Silver Lining Between Judicial Independence and Judicial Accountability in Judicial Appointments

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ABSTRACT
The silver lining between judicial independence and judicial accountability in judicial appointments is the creation of an independent and transparent process that balances the need for judicial independence with the need for judicial accountability. Such a process would ensure that judges are appointed based on their qualifications and merit, while also providing ongoing evaluation and review of their performance to maintain public confidence in the legal system. This paper neither criticizes NJAC nor supports the current collegium system; rather it attempts to bring out a neutral judicial commission. In that reference, judicial commissions across the world have been examined. Being a developing country, India can learn from the pitfalls in judicial commissions of developed countries.

1. Introduction

A democracy cannot function without an accountable and transparent administration. To ensure accountability and fairness, the government must give all three organizations more power. Yet, it is the judiciary's responsibility to keep an eye on and protect harmony among all the organs. As a result, the judiciary is essential to the welfare of the country. So, it was necessary to increase the judges' power. Where the legal system has more power, it also has some responsibilities. The judiciary is free to use all the power that our Constitution grants it.

A just and rational-legal system must respect judicial independence and accountability principles. Nonetheless, there may be times when the two perspectives diverge, particularly regarding judicial appointments.

On the one hand, judges must be free from bias and able to base their decisions only on the law and the facts of a case to maintain judicial independence. To put it another way, judges ought to be selected based on their qualifications, experience, and competence rather than their political beliefs or personal convictions. Judicial independence is necessary to uphold the rule of law and give the court the ability to review the other branches of the government. Judges must, however, be held accountable for their decisions and subject to the appropriate checks and balances to be held to a high standard of justice. This indicates that the general public, the legal community, and other governmental organizations are all parties to which judges must respond. Judicial accountability is essential to maintaining the public's confidence in the legal system and ensuring that judges are abiding by the law and community norms.

What is the best way to combine these two concepts in the context of judicial appointments? Establishing a fair and transparent process for choosing judges that finds a balance between the needs of judicial independence and accountability is one tactic.

The framers of the Indian Constitution understood the value of having a distinct judicial system while they were drafting it. Dr Ambedkar stated during the discussions of the Constituent Assembly that "our judiciary must be both independent of the government and competent in it." And the question is, how could these two things be secured?

But, ongoing debates over judicial appointments seem to indicate the opposite. With the creation of the National Judicial Appointment Committee, which was ultimately overturned and ruled illegal, a difficult problem addressing the "need for independence of the judiciary" has come to light. A fundamental change occurred when

the Supreme Court's 7-judge panel ruled in 1981 that the government would be given preference in the appointment of judges.

Since the judiciary gained primacy in judicial nominations in 1998, it has been important to create a system of judicial appointments that is more practical, equitable, and agreeable. This has necessitated the creation of a more palatable, workable and fair selection process for judges. This article analyses the existing system of judicial appointments and suggests a better approach that would give the executive and the judiciary equal power to select and appoint judges in the courts. It argues that the "Judges appointing Judges" system in its entirety and the collegium system could result in the judiciary abusing its power. That is a potent illustration of aristocracy and elitism, which violates the Constitution's spirit because they reject both equality and democracy in general.

The paper analyses the Third Judges case and critiques the collegium's appointment process, many other judicial appointment models are also looked at: the American model, the South African model, the British model, France Model, the Brazilian Model, Argentina Model and Germany Model. It further argues that the executive's role in appointing judges does not influence the judges' capacity to exercise their authority. This essay also argues that the executive branch should only be involved in judicial appointments and not in the appointment of the Chief Justice, judicial promotions, or judicial removals.

APPOINTMENT OF JUDGES IN THE INDIAN JUDICIAL SYSTEM:

Ancient Era:

The monarch or the local ruler was responsible for appointing judges in ancient India. Judges who were renowned for their wisdom, integrity, and legal expertise were chosen by the king in the past. The selection procedure was founded on the "Dharma" principle, which highlighted the value of fairness and righteousness. This idea guided the judges' choices, and they were supposed to do the same in their job.

The judges were appointed from among the eminent and well-respected members of society, such as Brahmins, who were renowned for their legal expertise and moral character. These judges were also expected to possess a thorough knowledge of the Vedas, which in ancient India were regarded as the fount of all knowledge. The judges were appointed from among the eminent and well-respected members of society, such as Brahmins, who were renowned for their legal expertise and moral character. These judges were also expected to possess a thorough knowledge of the Vedas, which in ancient India were regarded as the fount of all knowledge.

In conclusion, the ancient Indian judicial system relied on the virtues of wisdom, integrity, and legal understanding when choosing judges. The judges were supposed to conduct themselves fairly and adhere to the "Dharma" ideal in their work.

Medieval Era:

Several dynasties and empires, such as the Mughal Empire, the Delhi Sultanate, and the Vijayanagara Empire, ruled over India during the mediaeval era. In India throughout this time, the appointment of judges varied according to the governing authority and the country's legal framework.

Throughout the Mughal Empire, either the emperor or his delegated representatives appointed judges. The judges were chosen for their expertise in Islamic law, or Sharia, as well as their reputation for justice and objectivity. The Mughal emperors respected the function of judges and frequently used their counsel when making judgments.

The ruling Sultan in the Delhi Sultanate was also in charge of appointing judges. The judges were appointed because of their familiarity with Islamic law and their fealty to the Sultan. To settle conflicts under Islamic law, the Delhi Sultanate set up a system of Qazi courts.

The Vijayanagara Empire, which was renowned for its support of the arts and culture, had a sound judicial system as well. A council of judges served the empire, and the king appointed them. These judges, who were in charge of resolving property, marriage, and inheritance conflicts, were well-known for their familiarity with Hindu law.

Generally, the reputations of the ruler for justice and impartiality, as well as his or her legal and religious convictions were heavily weighted when appointing judges in mediaeval India. To uphold law and order and settle conflicts justly and fairly, judges were seen as playing an essential role.

Modern Era:

The history of the higher judiciary's appointment of judges may be traced back to India's British colonial era. At this time, the Brits constructed a hierarchical legal system that was based on British legal concepts.

