

NATIONAL JUDICIAL APPOINTMENT
COMMISSION AN ANALYSIS OF NJAC'S EFFECT
ON JUDICIAL INDEPENDENCE IN INDIA BY
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Abstract

The Union Parliament of the Republic of India recently passed the much awaited judicial reformation bill, paving the way for constitution of the National Judicial Appointment Commission, an apex body to advise the Executive on the appointment of Judges in the Supreme Court and the various High Courts of the country. As stated in the Constitution under Article 124, it is the Executive which conducts the appointments of judges in higher judiciary after consulting such judges as it may require. But 1990s witnessed a new phenomenon unheard in the global legal arena, when the Apex Court of the country through its infamous *Three Judge Cases*, overran the basic spirit of check and balance of power amongst the three organs of the state, and created the collegiums system for judicial appointments, unique in the world, in which judges appointed themselves. This paper deals with the need for judicial reforms and its implementation in the form of establishment of the commission in India. This paper also comparatively analyses the system of judicial appointment in US and India and lays down fundamental loopholes in the collegiums system. This paper also focuses on the effects of the NJAC on the Judicial Independence, elaborately shows how the enactment refrains from interfering with the independence of judiciary, an idea which forms the basic feature of Indian Constitution.

The Need for Judicial Accountability

Judicial independence is a pre requisite for a society that claims it to be free, egalitarian and democratic. The independence of judiciary is directly related to the mode of the appointment of the judges in the higher judiciary. The higher judiciary (comprising of the Supreme Court and the High Court is largely perceived by the people of India as an institution that champions their fundamental rights, assiduously guards the basic structure and features of the Indian Constitution and effectively applies brakes on the arbitrary exercise of power by any public functionary¹ and this has increased the importance of judiciary manifold. Such immense importance also brings in the crucial issue of judicial accountability. The Constitution lays down the three wings of the government: legislature, executive and judiciary to carry out the functions of the state. The underlying principle between them is the separation of powers. As Lord Acton puts it “power tends to corrupt and absolute power tends to corrupt absolutely”. The judiciary in India enjoys power more than ever before and is the most powerful judiciary of the world. Its work is not just limited to the judicial review as provided in the Constitution. Judiciary interferes in every aspect of the social and political

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¹ Justice AP Shah et al, *Strengthening The Judicial Standards and Accountability Bill, 2010*, 02/04/2015.<http://righttoinformation.info/wp-content/uploads/2013/10/A-critique-of-the-Bill-authored-by-Justice-AP-Shah-and-Venkatesh-Nayak.pdf>

life through the tool of judicial activism. It enjoys immense public authority. “Any authority which has some amount of public power must be responsible to the people. The fact is that in a democratic republic, power with accountability of the individual enjoying it is essential to avert disaster for any democratic system.”² Since judicial accountability is a facet of the independence of the judiciary, Article 235 of the Constitution of India provides for “control” of the High Courts over the subordinate judiciary clearing indicating that the provision of judicial accountability is a part of the constitutional philosophy.³ However the Supreme Court further doesn’t have a higher authority above it. It was thought that underlying principle of checks and balances would ensure accountability on the part of the higher judiciary. This hasn’t been entirely true. The Supreme Court observed that **“a single dishonest judge not only dishonors himself and disgraces his office but jeopardizes the integrity of the entire judicial system.”**

Transparency is facilitated through the process of accountability. It is best achieved when one is accountable to law. The existing systems of accountability have failed, and the growing corruption is eating away the vitals of this branch of democracy. This lack of accountability has been best put forward by Pt. Nehru in a diatribe, “judges of the Supreme Court sit on ivory towers far removed from ordinary men and know nothing about them.” The demi god’s image has to be replaced, after all judges are also humans capable of making mistakes and committing vices.⁴

Constitutional Background

Art 124(2) of the Indian Constitution provides that the judges of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the judges of the Supreme Court and of the High Courts in the state as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years.

Also provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted.

Similar provisions are given under Art 217⁵ and Art 222(1)⁶ regarding the High Court judges.

