



## JUDICIAL APPOINTMENT BILL: A THREAT TO INDIAN JUDICIARY \*

### INTRODUCTION

A democracy is incomplete without an independent judicial system which is free from any fear and favours, aloof from other branches of government. In a democratic country like India which has already become a victim of corruption, there are several matters like distribution of the powers between centre and states, president's rule and corruption charges imposed by the opposition on the government, which highlight the strong need of independent judicial system. The Supreme Court being main organ of the Indian judicial system is last thing on which the country rest to deliver justice. But in the past few years we have seen the transparency of collegiums system has been hotly debated and passing of "national judicial appointment commission bill 2013" by the newly formed NDA government headed by Hon'ble Prime Minister Narendra Modi. So it is imperative to safeguard the Indian judicial system so that it can play an active role in our country.<sup>1</sup>The Indian judicial system is a oldest judicial system of the largest functioning democracy of the world, it is one of most important system running as it is guardian of the constitution of India, the judiciary also helps in balancing the wheels of federation, at the same time it bound all the administrative tribunals and other government authorities by its judgements. The Indian judiciary is independent of the other two systems of the government of India, that is the legislature and the executive and the system is continuation of the British legal system that was established by British in the mid-19<sup>th</sup> century also known as the common law system which is the distinct feature of the Indian judiciary. In a common law system the law is developed by the judges, orders, judgements and they are also taken as precedence. The Indian judicial system is also based on adversarial system in which they are two sides which are allowed to present their case before a neutral judge. The judicial system draws some of the features from different judicial systems of the other countries like the "judicial review" given under Article 13 of the constitution of India, which is taken from American judicial system. The Indian judicial system works on the supreme legal document of the country that is "the constitution of India".<sup>2</sup> The Indian judicial system form a strict hierarchy of courts based on the Indian judicial system in which judges are appointed in different hierarchical position according to their ability. The senior most court is the supreme court of India followed by the high courts and district courts. When the Indian constitution came into force on 26<sup>th</sup> January 1950 the Supreme Court was formed in Delhi. The inaugural proceedings were seated by justice H.J.Kania Justice Fazi Al M, Justice Patanjali Sastri, Justice Mehr Chand Mahajan, Justice Bijon<sup>3</sup>Kumar Mukherjee and Sudh Rajan Das. The original constitution of 1950 envisaged a supreme court with a chief justice & 7 senior most judge under article 124 of the

\*Mr. DANISH AHMED KHAN, 4TH YEAR, B.A LL.B (HONS.) ALIGARH MUSLIM UNIVERSITY MURSHIDABAD

<sup>1</sup>Indian Judicial System, <http://www.wikipedia.com>

<sup>2</sup>Judicial System, <http://www.thetimesofindia.co.in>

<sup>3</sup>Dr. J.N Pandey, The Constitutional Law Of India(pg 497-502) 49<sup>th</sup>edi 2012

constitution and left to the parliament to increase the number in coming years. It increased to 8 in 1950, 11 judges in 1956, 14 judges in 1960, 18 judges in 1978 and 26 judges in 1986 and according to the ratio the number bench also increased to 5 according to the case. Today the apex court is headed by the chief justice and 30 senior most judges of the country. The proceedings of supreme court are framed under supreme court rules 1966 and 145 of the constitution. Article 141 of the constitution bounds the high court's from the judgements of Supreme Court of India. The Indian judiciary has played a very important role in the history of India and in past few decades of Indian administration after the independence. Though it is independent from executive and legislature the Indian judiciary has few back draws and backlogs. In India judiciary plays an important role in controlling and keeping check on the arbitrary actions of the administration, but in the past few year here have been intervention of executive branch of government in the judiciary which is effecting the independent nature of the judiciary. The executive is trying influence the judiciary by its power and interfering in its matters through the judicial appointments where as it is threat to the higher judiciary which is the supreme courts, the lower judiciary on the other hands is still in safe hands as appointments in the lower judiciary are made through (pcs j). But the higher judicial appointments have been effected in the past recent years.