The Mayor's Courts are where the history of India's current judicial system began. The Governor-in-Council of each Presidency (there were two at the time, Madras and Surat) was given the authority by the Royal Charter of 1661 "to judge all persons belonging to the said presidency or that shall live under them in all causes, whether civil or criminal, according to the laws of this kingdom and to execute judgment accordingly." At least two decades went by in Madras without this power being used. The Governor-in-Council agreed in 1678 that they would have two weekly sittings to hear and decide all disputes between Europeans and Indians under English law. Another charter permitted the company to establish a municipality in Madras in 1687, which marked the beginning of the territorial nature of the company's control in Madras.

The company constituted a municipality by using this authority. A "Court of Record" with the authority to hear civil and criminal cases in their respective jurisdictions was established with the Mayor and Aldermen as members. As the "Justices of the Peace," the mayor and three of the twelve aldermen were appointed. In Bombay and Calcutta, comparable courts were formed throughout succeeding presidencies. Each presidency town Madras, Bombay, and Calcutta was given a Mayor's court under the terms of the Charter of 1726. The earlier Mayor's courts belonged to the company, while the more recent courts belonged to the King of England. This was the main distinction between the previous courts and this new court. The charter's provisions made it clear that Indian Mayor's Courts had to follow English law.

But, in the meanwhile, the French had taken over Madras, and this system remained suspended until 1749 when the French finally gave Madras back. To resolve the issues with the earlier charter, including the courts, the Charter of 1753 was later passed. To prevent conflicts between the two, the Mayor's courts were placed under the Governor-in-Council under the new charter. However, the judiciary continued to struggle with issues such as a lack of local judges, an overworked administration, a failure to render unbiased judgement, and others.

Under the Regulating Act of 1773, the Supreme Court of Fort Williams in Kolkata was initially constituted in 1774. It was formed of the Chief Justice and three judges (later reduced to two), all of whom were nominated by the Crown and served in the King's court. The founding of this Supreme Court was therefore "an act of reformation rather than of innovation," as it was designed to "in actuality fill the place of the Mayor's Court formed in 1727," (under the Charter of 1726). This court was endowed with the authority to try civil and criminal cases, punish for contempt, have jurisdiction over the ecclesiastical and maritime realms, and more. You could appeal to the King-in-Council regarding this court.

The Regulating Act of 1773's uncertainties caused the Supreme Court and the Governor General in Council to argue frequently. By significantly limiting the Supreme Court's authority in favour of the Governor-in-Council in 1781, this problem was fixed. However, an effort was made to keep the council's judicial meetings and executive meetings apart. It was deemed that new courts needed to be established because of the company's expanded activity. A second charter was issued by the King on February 1st, 1798, to set up two Recorder Courts in Madras and Bombay. Three Corporation Aldermen, one Recorder, and one Mayor made up each Recorder's court. Except for composition, the Recorder's Court had the same rights, obligations, and restrictions as the Supreme Court of Calcutta. Madras and Bombay each had a Supreme Court established in 1801 and 1824, respectively. These courts shared with the Supreme Court in Calcutta the same constitutional rights, duties, restrictions, and territorial authority. These Supreme Courts operated until 1862 when the High Courts at all three locations took their place.

Mofussil Courts were created following it. Rural, or areas remote from the company's presidency towns, is what is meant by the term "mofussil." Achieving the Diwani of Bengal, Bihar, and Orissa in 1765 was the Company. The Mofussil Faujdari Adalat and the Mofussil Diwani Adalat, as well as the Little Cause Adalat, were formed by Warren Hastings. These courts' decisions might be appealed to the Sadar Nizami Adalat and Sadar Diwani Adalat, respectively, which handle criminal and civil appeals. Warren Hastings abolished the Zamindars at that point since they were also performing some sort of judicial duties. It's also known that Warren Hastings requested that Indian judges be appointed in Fauj dari adalats and that he put the legal proceedings on paper. Lord Cornwallis made changes to the judicial system in 1787, 1790, and 1793. In Bengal, Bihar, and Orissa, he completely overhauled the civil and criminal justice systems and instituted the notion of administration according to law. The judiciary under Cornwallis was divided into three tiers as follows:

Civil Judiciary:

For cases with values under Rs. 50, the Amin Court or Munsif Court was the lowest. Was a district court presided over by a session judge or the Diwani Adalat higher? The Provincial Court of Appeal was superior to Diwani Adalat. At Dhaka, Calcutta, Murshidabad, and Patna, there are four provincial courts of appeal. The highest court of appeal, known as "Sadar Diwani Adalat," was established after the provincial court. The Sadar Diwani Adalat was the Supreme Court of Appeal, and its headquarters were in Calcutta. A Head Qazi, two Muftis, and two Pandits stood behind the judge in the case. The "Sadar Diwani Adalat" appeals could be delivered to the King of England. Only cases worth more than 5000 rupees were considered by the King of England.

Criminal Judiciary:

There was a Darogha-i-Adalat at the Taluka/Tahsil level. Darogha, an Indian judge, served as the case's judge. District Criminal Courts would hear appeals from Darogha. This court's judge was a session judge. Four circuit courts were formed in Murshidabad, Dhaka, Calcutta, and Patna to hear criminal appeals from district courts. The "Sadar Nizami Adalat" in Calcutta, which used to meet once a week, served as the highest court of criminal appeal. The Governor General in Council oversaw it. Also, Lord Cornwallis abolished the court fee and instructed the attorneys to choose their rates. Inhumane punishments from the Mughal and Sultanate eras, such as cutting off arms and heads and eyes, were also outlawed by him.

The High Courts of Calcutta, Bombay, and Madras were formed by the Indian High Courts Act of 1861. These courts only employed judges who were British subjects and were appointed by the British Crown. They were chosen based on both their fidelity to the British Crown and their legal training and expertise.

As a result of India's 1947 declaration of independence, the Indian government is now in charge of appointing judges for the higher courts. A separate judiciary was formed by India's 1950 Constitution, which also defined the procedures for high court and supreme court judges to be appointed.

The President of India picks the Supreme Court and High Court judges following the Indian Constitution after consulting with a collegium of experienced judges. The Supreme Court established the collegium system in 1993, which provides the judicial branch with a considerable role in the selection of judges.

The method used to appoint judges in India has been a topic of discussion over the years. Some detractors claim that the collegium system is not transparent or accountable, while others contend that a wider range of applicants should be considered for judicial appointments. Overall, the development of the Indian legal system and efforts to create an impartial and independent judiciary is reflected in the historical backdrop of the nomination of judges in the higher courts.

