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Appointment of Judges in India

Aakriti Srivastava^a

^aKIIT University, Bhubaneswar, India

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The judiciary's role is to adjudicate disputes, protect citizens' rights, and uphold the Constitution. For this, the judiciary must remain independent. Judicial independence is a basic constitutional principle, and appointing judges is crucial in maintaining that independence. The appointment process must, thus, be free from any kind of bias. The constituent assembly understood the necessity of having an independent judiciary. Currently, the only country in the world where the system of judges appointing judges exists in India. Constitutional benches of the Supreme Court have established this system through multiple precedents. In this paper, we are going to analyze the four cases, popularly referred to as the 'four-judge case', to determine how these cases have shaped the system of appointing judges in the Supreme Court and the High Courts. To better understand the appointment process for judges, the paper analyses both the Collegium and the National Judicial Appointment Commission, and provides criticism of both at the end to acknowledge their shortcomings.

Keywords: *appointment of judges, collegium system, judge, independent judiciary.*

INTRODUCTION

Indian democracy stands on three pillars: Legislative, Executive, and Judiciary. The functions, powers, and limitations of these organs are specified in the Constitution of India. Despite this, there are clashes between the organs on the jurisdiction of the powers and functions that they can exercise. The legislative and the executive perform functions that sometimes overlap. The

judiciary, however, functions entirely independently. The judiciary is responsible for adjudicating disputes between private parties, states, or the government, reviewing executive actions that have been challenged, upholding the Constitution, and presiding over criminal cases.

Articles 124 and 217 of the Constitution appoint judges to the Supreme Court and High Court. In India, until 1973, the Supreme Court's senior-most judge was appointed Chief Justice. Despite this, A.N. Ray succeeded the three other senior judges as Chief Justice in 1973. M.H. Beg became the Chief Justice in 1977, superseding other senior Supreme court judges. This was highly criticised and resulted in tensions between the Executive and Judiciary. The Collegium system for the appointment of Supreme Court and High Court judges was introduced and implemented as a result of the 'Four Judge case'.

FIRST JUDGE CASE

The first case was "*S.P Gupta v Union of India*¹", which gave rise to the idea of the Collegium system of appointing judges. In the High Courts, several writ petitions were filed, while one was also filed in the Supreme Court. Known as "writs of great constitutional importance", the reason behind the filing of these writs was the non-appointment of two judges and the transfer of one.

There was a constitutional issue concerning the constitutional validity of a government order that sanctioned both the non-appointment and transfer of High Court judges during a short period well as appointing them to the High Courts. Whether the correspondence is protected from judicial scrutiny and whether its disclosure would harm the public interest was another issue. According to the petitioners, the correspondence between the Chief Justice of India and that of the Delhi High Court, and the Law Minister must be disclosed, and the order indirectly forced the judges to approve the appointment as additional judges, otherwise, it would adversely affect the permanence of their profession. Furthermore, they argued, the President had failed to fulfill his duties under Article 217², so a writ of mandamus must be

¹ *SP Gupta v Union of India* (1982) SC 149

² Constitution of India 1950, art. 217

issued. Another argument was that the procedure in Article 124³ had not been followed properly.

According to the respondent's argument, Article 74(2)⁴ prohibits the advice by the Council of Ministers given to the President from being challenged. Another argument was that under Section 123 of the Indian Evidence Act⁵, unpublished documents could not be used as evidence. Section 123 of the Indian Evidence Act⁶ applies to the council of ministers' advice given at meetings, the respondents noted, citing "*State of Punjab v Sodhi Sukhdev Singh*.⁷" It was, therefore, up to the Department to decide whether or not to publish it. According to them, the petitioner's claim was not maintainable since they had not suffered any harm. It was the judges appointed as additional judges who were eligible to file the petition.

It denied the respondents' argument based on Article 19(1)(a) of the Constitution⁸, which mentions freedom of expression. According to the Supreme Court, an open and responsible government is one where the government is accountable to the people, and this concept indicates the Right to Know. The spirit of democracy exists in the accountability and transparency of its government. For this, there must be a check on their role and their functioning. Information related to the security of the country or such nature that its disclosure might harm the public interest is the only exception to the right to know by the people. Moreover, the court stated that it has the authority to ascertain whether a correspondence is disclosed to the public and what effects it will have. The court also held that the advice does not include correspondence and hence is not protected under Article 74(2) of the Constitution⁹.

By citing "*State of UP v Raj Narain*¹⁰", the court upheld the High Court's decision that unpublished documents can be used in court as evidence because the court has the authority to

³ Constitution of India 1950, art. 124

⁴ Constitution of India 1950, art. 74(2)

⁵ Indian Evidence Act 1872, s 123

⁶ *Ibid*

⁷ *State of Punjab v Sodhi Sukhdev Singh* (1961) SCR (2) 371

⁸ Constitution of India 1950, art. 19(1)(a)

⁹ Constitution of India 1950, art. 74(2)

¹⁰ *State of UP v Raj Narain* (1975) SCR (3) 333

determine the impact they will have on the public. As the appointment and transfer of judges are matters of public interest, this correspondence was not contrary to it. Consultations between the government and the authorities did not properly take place, nor were they based on relevant grounds. Consequently, the court ruled that the central government's decision not to disclose the correspondence was unjustified.