### 1. Retrospectively

After the independence of India the constitution was enforced over India which became the supreme law of the land. The constitution makers had put a lot so as keep the balance between the executive and the judiciary and also to secure the independence of judiciary. The appointments in Indian judiciary in context to higher judiciary which Supreme Court and the high court is mentioned in the constitution of India under the Articles 124 of the constitution which reads as under “

“Every Judge 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 States as the President may deem necessary for the purpose...”, and further that “...in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted.”<sup>4</sup>

The practice of taking opinion of appointing from the CJI and CJ of other high courts proved to be beneficial until, the new congress government of 1970's led by Smt. Indira Gandhi created a gap between the judiciary and executive. Suppressing the appointment of the senior most judges to the post of Chief Justice of India by appointing Justice A.N Ray. He was made chief justice bypassing the three senior most judges of the supreme court namely justice J.M Shelar, K.S Hegde and A.N Grover. This act was done by the government so as to boycott the three senior most judges who did not give judgement in the favour of government. After this there were several instances during the emergency between 1975-1977, where the high court judges were transferred from their high court to high courts of different states just for not delivering the judgement in government's favour.

Retrospectively judicial system which was followed since 1993 “collegiums system” of the judicial appointment is based on the three judges' case and derives its genesis from these three cases, which were

1. S.P Gupta vs. President Of India and Ors.,1981
2. Supreme Courts Advocate on Record Association vs. Union Of India,1993
3. In re Special Reference 1 of 1998<sup>5</sup>

The judicial appointment was done by the collegiums system which was appointing the judges of Supreme Court, the collegiums system was the system in which the judges of the Supreme Court and high court were transferred and appointment by the chief justice of India and four senior

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<sup>4</sup>Bare Act, The Constitution Of India, Universal law publication, New Delhi(pg 50) 2014

<sup>5</sup>Threejudgescase, <http://www.wikipedia.com/threejudgescase>

most judges of the supreme court of India. As the collegiums system derives itself from the three judges' case .The three cases are as follow:-

### **First Judges” Case**

S.P Gupta Vs President Of India and Ors.

(AIR1982SC149)

Decided on 30.12.1981

Hon’ble judges

[[ (J) A.C. Gupta, (J) E.S. Venkataramiah, (J) D.A. Desai , (J) P.N. Bhagawati , (J)R.S. Pathak, (J) Syed M. Fazal Ali and (J) V.D. Tulzapurkar.]]

In this case justice Bhagwati gave the judgement and this is popularly known as the “judges transfer case “, in this it was held that the executive opinion in appointment of judges to higher judiciary should have primacy, and the appointment should be in regard to the opinions of the executives rather than only being in hands of president and chief justice. The relevant portion delivered by Justice Bhagwati emphasized on the word “consultation”. In this case it was said that the three main functionaries of the government have an equal and important role and cannot be overruled by each other , this case talks about the chief justice of the high courts in which primacy in appointment is given to opinion of chief justice of India , though the chief justice was to share<sup>6</sup> no equal position as CJI of India but is not under supervision of the chief justice of India, if primacy is given to chief justice of India then it will mean that the opinion will prevail over the governor of the state and the chief justice of state which the central government has to accept in anyway . But the article 217 which talks about the appointment of judges of high courts specifies only the word “consultation “, so the president of India has to only consult the CJI in matter of transfer of judge of high court, in this case the need of collegiums system was felt to make recommendation to the president regarding the appointment of high court and supreme court judges. The thought was collegiums system would comprise of people who can recommend fit people to deliver judgements in the courts. The first judge’s case proved as back draw for the Supreme Court as it gave the control over judicial appointments from CJI to executive, the first judge’s case destroyed the balance between the executive and judiciary and placed executive on first place in appointments. It also widened the rule of *locus standi* after which the courts received writs petition in large number throughout the country.