HOW JUDGES ARE APPOINTED IN OTHER MAJOR COUNTRIES:

The provisions for the appointment of judges in other countries vary widely depending on their legal systems and traditions. Here are some examples:

Appointment of Judges in the USA:

The US Constitution governs the appointment of judges to the higher courts in the United States. With the advice and approval of the Senate, the President of the United States selects judges for the Supreme Court and other federal courts.

A nominee for a judicial vacancy is first proposed by the President. After that, the nomination is forwarded to the Senate Judiciary Committee, which examines the candidate's credentials and holds a hearing during which the candidate is questioned about their judicial ideology and legal background. The committee decides whether to recommend the nominee for confirmation by the entire Senate after the hearing.

The nominee is submitted to the full Senate for a vote after receiving approval from the committee. Whether to confirm the nominee is decided after discussion in the Senate. While a filibuster occasionally has the power to stop a vote from happening, a simple majority is necessary for confirmation.

Except for the Chief Justice of the United States, no one is nominated or appointed to the role of the chief judge; rather, seniority determines who holds the position. For both circuit and district chiefs, the same standard applies. The senior judge in the commission of the judges who are 64 years of age or younger, have served as judges for at least one year, and have never held the position of the chief judge before, is the chief judge.

Given that federal judges are lifetime appointees and have a substantial influence on how the US Constitution and federal law are interpreted, the nomination of judges to the federal judiciary is regarded as a very important duty of the US President.

According to its critics, the appointment procedure has become much politicized, with Presidents and Senators frequently choosing and confirming justices based on their ideological leanings and political allegiances. Supporters of the procedure counter that it guarantees that judges are chosen based on their legal expertise and qualifications and that the confirmation process enables public inspection and debate of the nominee's credentials.

Appointment of Judges in the United Kingdom:

A combination of constitutional conventions, laws, and common law governs the selection of judges for the higher courts in the United Kingdom.

In the UK's higher judiciary, judges are generally appointed by the Lord Chancellor. However, this authority was given to the newly established Judicial Appointments Commission (JAC) by the Constitutional Reform Act of 2005. The JAC, an impartial organization, is in charge of appointing candidates for positions in the judiciary in England and Wales, Scotland, and Northern Ireland. It is administered by a Commissioner made up of both legal and non-legal members, who are picked by the Lord Chief Justice.

The Lord Chancellor, who ultimately appoints judges, receives recommendations from the JAC after the JAC advertises judicial positions, evaluates applicants' credentials and eligibility for appointment, and makes those decisions. Also, it is the commission's responsibility to encourage diversity in the choice of applicants for judicial positions.

The senior judiciary in the UK, in addition to the JAC, has a role in who gets appointed as a judge. The JAC receives advice and direction on judicial nominations from the Lord Chief Justice, who serves as the chief justice of England and Wales. The Lord Chief Justice of Northern Ireland, the Lord Justice General of Scotland, and the Lord President of the Court of Session all have a role in who gets appointed to be a judge in their respective countries.

The wide-ranging, complicated system of legal and constitutional rules and procedures, aimed at assuring the selection of highly qualified and impartial judges, governs the appointment of judges to the higher judiciary in the UK. In recent years, it has also been increasingly significant for the JAC to play a role in fostering diversity and guaranteeing openness in the selection process.

Appointment of Judges in France:

Constitutional principles, statutory rules, and legal precepts all work together to regulate the nomination of judges to the higher judiciary in France. Judges in France are appointed, promoted, and subject to discipline by the "Conseil supérieur de la magistrature" (CSM). A constitutional body made up of legislators, judges, and attorneys is called the CSM.

The CSM is responsible for appointing judges to the higher judiciary, including the Court de Cassation (the highest court in France for civil and criminal matters), the Conseil-d-État (the highest court in France for administrative matters), and the Court des Comptes (the court responsible for auditing public accounts).

In France, the selection and appointment of judges are extremely competitive. The concourse is a competitive test that candidates must pass before moving on. It measures their legal knowledge and the practical application of legal ideas. Individuals who succeed on the test can subsequently apply for judicial appointments.

Following that, the CSM selects applicants based on their credentials, professional expertise, and moral standards. To ensure that the judiciary accurately reflects the plurality of French society, the CSM must likewise encourage diversity in the selection of judges. In summary, a system that values merit, professional qualifications, a commitment to ethical norms, and diversity is used to nominate judges to the higher judiciary in France. An essential aspect of the French legal system is the CSM's oversight of the appointment procedure and maintenance of the independence of the judiciary.

Appointment of Judges in South Africa:

The Judicial Service Commission and the Constitution of the Republic of South Africa, 1996 both govern the appointment of judges to the higher judiciary in South Africa (JSC).

Judges in South Africa are appointed, promoted, and transferred by the JSC, a constitutional authority. It is made up of representatives from the government, legal community, and judicial system.

Based on their credentials, experience, and eligibility for the position, candidates for judicial office must be selected by the JSC. To guarantee that the judiciary accurately reflects the diversity of South African society, the JSC also has a responsibility to encourage diversity in the selection of candidates for judicial office.

The JSC's call for nominations for a specific judge vacancy marks the start of the appointment procedure. The JSC will thereafter receive applications from interested applicants, along with a curriculum vitae and any other pertinent paperwork. After reviewing the applications, the JSC selects a short list of applicants for further consideration. The JSC conducts interviews with shortlisted candidates before recommending judges for appointment to the President of South Africa.

After consulting with the JSC and the relevant Premier of the province where the court is located, the President then appoints the chosen nominee to the judiciary.

In essence, South Africa's higher judiciary appointments are controlled by a system that places a premium on talent, credentials, and a dedication to diversity and representation. An essential component of the South African legal system is the JSC's oversight of the appointment procedure and maintenance of the judiciary's independence.

Appointment of Judges in Australia:

Several constitutional provisions, laws, and customs combine to govern the appointment of judges to the higher couUnder

In accordance with the Commonwealth Constitution, the Australian government has the authority to nominate judges to the country's federal courts, including the High Court of Australia and the Federal Court of Australia. The governing body of each state or territory is in charge of appointing judges to state and territorial courts, including the Supreme Courts of each.