The court ruled that before appointing judges to the High Court, the President must consult with the Chief Justice of India, the Governor of the state, and the Chief Justice of the High Court. However, if there is a difference of opinions, then the President has to consider them separately. There is a possibility that he may hold a different opinion from the Chief Justice of India and the Chief Justice of the High Court. Moreover, the Chief Justice's opinion does not take precedence over those of the other functionaries. In giving primacy to the Chief Justice, his opinion would be valued more than the other judges and consequently affect the President's decision. Consultation, therefore, does not imply concurrence with the Chief Justice's opinion. Judiciary independence would be undermined if judges were appointed by the executive, which is a fundamental constitutional principle.

SECOND JUDGE CASE

The judgement of the first judge case was overruled by a 7:2 majority as a result of “The *Supreme Court Advocates on Record Association v Union of India*.¹¹” According to Article 124¹², this case led to the creation of the collegium system for appointing judges. In this case, the question was whether primacy should be given to the Chief Justice's opinion in the appointment and transfer of judges. The result was, that a procedure was devised to appoint the Supreme Court and the High Court judges in the interests of “protecting the integrity and guarding the independence of the judiciary”. The petitioners accused the executive of failing to fill judicial positions in the High Courts in a timely and proper, as well as failing to choose judges with the best qualifications. The court held that the Chief Justice of India has a unique, singular, and primary role in the appointment and transfer of judges, but that he is also a participatory

¹¹ *Supreme Court Advocates on Record Association v Union of India* (1993) 4 SCC 441

¹² Constitution of India 1950, art. 124

member of the executive. Therefore, neither the Chief Justice nor the executive could force an appointment that deviated from their wishes.

The court interpreted the term consultation to mean concurrence, with the Chief Justice's opinion being the most essential part of it. The Chief Justice must approve the appointment. Also, the court ruled that Chief Justice's recommendations regarding the judges' appointment must be in consultation with the two senior-most judges, and only such recommendations will take effect.

THIRD JUDGE CASE

The third judge case was the "*In Re: Special Reference No. 1 of 1998*¹³". By Article 143 of the Constitution¹⁴, K.R Narayanan sent the Supreme Court a Presidential Reference regarding the meaning of the term "consultation". The question was raised to determine whether the Chief Justice's sole opinion was "consultation" or whether several judges needed to deliberate to form the opinion. The Supreme Court held that articles 124(2)¹⁵ and 217(1)¹⁶ of the Constitution require the Chief Justice to consult with several judges before rendering an opinion. The Chief Justice's opinion alone does not constitute a "consultation". The Chief Justice cannot appoint and transfer judges without the consultation of four senior-most Supreme Court judges. Further, the Supreme Court held that judicial review of a judge's transfer is only available when the Chief Justice makes the recommendation without consulting the four senior-most judges.

COLLEGIUM SYSTEM

The Supreme Court introduced a collegium system to appoint judges under Article 124¹⁷. Among the members of the Supreme Court's Collegium is the Chief Justice of India, as well as four senior judges, including the Chief Justice's successor. There are four senior-most judges in the High Court Collegium, which is headed by the Chief Justice of the High Court. A

¹³ *In Re: Special Reference No. 1 of 1998* (1999) SC 1

¹⁴ Constitution of India 1950, art. 143

¹⁵ Constitution of India 1950, art. 124(2)

¹⁶ Constitution of India 1950, art. 217(1)

¹⁷ Constitution of India 1950, art. 124

recommendation is made to the central government, which also forwards some suggestions to the collegium in the course of the process. Names are investigated and fact-checked by the Central Government and then sent back to the Collegium. Following the central government's submissions, the collegium considers some further changes and sends it for final approval. It is however necessary that the Central Government approves the name if the Collegium resubmits it. Because there is no fixed time limit for replies, the appointment of judges can take a long time. First, the Supreme Court collegium and the Chief Justice of India must approve names recommended by the High Court collegium before they can reach the government.

FOURTH JUDGE CASE

The fourth judge case was the "*Supreme Court Advocates on Record Association and Anr. v Union of India*,¹⁸" challenging the 99th amendment¹⁹ and the National Judicial Appointment Commission Act of 2014²⁰, in several petitions filed against their validity. This case was mainly centred on the question of whether the 99th Amendment Act²¹ violated the principle of Separation of Powers, and whether the National Judicial Appointment Commission Act²² violated that principle. According to the Supreme Court, the 99th amendment²³ is unconstitutional and void. It is the supremacy and primacy of the judiciary that is undermined by executive intervention in judicial appointments, according to the Supreme Court. A fundamental feature of the Constitution is that executive and judicial powers are separated. However, this was violated by this act. In the Court's view, the NJAC Act²⁴ left open questions about the privacy of candidates for judicial appointments, and, if any sensitive information about the candidate were made public, it would seriously damage that individual's reputation and dignity. Candidates providing their information voluntarily might not have a right to privacy but should expect not to have it disclosed to third parties. Candidates should have the right, not to have their information disclosed in the case where the President rejects their

¹⁸ *Supreme Court Advocates on Record Association & Anr v Union of India* (2015) SC 5457

¹⁹ Constitution (Ninety-ninth Amendment) Act 2014

²⁰ National Judicial Commission Act 2014

²¹ Ninety-ninth Amendment (n 19)

²² National Judicial Commission Act 2014

²³ Ninety-ninth Amendment (n 19)

²⁴ National Judicial Commission Act 2014

recommendation. There were concerns about candidates' privacy as well as their right to know under the NJAC Act²⁵ and the 99th amendment²⁶, the court held.