Circumstances Leading to Collegium System

The Collegium system of judicial appointments is unique in India. Collegium is a college of the members who decide the appointment of the judges to the higher judiciary. It includes the Chief Justice of India and other Judges of the Supreme Court. This system came up after the

² Justice JS Verma, *Mechanisms of Judicial Accountability*, 02/02/2015, <http://www.judicialreforms.org/judicial-accountability/554-mechanisms-of-judicial-accountability-by-justice-jsverma.html>

³ *Id.*²

⁴ Isha Tirkey, *Judicial Accountability In India: Understanding & Exploring the Failures & Solutions to Accountability*, 02/06/2015, http://ccs.in/internship_papers/2011/247_judicial-accountability-in-india_isha-tirkey.pdf

⁵ Every judge of a high court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the governor of the state, and in case of appointment of a judge other than the Chief Justice of the High Court and shall hold office in case of an additional acting judge, as provided in article 224, and in any other case, until he attains the age of sixty two years.

⁶ The president may, after consultation with the Chief Justice of India, may transfer a judge from one high court to the any other High Court.

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Judges Case and had been in existence since then and recently replaced by the National Judicial Appointment Commission. Circumstances leading to the creation of the most unique system of judicial appointment i.e. the Collegium system can be studied below.

Majority of the judges of the Supreme Court were Judges of the High Courts in India before their appointment to the Bench of the Supreme Court.⁷ The senior most Judge was appointed as the Chief Justice of India. It was the norm, and no legal sanction was attached to it. In 1958 the Law Commission criticized this practice on the ground that a Chief Justice should not only be an able and experienced judge but also a competent administrator and therefore the office should not be regulated by mere seniority.⁸ The report was although never implemented. This norm of appointing the senior most judge as the CJI of India remained unspoiled until 1973 when the then Prime Minister of India Mrs. Indira Gandhi broke this tradition and appointed Justice A.N Ray as the Chief Justice of India superseding three judges⁹ who were senior to him. It was a dictatorial decision taken by Mrs. Gandhi to ensure that the judiciary favors the actions of the government, which she did when emergency was imposed. This convention was further broken in 1977 when Justice M.H Beg superseded Justice H.R Khanna. This suppression was widely perceived as an outcome of the dissenting judgment of Justice H.R Khanna in *ADM, Jabalpur v. Shivkant Shukla*¹⁰

This was primarily because of failure of duty on the part of the executive in deciding how the judges are to be appointed to the Supreme Court. It so happened that a list of 56 judges was prepared for transfer without their consent and 16 of them actually transferred. One of these judges was Justice Sakalchand Sheth of Gujarat High Court. He filed a writ petition against the Union of India and the then Chief Justice A.N Ray challenging the order of the transfer as *ultra vires* the Constitution. This case was *Sakalchand Sheth v. Union of India*¹¹ where the question regarding the nature of consultation was raised. It was observed that “consultation” meant effective consultation for which the three constitutional machineries must have for its consideration “full and identical” facts, but the President has discretion to accept.¹² But it is doubtful whether by such a holding the Court was able to evolve a meaningful concept of consultation as what has actually come out of the decision was only a formal concept of consultation rather than a substantive one.¹³ Due to inconclusive and unclear judgments, the question kept cropping before the court. In *S.P Gupta v. Union of India*¹⁴ (The Judges Transfer Case) it was held that Art. 217(1) speaks about consultation and not concurrence and it is open to the central government to over ride the opinion given by the constitutional functionaries required to be consulted and arrive at its own decision i.e. the President’s opinion should be considered and the opinion of the Chief Justice cannot have primacy. In the *Supreme Court Advocates on Record Assn v. Union of India*¹⁵ (second judges transfer case), a

⁷ The Bangalore Law Journal, Vol. 5, p. 179

⁸ *Id.* 7

⁹ Justices K.S Hedge, J.M Shelat and A.N Grover

¹⁰ The Bangalore law journal, Vol. 5, p. 180

¹¹ 2328 SC AIR (1977)

¹² Bangalore Law Journal, Vol. 5, p. 181

¹³ VR Jayadeven, *Judicial Creativity in Constitutional Interpretation*, p. 42

¹⁴ (1993) 4 S.C.C. 441.