As per the objective and unbiased Judicial Appointments Advisory Committee's recommendations, the federal government names judges to the higher judiciary (JAAC). The JAAC is in charge of judging whether candidates are qualified for judicial office based on their education, experience, and character traits, including integrity and impartiality. The JAAC Evander follows a set of standards set forth by the government, which include legal knowledge, professional experience, and character traits. The federal Attorney-General then receives a shortlist of candidates from the JAAC, and he or she makes the ultimate decision for appointments. Judges are appointed in Australia by the senior judiciary in addition to the JAAC. Judges are appointed with the advice and consent of the Chief Justice of the High Court, the Chief Justices of the Federal Court, and the Supreme Courts of each state and territory.

Generally, a system that places a premium on merit and professional credentials as well as a dedication to diversity and representation governs the selection of judges for Australia's higher judiciary. An essential component of the Australian legal system is the JAAC's oversight of the appointment procedure and maintenance of the judiciary's independence.

Appointment of Judges in Canada:

The Constitution Act, of 1982, governs the appointment of judges in Canada and specifies the steps that must be taken to name judges at both the federal and provincial levels.

The Governor General, who officially appoints federal judges, including members of the Supreme Court of Canada, receives recommendations from the Prime Minister and the Minister of Justice. The Judicial Advisory Committees (JACs), which are made up of attorneys, judges, and other members of the legal community, suggest a pool of candidates for the positions. The JACs evaluate applicants based on merit and additional standards, including diversity and bilingualism.

On the advice of the Attorney General, the Lieutenant Governor in Council (the provincial Cabinet) makes appointments for provincial judges using a similar procedure. The Attorney General, who proposes candidates to the Government for the appointment, receives recommendations from the JACs in each province. The idea of judicial independence and the requirement that judges be qualified, competent, and unbiased are used to guide the nominations in both situations. The selection procedure is regularly examined and evaluated and is intended

to be open and accountable.

Appointment of Judges in Argentina:

The National Constitution of Argentina and the Council of the Magistracy (Consejo de la Magistratura) both govern the nomination of judges to the higher court in Argentina.

Judges are selected, appointed, and dismissed by the Council of the Magistracy, an independent constitutional body. It is made up of representatives from the legislature, the legal community, and the judicial system. Depending on their qualifications, experience, and appropriateness for the position, the Council of the Magistracy is in charge of choosing candidates for judicial office. To ensure that the judiciary accurately reflects the diversity of Argentine society, the Council also has a responsibility to encourage diversity in the selection of candidates for judicial office.

The Council of the Magistracy issues a request for nominations for a particular judicial vacancy to kick off the appointment process. The Council then receives applications from interested applicants, together with curriculum vitae and any other pertinent materials.

After reviewing all of the applications, the Council selects a few applicants to move on to the next round of consideration. The Council conducts interviews with the shortlisted applicants before recommending individuals for appointment as judges to the President of Argentina.

Following consultation with the Senate, the President then appoints the chosen candidate to the judiciary. In general, a system that stresses merit, professional credentials, a commitment to diversity and representation, and the appointment of judges to the higher judiciary in Argentina governs the selection of judges. An essential aspect of the Argentine legal system is the Council of the Magistracy's oversight of the hiring procedure and maintenance of the judiciary's independence.

Appointment of Judges in Brazil:

The National Council of Justice (Conselho Nacional de Justiça, or CNJ), as well as the 1988 Brazilian Constitution, both regulate the appointment of judges to the higher judiciary in Brazil. The administration and supervision of the judiciary are the purviews of the CNJ, an independent constitutional authority. The judges, the legal community, and members of the general public are all represented on it. Based on their qualifications, experience, and appropriateness for the position, the CNJ is in charge of choosing applicants for judicial office. To ensure that the judiciary accurately reflects the diversity of Brazilian society, the CNJ also has a responsibility to encourage diversity in the selection of candidates for judicial office.

The CNJ issues a request for nominations for a particular judge vacancy, which kicks off the appointment procedure. Thereafter, interested candidates send the CNJ their applications, along with curriculum vitae and any other pertinent materials. After evaluating the applications, the CNJ selects a short list of candidates for consideration. The CNJ conducts interviews with the shortlisted candidates before submitting recommendations for the appointment of judges to the President of Brazil. After consulting with the Senate, the President then appoints the chosen candidate to the judiciary. The Brazilian Bar Association (Ordem dos Advogados do Brasil or OAB), in addition to the CNJ, has a say in appointing judges. The OAB is in charge of evaluating the candidates for judicial office in terms of their legal expertise and moral character.

In essence, Brazil's higher judiciary appointments are guided by a system that places a premium on talent, credentials, and a commitment to diversity and representation. An essential aspect of the Brazilian legal system is how the CNJ and the OAB supervise the hiring procedure and guarantee the independence of the court.

Appointment of Judges in Germany:

The selection process for full-time judges often begins with an application, and candidates are chosen based on their qualifications and professional performance. A judge must be appointed before they can begin serving. The head of state or a capable governing body appoints the judges. A formal document is used to make appointments. From court to court, different procedures are used for selection and appointment. Depending on the level of court, autonomous judicial authorities at the federal and state levels appoint judges in Germany. The appointment procedure is intended to safeguard the judiciary's impartiality and independence from political influence.

The Federal Constitutional Court's judges are appointed by the Bundestag and Bundesrat, respectively, with the

Bundestag selecting half of them (state chamber). The court is composed of federal judges and other individuals who are not permitted to hold office in the Bundestag, Bundesrat, federal government, or another similarly situated state (Land) entity. To decide, two-thirds of the members present must vote.

At the federal level, the Federal Minister of Justice appoints judges after consulting with the Federal Judicial Selection Committee. Members of this committee include the Federal Bar Association, the Federal Court of Justice, the Federal Ministry of Justice, and the Judges' Association. The selection committee takes into account a candidate's education, work history, moral character, and reputation. Judges are chosen by impartial organizations known as Judicial Selection Committees at the state level. Representatives from the legislative branch, the judiciary, and the legal community make up these committees. They are in charge of assessing and choosing candidates for appointments to the state's courts.

Candidates for judicial appointment must have finished legal studies and passed a state exam in law in both situations. Also, they need to have real-world legal experience, including working as a lawyer or legal assistant. Additionally, they need to exhibit traits like integrity, objectivity, and a dedication to the rule of law on a personal and professional level.