NATIONAL JUDICIAL APPOINTMENT COMMISSION

Bypassing the 99th amendment²⁷, the government established the National Judicial Appointments Commission (NJAC) in 2014 to replace the Collegium system. To regulate NJAC's functions, Parliament passed a National Judicial Commission Act²⁸. Also, the executive was proposed to play a greater role in selecting Supreme Court and High Court judges. Transparency and accountability were sought in the appointment process by replacing the collegium system.

It comprised of the Chief Justice of India, two senior Supreme Court judges, the Law Minister, and two 'eminent persons', nominated by a committee comprised of the Chief Justice, the Prime Minister, and the Opposition Leader, for a period of three years. Once their term expires, they cannot be nominated again. A senior Supreme Court judge was to be recommended to be Chief Justice of India based on their qualifications, merits, etc. The NJAC was to recommend a judge as the Chief Justice of the High Court based on their seniority, laying consideration on aptitude, merit, etc. For appointing judges to the High Court, NJAC was to provide names to the Chief Justice. The Chief Justice must also consult with the two senior-most judges. The opinion of the Chief Minister and the Governor were to be taken into consideration before the recommendation of the names. The recommendations made by the NJAC could further be scrutinized by the President, and after reconsideration, the President was to select the candidate by following the recommendations by the NJAC.

CRITICISM OF THE COLLEGIUM SYSTEM

- The Supreme Court, especially after the third judge case, has created such an intricate

²⁵ *Ibid*

²⁶ Ninety-ninth Amendment (n 19)

²⁷ *Ibid*

²⁸ National Judicial Commission Act 2014

system of appointment of judges that it seems that they have made their version, which is very different from what one would interpret after a simple reading of the article. Given the text of the Constitution, this interpretation by the Supreme Court makes it extremely difficult to figure out what its framers intended.

- The Collegium system has been criticised, recently even by the Union Law Minister, Kiren Rijju, for lacking transparency and accountability, and is accused of being “opaque” and involving “intense politics”²⁹.
- The Collegium system has been critiqued heavily for having nepotistic tendencies. This system is also called ‘Judges appointing judges’³⁰, where the judiciary itself decides who becomes a part of it. Such a system may even create a situation of judicial aristocracy and those who are talented and deserving may be overlooked since only a few judges end up taking crucial decisions.

CRITICISM OF THE NATIONAL JUDICIAL APPOINTMENT COMMISSION

- Under NJAC, the executive would have had significant authority over the appointment of judges, which could have resulted in appointments that were political in nature and the judgements given could be biased towards the executive.
- NJAC Act³¹ did not provide any clarity or certainty over the fact on who the ‘eminent persons’ would be and whether they would be qualified enough to participate in the appointing process of judges, them being very significant in keeping a check on both the legislature and the executive.
- The NJAC system possessed lacks adequate representation of the judiciary. Only two senior-most judges were a part of the commission along with the Chief Justice, as opposed to four senior-most judges in the Collegium system.

²⁹ R Balaji, ‘Collegium system of appointing judges involves ‘intense politics, says Kiren Rijju’ (*Telegraph India*, 6 November 2022) <<https://www.telegraphindia.com/india/collegium-system-of-appointing-supreme-court-and-high-court-judges-involves-intense-politics-kiren-rijju/cid/1896479>> accessed 15 December 2022

³⁰ *Ibid*

³¹ National Judicial Commission Act 2014

CONCLUSION

The Chief Justice of India's primacy in appointing judges was ruled by the Supreme Court in the 'second³² and the third judge case³³' after the executive made authoritarian appointments of judges. The Central government in 2014 brought the NJAC Act³⁴ to reform the appointment system of judges. It, however, came with its own set of shortcomings. It brought forth concerns for privacy for the candidates and posed a lack of judicial representation. Even though the Supreme Court held the 99th amendment³⁵ unconstitutional, the majority judgment acknowledged that the collegium system needed to be streamlined to become more transparent and responsive. Nevertheless, one cannot deny that executive existence in appointing judges is crucial. To ensure that proper checks and balances were in place, the Constituent Assembly framed the system to involve the executive in the appointing process of the judges. There is a need to reform the process of appointing judges to ensure transparency, accountability, and checks and balances, without hindering their independence and privacy.

³² *Supreme Court Advocates* (n 11)

³³ *In Re: Special Reference* (n 13)

³⁴ National Judicial Commission Act 2014

³⁵ Ninety-ninth Amendment (n 19)