### **Second Judges” Case**

Supreme Court Advocates on Record Association Vs Union of India

(1993(4) SSC441)

Decided on 06/10/1993

Hon’ble Judges

[[Justice J.S Verma]]

In this case the first judges case was reconsidered by a larger bench of 9 judge of the supreme court of India, the court felt the need because the amount of petition it received regarding the first judge case was very much also an advocate filed a petition before supreme court asking about the vacancies of the judges of high court and supreme court .in the second judges case, amazingly the judgement again turned the control of judicial appointment from the executive to the judiciary. The word “consultation “used in the first judges case was overwritten by “concurrence”. The court still wanted a balance between judiciary and executive in accordance with the appointment of judges , this judgement laid down if there will any conflict between the executive and the CJI , in the last the opinion or the recommendation of the CJI will prevail .But the CJI alone does not enjoy the powers of the appointing it has to take into consideration of two

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<sup>6</sup>M.P Jain ,Indian Constitutional Law,(pg 386)6<sup>th</sup>edi 2010



senior most judges who are the part of collegium<sup>7</sup>, the second judges case inserted the same collegium system at the high court level also. It also laid that senior most judge will be appointed as the Chief Justice of India and CJI has no primacy in transfer of judges of high court.

### Third Judges “Case

“Re Special Reference of 1998”

Role played

President of India in 1998

[K.R Narayan] & Justice M.M Punchhi (CJI)

[[S.P. Barucha, M.K. Mukherjee, S.B.Majumdar, Sujata V. Manohar, G.T. Nanavati, S. SaghirAhmad, K. Venkataswami, B.N. Kirpal and G.B.Pattanaik]]

In this case the CJI justice M.M Punchhi recommended five names for Supreme Court judge but was refused by the executive on the ground that there are doubts in appointing as judges. The president of India K.R Narayan put three broad issues under Article 143. They were (a) consultation between CJI and other judges in appointment. (b) Power of judicial review of the transfer of judge. (c) Seniority of high court judge in making appointment. After this the judge were increased from two to four in the collegium under article 143. The nine judge bench answered the the president as:- (a) sole opinion of CJI does not mean “consultation” (b) recommendation for transfer should be on sole opinion (c) no leak of information of government for non-appointing of judge from the desk of CJI.

<sup>8</sup>The collegium system was better as the judges of SC and HC knew the lawyers better so they can recommend better people for judges, the performance of lawyer is a sole criteria for selection to judge post, the justice would be delivered in less time, this was pure system to maintain independence of judiciary as there was no political interference. But this system had back draws as it lacked the transparency of selection process, impractical and it was also said that judgement to the second judge case was null and void as majority opinion was not visible<sup>9</sup>, the relevancy of few fact by Justice M Katju. And criticisms by the legal luminaries like Fali S Nariman became a strong stand to criticize the collegium system. The judges who were a part of this collegium were criticizing of appointing their relatives and friends as high court judges. Many judges of higher judiciary themselves acknowledge that the system needs greater transparency, inclusiveness, participation and consultation at a broader level.

## 2. Prospectively

After the collegiums the has<sup>10</sup>been criticized the executive which tried the to replace the collegium system brought a change in the judicial system in India by proposing the national judicial appointment commission. The main objective of the government is to remove the collegium system that is being followed since 1993. The executive by amending the legislature is trying to hold primacy in the judicial system of India. The commission will appoint the judges of judges of supreme court and the high court by bringing the 99<sup>th</sup> amendment after proposing the 121<sup>th</sup> bill which is passed by the Lok Sabha 13 Aug 2014 and Rajya Sabha on 14<sup>th</sup> August 2014, the bill after getting ratified from the half of the state legislature will insert new amendment in the Article 124.<sup>11</sup> Along with constitution amendment bill that will amend the article 124, the national judicial appointment commission bill 2014 is also passed by the parliament.

### Amendments brought by 121<sup>th</sup> bill

<sup>7</sup><http://www.lawcommissionofindia/report.14th.pdf>

<sup>8</sup>Judicial supremacy vs. Collegiums ,R.Jagannathan, <http://www.firstpost.com>

<sup>9</sup>The Collegiums System, January 8, 2013, <http://www.thehindu.com>

<sup>10</sup>[http://www.rajasabha.nic.in/rsnew/bill2014/rs\\_bill.pdf](http://www.rajasabha.nic.in/rsnew/bill2014/rs_bill.pdf)

Article 124 is the major article in which the amendment is brought about. If ratified by state legislature the bill will be known as 99<sup>th</sup> amendment act .after the amendment article 124 reads as under

“After consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose, on the recommendation of the National Judicial Appointments Commission”

Insertion of new articles

**124A**

**124B**

**124C**

**Article reads as 124A.**

(1) There shall be a Commission to be known as the National Judicial Appointments Commission consisting of the following, namely:—

- (a) The Chief Justice of India, Chairperson, ex officio
- (b) two other senior Judges of the Supreme Court next to the Chief Justice of India
- (c) The Union Minister in charge of Law and Justice.