In Germany, judges have complete independence and objectivity when carrying out their duties. They must interpret and apply the law impartially, regardless of their political or religious views. Also, they must abide by several ethical and professional requirements, such as those relating to impartiality, confidentiality, and conflicts of interest.

PROVISION REGARDING JUDICIAL APPOINTMENT UNDER THE CONSTITUTION OF INDIA:

The most detailed written constitution is the one from India. The constitution's quasi-federal framework outlines and clarifies all of the three governmental institutions' powers, duties, responsibilities, rights, and restraints. The constitution serves as the foundation for the judiciary, one of the three branches of government, and establishes its rights and powers. The process for choosing judges is governed by the constitution, but it has undergone numerous changes as the collegium system has developed. This appointment procedure, in place for the past three decades, is not something that was included in the original constitution. The constitutional provisions regarding the appointment of judges to the Supreme Court and High Courts must therefore be studied and analyzed in light of the constituent assembly's original intent. This essay will outline how judicial appointments have changed since the Constitution's passage and through the Judge's case.

The members of the constituent assembly carefully considered the social, economic, political, and legal implications of each provision as they drafted the Indian constitution, and after reaching an agreement in the assembly, it was ratified on behalf of "WE THE PEOPLE." There were some substantial arguments over the selection criteria for judges, and there was a definite agreement on how judges were chosen and appointed. According to Jawaharlal Nehru, judges should be individuals of the "highest integrity" who "can stand up against the president, the legislature, or anybody who might come in their way." The assembly acknowledged the importance of the judiciary's independence but not its "insulation."

Dr B.R. Ambedkar expressed a similar opinion when he strongly opposed a proposal to make the Chief Justice of India's advice regarding judicial appointments binding on the executive. His speech effectively summarizes the risks of this proposal: "It would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, which is to say simply on the advice of the executive of the day. In a similar vein, it doesn't seem like a very good idea to me to require legislative approval for any appointments the executive chooses to make. Regarding the issues surrounding the Chief Justice's concurrence, it appears to me that those who support that idea appear to implicitly rely on both the Chief Justice's objectivity and the accuracy of his judgment. I believe that no nomination of judges should shift power from the President or the current government to the Chief Justice. Hence, in my opinion, that is also a risky notion.

A new system of appointing judges was adopted, one that was not entirely based on the USA's system of appointing judges and not just based on the United Kingdom's. This was done after the Constitution's framers researched the constitutional provisions about judicial appointments in the majority of countries. Framers developed a technique under Article 124 as a result of the experiences of all these nations. Chapters IV and V of the Union Judiciary, which is included in Art 124 to 147, deal with the founding and constitution of the Supreme Court, the appointment of justices, as well as the judges' rights, jurisdictions, and conditions of service. Whereas Chapter V, Part VI, and Articles 214 to 231 undo the caption The High Court of the States deals with

matters such as the establishment of High Courts, the appointment and requirements for a judge to hold a High Court position, as well as the judge's authority, jurisdiction, and other conditions, as well as the transfer of judges between High Courts. The president is given the authority to nominate judges to the Supreme Court or a High Court under Articles 124(2) and 217(1), respectively.

Under Article 124(1), the president may designate a Supreme Court judge who will serve in that capacity until the age of 65 after consulting with the judge of the Supreme Court and the state's high court. As long as the Chief Justice of India must always be contacted when a judge other than the Chief Justice is appointed, Under Article 217 of the constitution, the governor of the state or the chief justice of the High Court, in the case of the appointment of a judge other than the chief justice of the High Court, shall make the appointment and determine the terms of service of a High Court Judge, who shall hold office until he turns sixty-two years old. According to Article 235 of the constitution, state governors, in collaboration with the high court, nominate judges for subordinate courts, which are subject to the control of the state's high court.

The Constituent Assembly, therefore, planned for a careful inter-institutional balance in the selection of judges, with a variety of authorities from different branches of government monitoring and balancing one another to guarantee that the judiciary's honour and independence were upheld. The Law Commission of India expressed worry about the constitutionally mandated system of appointment in its 14th report, "Reform of Judicial Administration," noting that the influence of the administration, particularly in the state, was eroding the judiciary's independence. This was probably the seed of the idea that the court itself, through its representatives, was best suited to determine its makeup and ensure judicial independence.

JUDICIAL ACTIVISM ON APPOINTMENT:

It is divided into three phases

- Phase 1- 1971 to 1981
- Phase 2- 1982 to 1993
- Phase 3- 1994 to date

Phase 1:

Up until 1973, it was customary to name the Chief Justice of India from among the Supreme Court's senior-most judges and to consult with him or her before appointing other judges. Only Judge Zuffer Imam was not appointed as chief justice of India because he was experiencing very serious mental and physical infirmities, and he later resigned from this position. This practice had practically become a tradition and was permitted by the Executive without any exception.

On April 25, 1973, the government abruptly ended a 22-year-old custom. Within hours of the Keshwa Nanada Bharti judgement being delivered, Mr A. N. Ray, a senior judge, was sworn in as the country's chief justice, replacing Justices Salat, Grover, and Hegde. Eight hours after Mr Ray's oath-taking ceremony, the three judges resigned from the Supreme Court. The government argued on the ground as follows:

(1) Under Article 124, the President is free to choose whoever he sees fit to be the Chief Justice of India. Government Viewpoint: Throughout the past 22 years, the President of India has never chosen to use his or her discretion instead of adhering to a procedure that has essentially become the norm.

(2) It was asserted that when appointing the Chief Justice of India, the government did so under the Law Commission's recommendations. 215 The Law Commission proposed in 1956 that while choosing the Chief Justice of India, merit, administrative competence, and experience as a judge should be taken into account in addition to seniority. For over 17 years, the report was not put into practice. The commission's recommendation for the selection of India's Chief Justice did not imply that the candidate had superior qualifications, and the three illustrious judges were not elevated because they ruled against the government rather than because they were qualified.

In the matter of Lakhan Pal v. A. N. Ray, a plea for quo warranto under Article 226 was filed in the Delhi High Court, challenging the appointment of the new Chief Justice of India, Justice A. N. Ray, main grounds of this case were;

(1) The Act was malafied.

(2) It was against the Rule of seniority inherent in Article 124 (2)

(3) The mandatory consultative process in Article 124 (2) has not been restored

The High Court rejected the petition, stating that the Quo-Warranto process does not take the appointment authority's motivations into account.