¹⁵ 268 SC AIR (1994)

nine judge bench by majority 7-2 over ruled its own ruling in the case of *S.P Gupta v. Union of India*, and observed that the opinion of the Chief Justice of India must be given primacy.¹⁶

Loopholes:

The decisions in the Judges case produced undesirable results:

- In the instance of *S.P Gupta*, it left the final decision in the selection of the judges in the higher judiciary to the executive as the phrase “after consultation” with was held not to amount to have a binding effect on the “consulting person”¹⁷. This was interpreted in the sense that under Art 74(1), the President has to act in the aid and advice of the council of ministers and the matter of judicial appointment were taken to be within the purview of this Article. It therefore, gave a direct hand to the executive in judicial appointments, hampering the judicial independence.
- In the second Judges case, it gave a primacy to the CJI in the matter of appointment of judges to the higher judiciary making the judiciary a “self appointed institution” which is ultra vires the constitution.
- The entire framework of the checks and balances underlying in the Indian Constitution was crippled. The power straight forwardly went to the judiciary which enjoyed an upper hand in appointing itself.
- This entire arrangement makes the judiciary self consumed, corrupt and less responsive to the needs of the people.

A New Beginning

In 2014, the Bhartiya Janta Party led NDA government brought in the bill for setting up of a National Judicial Appointment Commission for regulating the appointment of the judges to the higher judiciary, i.e. Supreme Court and High Courts in India. The government also brought in a bill to amend Article 124 of the Constitution in order to provide the NJAC a constitutional status. Both the bills were overwhelmingly passed by both the Houses of the Parliament without a single negative vote. The passage of the bills with the approval of members of Parliament coming from different political parties itself brings out the importance and the urgent need for setting up of the commission. The bill was further ratified by sixteen states in order to grant the NJAC a constitutional status, as required by the Constitution under Article 368.¹⁸ Finally the bill received the assent of the President Mr. Pranab Mukherjee on 31st December 2014, scrapping the opaque and unconstitutional Collegium system of appointing judges which clearly violated the basic principal of check and balance of power by all the three organs of the state. Collegiums system was unique in itself, wherein judges appointed themselves, a system unheard in any judicial machinery in any part of world.

¹⁶ Bangalore Law Journal, Vol. 5, p. 182

¹⁷ *Supra* note 13

¹⁸Source: PTI, *16 states ratify Judicial Appointments Commission Bill, 02/02/2015*, <http://timesofindia.indiatimes.com/india/16-states-ratify-Judicial-Appointments-Commission-Bill/articleshow/45664202.cms> (Jan . 28, 2015)

Composition of The National Judicial Appointment Commission

As per the National Judicial Appointment Commission Act, the National Judicial Appointment Commission will recommend to the President, names of the eligible persons for appointment as the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and for their transfers and for matters connected therewith or incidental thereto.¹⁹ The new body which is to be headquartered in New Delhi is to be headed by the Chief Justice of India. Carefully analyzing the compositional structure of the Commission, it can be crystal clear that the judiciary has an active or one can even say a superior role in whole exercise of the recommending power of the commission. As per the NJAC Act, the commission is to be a six member body, including the Chairman, which is to be the Chief Justice of India. The body will comprise of the Chief Justice of India, two senior most judges of the Supreme Court of India, Union Law Minister and two eminent personalities belonging to schedule caste/tribe or women community. The Act lays down the procedure for selection of these two eminent persons wherein a body comprising of the Prime Minister, Leader of Opposition (In case, there is no leader of opposition, then the leader of the largest opposition party) and the Chief Justice of India shall collectively decide on their nomination in the body. Hence looking into the numerical strength of all the three organs of the state in the composition of the commission, the judiciary is represented by 3 members, while the Executive is represented by only one member, i.e. the Law Minister. The selection process of two eminent members has an active role of judiciary in addition to the common consensus of the ruling and opposition party. Hence minutely studying the composition of the commission, there is not a single chance of Executive abusing its power with malafide intention to influence the judiciary. Hence speculations of loss of judicial independence by enactment of NJAC hold no serious ground. The Act also provides ample room for ensuring federal spirit in the procedure for appointment of Judges and Chief Justice of the High Courts, where the Commission shall take into consideration the views of the Governor and Chief Minister of the concerned state where appointments are to be made. This arrangement is perfectly in tune with the original Constitutional provision for appointment laid down under Article 124 of the Constitution. The Act also ensures that the Commission doesn't take up an arbitrary shape where members using their numerical strength and other kind of malafide influence get the recommendation passed by the Commission. Accordingly the Act states that no recommendation of the Commission shall be valid, if it has been vetoed by any of the two members of the commission. Hence a consensus is required amongst the members regarding the recommendation to be made to ensure a non partisan and transparent process of appointment of judges. Hence the veto provision is an important key to ensure that the judiciary remains free from influence of any kind from any organs of the state. Hence the setting up of the National Judicial Commission for judicial appointments is beyond doubt a benevolent, balanced and a perfect method for appointing the persons of integrity to the temples of justice.