(d) two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People (Provided that one of the eminent person shall be nominated from amongst persons belonging to the Scheduled Castes, the Scheduled Tribes, Other backward Classes, Minorities or Women and will appointed for a period of 3 years and cannot be re-elected.

(2) No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission.

**Article 124B.** It shall be the duty of the National Judicial Appointments Commission to—

- (a) Recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts
- (b) Recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court
- (c) Ensure that the person recommended is of ability and integrity.

**Article 124C.**

Parliament may, by law, regulate the procedure for the appointment of Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and empower the Commission to lay down by regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it.

Similarly many other article were also amended they are article 127 article 128, article 224, article 222. In Appointment of other high court judges the commission shall seek nomination form the chief justice of that high court and then forward the name to chief justice of other high courts for his/her views. In such cases the chief justice should consult two senior most judge s of high court and other advocates as mentioned in the regulation. The commission shall elicit the views of the chief minister and the governor while making the appointment. The commission will not recommend the if two person don't agree.

### 3. Conclusion

The national judicial appointment commission is considered to a threat to the judiciary as it will replace the opaque collegium system in matter of appointment of system. It is also seen that the NJAC will give a strong position to executive in relation to appointment of judges to the higher

judiciary.<sup>12</sup>The noted lawyers like Kapil Sibal and the ex CJI R.M Lodha strongly defended the collegium system over the NJAC.<sup>13</sup>There is taken as the after the passing of NJAC the judiciary will have no control in the say of appointment of judges as two eminent persons defines in the bill can stop the appointment of any persons to a judges post. This new system can be a threat because the justice will be influenced by the executive in their favour that will leads to more scams and corruption in the country and also the justice will delivered late .The role of Indian judiciary is distinct and has to be independent from the two other system, but the new NJAC bill of the government clearly shows the intention of the executive to destroy the independence of Indian judiciary. In a recent incident of government intention can be clearly seen.<sup>14</sup>Gopal Subramaniam , a former Solicitor General of India and a renowned supreme court lawyer whose name was given along with the name of three other people namely Justice Arun Mishra ,A.K Goel and former S.G (R.F Nariman) were sent to the government for appointment as supreme court judges , the name of Gopal Subramaniam was segregated by the new NDA government , the grounds which later came in the light that Gopal Subramaniam was an “amicus curiae” in *Rubabbudin Sheikh vs State of Gujarat* and also the wrong reports submitted by the intelligence agencies of India, on these grounds his name was rejected by the government .<sup>15</sup>Also the post of union law minister in the NJAC commission is also criticized by the senior lawyers of high court and supreme court of india and some other jurists. This criticism is because the union law minister at times has to practise as a lawyer in supreme court ,so how can a law minster who at times independently practicing as lawyer can sit in the collegium for appointing judges to high judiciary.But if we see the NJAC on other hand can be seen to bring back the balance between judiciary and the executive that was lost in 1970 where the Indira Gandhi told her law minister Kumaramanglam, that only those judges should be appointed to Supreme Court who are committed to the ideologies of the government. The NJAC has few major deadlocks like it gives much space to executive class diminishing the independent role of judiciary in appointment; it also violates the basic structure of the constitution.<sup>16</sup> The involvement of law minister reminds the same story where of 1970 where there was myth that to become a judge one should know the law the law minister, not the law. The flaws in the NJAC will come in the light after 10 -15 years as happened with the collegium system. The national judicial appointment commission should be reconsidered by the judicial accountability bill committee so as to give the judiciary strong say in the appointment and transfer of judges to the higher judiciary. The role of judiciary should be a primacy one and the executive should be limited to transparency, because a democracy cannot work without an independent judiciary.



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<sup>12</sup>Collegium system of judicial appointment ,N. Hingorani,(April 2014)www.layersupdate.co.in

<sup>13</sup>NJA C: August 2014, <http://www.thehindu.com>

<sup>14</sup>Collegium :A flaw,September 2014,www.indiantoday.co.in

<sup>15</sup>Collegium system,(august 2014),www.epw.co.in