Once more, in 1976, the government replaced Justice H. R. Khanna, who at the time was the most senior, by appointing Justice N. V. Beg as Chief Justice of India. Justice Khanna resigned from his position as a result of his opinion in the Habious Corpus Case. Shiv Kant Shukla v. A.D.M. Jabalpur, The government disagreed with Judge Khanna's dissenting decision supporting the right to live in times of emergency.

In the Sakal Chand Seth case, the Supreme Court first had to consider what the word "consultation" meant. Although there was an overlap between Article 124 (2) and Article 217, this decision related to the scope and meaning of consultation in clause (1) of Article 222, In this decision, Judge Chandra Churna declared that the term "consultation" refers to a gathering of two or more people to discuss a subject to include a correct or satisfactory resolution. According to the ruling, consultation is deferential to concurrence; but, if the consultation is founded on false or unrelated justifications, it may be suppressed.

In the case of S. P. Gupta v. Union of India, in March 1981, The Union of India's Law Minister wrote to several Chief Ministers and High Courts to inquire about the High Court judges assigned to their states. The validity of this circular was contested by several petitions, leading to the transfer of the Supreme Court. In addition to the circular's validity, the petition also raised concerns about the independence of the judiciary and the primacy of the Chief Justice of India in the appointment of judges. When the Supreme Court was debating whether to approve an ad hoc judge and whether to move a judge from one High Court to another without first getting his assent, the questions at stake were important to upholding the fundamental principle of judicial independence.

The majority opinion of the seven judges dismissed the petition and upheld the executive's authority to make these decisions. The majority judgment, which held that the words "consultation" and "concurrence" in Articles 124(2) and 217 of the Constitution do not mean the same thing, declared that the executive could appoint a judge even if the chief justice had a different opinion. Justice P.N. Bhagwati, who delivered the majority judgment, also held that consultation with the chief justice would mean that there should be collegiums to advise the court. However, it was not specified at this point what the collegiums makeup should be.

Phase-2:

In 1991, concerns were raised over the validity of the S.P. Gupta decision in Subhash Sharma v. Union of India, in this particular case, the Supreme Court's three-judge bench voiced its opinion that the institution of the Chief Justice of India is based on the Rule of Law because of the Constitution's philosophy and its aim of consultation. We acknowledge that the appointment of Supreme Court judges is of utmost importance, and the Bench proposed that the appointment issue be taken up by a larger Bench shortly.

Union of India v. S.C. Advocates on Record Association, In this instance, Supreme Court attorneys filed a public interest litigation filing with the court asking for help filling open positions in the Higher Judiciary. The case brings up several significant concerns concerning the selection of judges for the Supreme Court and High Court. Justice Verma issued the majority judgment after a bench of nine judges had considered the case. The Chief Justice of India should have the most influence in the selection of a candidate who is qualified for the position. The decision should come through a participative process. In which the Chief Justice of India's abuse of power should be greatly checked by the Government.

"The court has laid down following guidelines for appointment in Supreme Court.

(1) Initiation of the proposal for appointment of a Supreme Court Judge must be by the Chief Justice of India.

(2) No, the appointment of any Judge to the Supreme Court cannot be made by the president unless; it conforms with the final opinion of the Chief Justice of India with senior collegiums, (A collegium of two senior Judges).

(3) All consultation with everyone involved including all the Judges and the Chief Justice of India must be in writing.

(4) Appointment to the office of Chief Justice of India ought to be of the senior most Judge of the Supreme Court, considered fit to hold the office.

(5) Only in exceptional cases and for strong reasons are the names considered by the government. The Chief Justice of India and the collegiums may not be made."

In response, a bench of nine judges was established, and on October 6, 1993, a decision was made in what will now be referred to as the second Judges case. The ruling extends beyond the order of reference and fills 306 pages. In his renowned work on Indian constitutional law, the late jurist Late H.M. Seervai, declared the judgment to be void for failing to adhere to the mandatory clause of Article 145(4). If the judges are unable to agree after discussion and after carefully weighing each other's arguments, then multiple judgments should be given in open court in front of other people.

Phase 3:

In Re Presidential Reference Case, The appointment and transfer of judges were the subjects of controversy following the former Chief Justice of India, M. M. Punchhi's recommendation, so on November 1, 1999, the President of India requested clarification from the Supreme Court regarding the consultation procedure outlined in the Supreme Court Advocates on Record Case. The administration at the time disagreed with his suggestion for the nomination of judges and sent the case to the Supreme Court for review.

The Supreme Court was consulted over the President of India's ninth question, which was raised under Article 143 of the Constitution.

(1) Whenever recommending a candidate for the Supreme Court. The Supreme Court's four most senior judges should be consulted by the Chief Justice of India before any appointment is made, hence the Chief Justice of India should sit on the collegium that recommends the candidate.

(2) Whether they agree or disagree with each recommendation, the opinions of all collegium members should be recorded in writing.

(3) If the majority of collegiums are opposed to the appointment of a specific candidate. Even if two of the judges in the collegium voice strong opinions against the appointment for good reason, the individual should not be appointed.

(4) The Supreme Court Judges' appointments can only be revoked because the power of consultation did not follow the rules established in the 1993 Decision, i.e., with consulting of the four senior Supreme Court Judges.

In the Second Judge's Case, the formula developed by the majority opinion of five of the nine judges, has failed in the matter of selecting the most suitable persons without undue delay or appointing the most qualified candidate, or finding a gentleman with some knowledge of the law now beyond serious doubt. Despite strictly following the instruction manual, Ahmadi and Punchii J., who were vehemently opposed to the majority position, must have been convinced from personal experience that the judge-made apparatus was inoperable. The Second Judge's Case method was followed till the President of India expressed uncertainty and asked the Supreme Court for clarification regarding the appointment process. In 1998, a beautiful bench was once more assembled under the leadership of Justice S.P. Bharucha. The reference's paragraph 44 received a unanimous response from the nine-judge benches.

In consultation with the four senior-most puisne judges of the Supreme Court, the Chief Justice of India must suggest the appointment of a Supreme Court judge and the transfer of the chief justice or puisne judge of a High Court. The Supreme Court further held that the requirement of consolation by the Chief Justice of India with his collegium, which is likely to be conversant with the affairs of the High Court concerned, does not refer only to those judges who have that High Court as a parent High Court. Instead, the recommendation must be made in consolation with two of the most senior justices on the Supreme Court. It does not exclude judges who were transferred into the position of chief justice or judge on that High Court. The court also made it clear that seniority should not be the only factor taken into account when judging candidates.