Mode of Judicial Appointments in the United States of America

The concept of judicial independence and judicial review has been borrowed by India from the United States Constitution. Judicial independence has been a core political value in the

¹⁹ <http://bombayhighcourt.nic.in/libweb/actc/yearwise/2014/2014.40.pdf> Gazette of India, NJAC ACT (Jan. 28, 2015)

United States since the founding of the republic.²⁰ United States has been the cradle of the judicial independence and has actively nourished judicial empowerment by evolving the concept of judicial review. The uniqueness of the American Constitution lies in the fact that, it combines in a single document, the two theories of separation of power and checks and balances.²¹ But at the same time, the land which has given birth to the whole concept of free and empowered judiciary has also incorporated in its democratic framework, a mechanism to keep it accountable to the law. Government, James Madison wrote during the ratification debate, must derive all its power directly or indirectly from the great body of the people.²²

Judicial accountability is far stricter in the United States than in India. In United States, the appointment of the judges is a far more political affair and is an exclusive domain of the Executive. The President reserves the exclusive powers regarding appointment of judges to the higher courts, i.e. federal courts. The Constitution provides that the president shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States.²³ Political preferences play a key role in the appointment of the Supreme Court judges in the United States. Most of the recommendations of the Senate for the appointments, reflects the will of the political party in power. There have been several instances where in members of the political party to which the President is affiliated, has been raised to the bench. The United States judicial mechanism also includes direct elections for appointment to the post of State Supreme Courts. As many as 22 states in the United States use competitive elections to fill state Supreme Court seats, at least some of the time.²⁴ Hence when comparing the system of judicial appointments in the birthplace of Judicial Independence, the United States, with the newly constituted body of National Judicial Appointment Commission for appointment of judges in India, one can undoubtedly come to a conclusion that NJAC gives much larger say to the judiciary in the appointment procedure of the judges. Hence arguments stating that that the role of the National Judicial Appointment Commission in judicial appointments and transfer of judges can curb the judicial independence as it has a role for executive and legislature in it, does not hold any suffice substantiality.

Conclusion

Hence, the establishment of the National Judicial Appointment Commission is a benevolent step further in the direction of judicial reforms. Independence of the judiciary must remain intact along with accountability of the judges. Sanctity of the judiciary depends upon its fair and impartial conduct which should be free from arbitrary powers. The supremacy of the Constitution can be maintained only if along with separation of powers, the system of checks and balances is also implemented. In a democratic society, where legislature is accountable to the people and the executive has an accountability towards the legislature, Judiciary too must be accountable to the people in a constitutional manner which doesn't effects its ability of imparting free and non partisan justice. As it is said, absolute power corrupts absolutely; we the citizens of this magnificent country should make sure that all the three organs of the state

²⁰ Mira Gur-Arie, *Judicial Independence in the United States: Current Issues and Relevant Background Information*, , [http://www.fjc.gov/public/pdf.nsf/lookup/JudIndep.pdf/\\$file/JudIndep.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/JudIndep.pdf/$file/JudIndep.pdf) (Feb. 2, 2015)

²¹ Rajni Goyal Galgotia, *Major Constitutions*, p. 275

²² *Id* 21

²³ *Id* 22

²⁴ http://www.justiceatstake.org/issues/state_court_issues/election-vs-appointment/ (Feb. 4, 2015)

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work in a harmonious way abiding by the constitution and having checks and balances over each other. Hence establishment of the NJAC not only makes the judiciary accountable, but also strengthens its independence from any kind of malafide activities and partisan character, by making it more transparent, democratic in accordance with the intentions of our founding fathers.

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