report, and also prepared a draft Bill.

[13] *Ibid*

CONCLUSION

All processes and ways for judicial appointments will have some benefits and some loopholes and thus, no particular system can be said to be a perfect system. However, to restore people's confidence in the judiciary, we need to come up with a method of appointment that is transparent, fair, and accountable and for this purpose, the best option seems to be that of an independent commission to appoint the judges. But having such a commission might not be enough, hence we also need to make sure that the body is representative in nature and does not follow in the footsteps of its predecessor and therefore should have members not just from the judiciary but also from the legal profession and public as well and other stakeholders as needed. Additionally, it should also be ensured that the commission uses a mechanism that is transparent and open to public scrutiny because in the Apex Court's own words *"Justice must not merely be done but it must also be seen to be done."*