In the First Judges Transfer Case in 1982, Justice Bhagwati recommended that the Judicial Committee be established and permitted to provide a list of names for the appointment of judges for the Supreme Court and High Court. In 1987, the Law Commission promoted the creation of a judicial commission once again. According to the Constitution, the structure and duties of this National Judicial Service must be determined shortly; however, the Law Commission recommended the following members: the Chief Justice of India as Chairman, the three senior-most Supreme Court judges, the Chief Justice of India, who is retiring, three Chief Justices of the High Court, Ministers of Law and Justice, the Attorney General of India, and a distinguished

legal scholar. A bill authorising the President to assemble a high-level panel for making recommendations was tabled in the Lok Sabha in 1990 by the National Front Government in preparation for the 1990 meeting of the National Judicial Commission by the Law Minister, Dinesh Goswami.

(1) Appointment of Judges to the Supreme Court (other than the Chief Justice of India).

(2) Chief Justice of the High Court.

(3) Transfer of Judges from one High Court to another.

As the Lok Sabha was dissolved, the bill expired. was a seminar held in 2005 on the occasion of Law Day? In the debate over whether or not a National Judicial Commission is essential for the nomination and transfer of judges, there are notable disagreements between those inside the judiciary and those without. The former believe that the matter has already been resolved and they do not need one.

RECENT UPDATES ABOUT THE COLLEGIUM SYSTEM IN INDIA:

For the nomination of five new Chief Justices of High Courts, the Supreme Court Collegium recently forwarded candidates. There have been various rumours about the Collegium System for a while. The Collegium's system for selecting judges has been supported by Chief Justice of India NV Ramana, who claims that the procedure is as transparent as it can be.

National Judicial Appointments Commission was established in 2014 as a result of the NJAC Act and the 90th constitutional amendment legislation. The NJAC Act defines "member" as the Chief Justice of India, two judges of the Supreme Court, the Union Minister of Law, and two prominent members recommended by a committee. Section 6(6) of the Act grants any two members the right to oppose any nomination. The amendment included Articles 124 A, which establishes the NJAC's constitution, 124 B, which specifies its functions, and 124 C, which grants Parliament the authority to control the nomination of judges. With this authority, Parliament delegated this role to the NJAC by passing the NJAC Act.

In Supreme Court Advocates on Record Association v UOI, the Supreme Court ruled that the Amendment Act violate the Constitution in Advocates on Record Association v. UOI. In his dissenting opinion, Judge Chelameswar argued for judicial appointment transparency and the necessity of checks and balances, while the other four judges maintained judicial independence. Also, the court acknowledged the lack of transparency while it was repealing the NJAC Act and asked the government to develop a memorandum of procedure. Due to a lack of agreement between the judiciary and government, the revised memorandum has not yet been drafted.

JUDICIAL COUNCILS ACROSS THE WORLD:

If the Councils are correctly formed and depoliticized in reality, they have the institutional potential to foster judicial independence. But, differences in the structure, membership, and functions of the Councils might have a substantial impact on the Councils' ability to do so. The political environment in which the legal system is designed to function will have a significant impact on how this can be accomplished in a particular nation.

Institutions known as "judicial appointment councils" have been set up in several nations to select and suggest candidates for judicial appointments. Following are a few instances of judicial appointment councils from various countries:

"The appointment of judges, as well as court administration and the judicial disciplinary process, is carried out by an independent body that includes substantial judicial participation," the Universal Charter advises.

In the Commonwealth, a judicial council formed by the Constitution or by statute, with the majority of its members selected from the senior judiciary, was advised by the Latimer House Guidelines that appointments in the judiciary should be made on its advice.

In its Recommendation on Judicial Independence of 1994, The Council of Europe suggests that an authority whose members are chosen by the judiciary and whose members are independent of the government and the administration be given the task of selecting judges and managing their careers. According to the European Charter on the Status of the Judge, all decisions affecting the judicial career, such as the choice, appointment, and advancement of judges, should be made by a judicial council that is independent of the executive and legislative branches of government and is made up primarily of judges.

- Judicial Appointments Commission (JAC) in England and Wales: The selection and recommendation

of applicants for judicial appointments in England and Wales is the responsibility of this commission. The commission, which works to guarantee that appointments are made based on merit, is independent of the government.

- Judicial Appointments Board for Scotland: This committee is in charge of choosing and recommending candidates for Scottish judicial appointments. The board works to ensure that appointments are made based on merit and are independent of the government.
- Judicial Appointments Advisory Committee in Hong Kong: The Chief Executive of Hong Kong is to receive advice from this committee about the appointment and removal of judges. The committee strives to make sure that nominations are made based on merit and are independent of the administration.
- Judicial Appointments Board in Northern Ireland: The selection and recommendation of applicants for judicial appointments in Northern Ireland is the responsibility of this board. The board works to ensure that appointments are made based on merit and are independent of the government.
- Judicial Appointments Advisory Committee in Canada: This committee is responsible for recommending candidates for appointment to the judiciary in Canada. The committee is independent of government and works to ensure that appointments are made based on merit.

The numerous judicial appointment councils that exist throughout the world are only a few examples. Each council has been created to specifically address the demands and specifications of the legal systems of the individual nations.

The sources make it clear that Europe has steadfastly supported judicial councils to maintain judicial independence.

Whether a country will experience success or failure depends on the model chosen and the authority granted to the judicial council. The types of powers can vary, from advising to binding. The method of creation is crucial in figuring out how much a commission is worth. If it is included in the Constitution, it has a solid base and is not subject to interference from the legislative or executive branches. Nonetheless, legislative measures can grant the legislature additional power. In violation of judicial independence, the 99th CAA included a rider that reads as “Parliament may deem,” giving Parliament the power to alter the judicial selection process to suit its needs.

Thus according to reports on judicial councils, a majority of judges should make up the membership of the council to maintain judicial independence, and representatives from the state and civil society should also be included to maintain judicial responsibility. Non-judicial members can be lawyers, lawmakers, the head of the executive, members of the bar, professors, etc. The number also matters; it is thought that the higher the number, the greater the threat to judicial independence.

The veto procedure in NJAC put the independence of the judiciary at risk because judges did not constitute a majority. The success of the commission depends on the Council’s goals. To enhance openness and accountability, it is suggested that the commission handle judicial evaluation and advancement in addition to judge appointment. The disciplinary component of the commission, however, requires careful study because it is uncertain if it would foster accountability or be deadly to independence.

Supreme Court Advocates on Record Association v. Union of India, The National Judicial Appointments Commission (NJAC) Act and the 99th Constitutional Amendment, which aimed to give politicians and civil society the last say in the selection of judges to the highest courts, were both rejected by the Supreme Court because the judiciary cannot risk being caught in a “web of obligation” towards the government.

"It is difficult to hold that the wisdom of appointment of judges can be shared with the political executive. In India, the organic development of civil society has not as yet sufficiently evolved. The expectation from the judiciary, to safeguard the rights of the citizens of this country, can only be ensured, by keeping it insulated and independent, from the other organs of governance,"

In the five-judge Constitution Bench, Justice J.S. Khehar presided and explained his own decision.

The NJAC Act and Constitutional Amendment were declared "unconstitutional and invalid" by the Bench by a vote of 4:1. According to this theory, the collegium system would once more “become operational.” Intriguingly, the Bench acknowledged that despite the collegium system of “judges appoint judges,” things are not perfect

and that it is time to revamp the 21-year-old judicial appointment process. "Assist us in making the system better and better. You know, the mind is a very useful tool. When diverse brains and interests come together or clash, it creates a fascinating variety of perspectives, Judge Khehar told the government, setting the next discussion on how to improve the collegium system's operation for November 3.

The Constitution is not the foundation of the Collegium system. Instead, it has changed as a result of Supreme Court decisions. In this system, the government's only responsibility is to request that the Intelligence Bureau (IB) investigate before a lawyer is advanced to the position of judge on the High Court or Supreme Court. The Collegium's selections are subject to the government's questions and objections, but if the Collegium repeats the same names, the government is obligated by decisions of the Constitution Bench to appoint them to the position.

When he said that the Collegium method of nominations was "opaque" and needed to be revisited at the beginning of November, Union Minister for Law and Justice Kiren Rijiju revived the discussion. Later that day, on December 7, Vice President and Rajya Sabha Chairman Jagdeep Dhankar said in Parliament that it was "never too late to ponder" on the NJAC. According to him, the Supreme Court's 2015 decision to invalidate the NJAC Act was a "serious compromise" between legislative sovereignty and respect for the "mandate of the people."

Subsequently, Rijiju reiterated his request for a review of the Collegium system and connected the high number of cases pending in court to judge vacancies. On December 15, he blamed the Collegium system and said that a "new system" of appointments was the only way to fix the problem. He emphasised that although the NJAC Law had had majority support in Parliament, the Supreme Court had overturned it. He claimed that the current "collegium system" for appointing judges did not adequately represent the views of the general public and the House.

The top court declared shortly after Dhankar's comments that it is the "ultimate arbitrator" of law under the Constitutional framework and that, under the current legal framework, the government "had to appoint" all candidates reiterated by the Collegium without taking any names. Justice S. K. Kaul presided over a three-judge panel that also instructed Attorney General R. Venkataramani to tell Union ministers who are criticizing the Collegium system to keep their mouths shut. "You need to urge them to exercise some restraint," Judge Vikram Nath stated.

The Chief Justice of India, D.Y. Chandrachud, later stated: "It is in the seemingly trivial and regular situations involving concerns of citizens that the issues of the day, both in jurisprudential and constitutional terms, emerge," two days after Rijiju's statement in Parliament referring to the high pendency of cases. In the Indian system, recommendations for judicial appointments and transfers come from the Chief Justice of India and the four senior-most Supreme Court judges.

The current Chief Justice and the two most senior justices of the High Court, meanwhile, serve as its leaders.

The establishment of a council with a majority of judges and legal professionals in it is the only way to guarantee judicial independence and provide checks and balances, which will advance the constitutional principle of the separation of powers, according to the aforementioned reports and legislative rules. In addition to the members, the council's goal needs to be taken into account.

2. Suggestions:

The appointment of judges in India is a complex and contentious issue, and there have been many suggestions for reforming the current system. Here are a few possible suggestions:

- Transparent selection process: Judges should be chosen based on their qualifications, expertise, and honesty, and the appointment process should be open and impartial. Setting up an independent commission with a varied membership, such as judges, attorneys, and members of civil society, could be one way to do this.

- Increased diversity: The judiciary needs to be more diverse, including in terms of gender, caste, religion, and geographic representation. Underrepresented groups should be encouraged to apply, and the selection procedure should be set up to guarantee that they are given equitable treatment.

- Collegium reform: It has drawn criticism and controversy that judges currently appoint their fellow judges under the present collegium structure. Some have proposed replacing the collegium with an independent panel or changing it to increase accountability and transparency.

• Strengthening accountability: The accountability of judges needs to be improved both during and after their terms in office. Setting up a process for complaints against judges or creating a separate organization to monitor their behaviour and performance could be part of this.

• Addressing vacancies: There is a significant backlog of cases in the courts as a result of the delayed and ineffective way that judicial vacancies are now filled. Reform ideas include creating fast-track courts to handle urgent cases or adding more judges to the system to lighten the pressure.

There are numerous other ideas for improving the selection of judges in India; these are but a few examples. Any system modifications must be properly thought through and discussed, taking into account the opinions of all parties involved and the requirement to maintain the independence and integrity of the judiciary.

3. Conclusion:

It is assumed that the judiciary has devolved into an opaque oligarchy as a result of the "judges appointing judges" system, which also raises the possibility of favouritism. It is alleged that the Supreme Court created its interpretation of the provisions of Articles 124 and 217. But, in the pre-collegium era, executive authority prevailed, making the court a subservient branch of government and making it clear that the executive would pick individuals who would support them.

The judiciary should alone have the authority to nominate judges. The entire goal of speaking out against NJAC is to protect the judiciary's independence from meddling from the executive and legislative branches. The three instances of judges being superseded make it clear that if the government has a say in the appointment of judges, this will result in exploitation in its favour. On the other hand, more executive representation is thought to be a better form of checks and balances for appointees.

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