

The Impasse over Higher Judicial Appointments in India

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Abstract

The judiciary is the third and essential pillar of the democratic system governed by the rule of law in India. The judiciary must be impartial, fair, and competent to ensure justice and strengthen public confidence. Originally, the Indian Constitution provided a memorandum of procedure to be followed to appoint the judges of the Supreme Court of India and the high courts. The said procedure consisted of a 'participatory consultative appointment' by both the executive and judiciary. After the drafting of the Constitution, for the first forty years, the said procedure was carried out satisfactorily with only a few contentious incidents. But after the 'Second Judges' case in 1993, the Supreme Court put an end to the existing participatory consultative procedure and designed a new arrangement, called the "Collegium", for the selection of judges to both the Supreme Court and the high courts. However, the flaws and inefficiency of the collegium are being exposed by recent incidents. The issue that has emerged recently is whether or not the collegium of the Supreme Court is the only source of authority to appoint judges who will not only be independent and impartial but also free from the participation of the executive wing, which impairs their independence. The paper elucidates the framework for higher judicial appointments, the landmark judges' cases, the collegium system and the critique, the NJAC Act, the judgement of the NJAC, the inadequacy and transfer of judges of the high courts, and some suggestions for a transparent and independent judiciary.

Keywords: Chief justice, collegium system, high court, judiciary, judges, NJAC act, Supreme Court

INTRODUCTION

As quoted by Dr. B.R. Ambedkar, the pioneer of the Indian Constitution, who observed during the Constituent Assembly debates that "our judiciary must be both independent and competent in itself, and the question is how both of these objects could be secured [1]". The judiciary is a significant organ of the government, and it plays a much more essential role. Ever since our Constitution came into force, the Judiciary has played a pivotal role in interpreting and safeguarding the Constitution, every time any dispute has ensued. The Indian Supreme Court is indeed one of the most powerful courts in the world. The Indian Constitution provides for the doctrine of separation of powers between

the union and the state as well as an independent judicial system. When any conflict arises between the centre and the state or between two or more states, the Supreme Court is the sole arbitrator. It also served as the ultimate adjudicator of constitutional interpretations and the defender of the fundamental rights of the citizens. Further, it is the highest and last interpreter of the general law of the nation. It is also the highest court of appeals for both civil and criminal matters. Hence, it is a formidable and dynamic wing of the government.

Since the Supreme Court of India has such broad authority and obligations, the judges who sit on the

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Received Date: January 18, 2023

Accepted Date: February 20, 2023

Published Date: February 26, 2023

Citation: Divya G., Chandrakanthi L. The Impasse over Higher Judicial Appointments in India. Journal of Constitutional Law and Jurisprudence. 2023; 6(1): 40–47p.

benches bear enormous responsibility; as a result, they must be nominated through a just and impartial procedure without any bias in order for the Supreme Court to function productively.

CONSTITUTIONAL FRAMEWORK FOR THE APPOINTMENT OF JUDGES TO THE HIGHER JUDICIARY

Article 124 of the Indian Constitution specifically emphasizes the construction of the Supreme Court of India, it is the President of India that must, with due consideration, deliberate with the judges of the Supreme Court of India and the high courts of each state regarding any appointments of the Supreme Court justices.

Moreover, there is the aspect of consultation with the chief justice of India whenever a judge is appointed other than himself. Further, there should also be “due dialogue and deliberation” with the chief justice of India and the governor of the respective state after being selected by the president while making an appointment for the position of a high court judge; this is stated in Article 217 of the Indian Constitution. The given provisions state unequivocally, that the president is appointing authority under the executive; however, prior to the appointment, the president of India will have to imperatively consult and seek opinion with the members of the judiciary.

Contrary to the election commission’s recommendation, the president or the governor have no authority to rule on the disqualification. Thus, the Constitution has used different expressions, namely “participatory consultation” and “shall act accordingly” for different purposes in different provisions to such an opinion.

JUDGES CASES

The three decisions from India’s own Supreme Court, known as the “Three Judges Cases”, are the foundation of the Indian Judicial Collegium system, which allows for the appointment of new judges to India’s constitutional courts.

The First Judges Case, which was issued in 1982, is otherwise known as the SP Gupta case [2]. The Supreme Court of India first received a petition in 1981 and during the course of this case, the Supreme Court debated on two key issues. The Supreme Court reversed this and declared that the consultation does not indicate concurrence; when asked whether the word “consultation” in Constitutional Article 124, in all sense and significance meant “concurrence”, the Supreme Court’s advice was not required for the president to base his or her choice on. Another important discussion of this case was that, it was ruled that a high court judge may be transferred from one high court to any other high court of a state contrary to his choice unceremoniously.

In the Second Judges Case [3] of 1993, the association of Supreme Court Advocates on Record Association (SCAORA) filed a petition before the Supreme Court of India. The nine-judge bench of the Apex Court reversed its prior decision in this case and modified the definition of ‘Consultation’ to ‘Concurrence’. Consequently, the Chief Justice of India’s advice binds the president of India. As a result, of this, the Collegium system was established.

In the Third Judges Case [4] which cropped up in the year 1998, the then President, RK Narayanan questioned the definition and interpretation of the word “Consultation” in Article 124, Article 217, and Article 222 of the Indian Constitution with reference to designation of Judges in the Supreme Court. The collegium of the Supreme Court’s four most senior justices would organize the consultation process, which would include participation from more than just the chief justice. Even if two judges disagree with any nominations, the chief justice would not present his/her viewpoint to the government. In a nutshell, the Apex Court’s ruling established stringent standards for the collegium system, which currently is used to appoint judges to both the Supreme Court and the High Court.

THE COLLEGIUM SYSTEM

The term “Collegium” is defined as “a group of people who have accountable—equal power and authority,” and it has been officially adopted by the courts. On October 17, 1981, the Bar Council of India advanced the idea of adopting a system in which Supreme Court judges would be appointed by three authorities:

- Firstly, the Chief Justice of India,
- Further, with the presence of, five senior superior Supreme Court judges,
- And finally, two representatives from the Supreme Court Bar Association and the Bar Council of India (BCI).

Following Justice Bhagwati’s proposal, the nine-judge Constitutional bench of the Supreme Court ruled in favour of the Collegium in the Second Judges case in 1993 with a majority decision from the same nine-judge Constitutional bench in 1998. However, Justice Bhagwati’s original proposal for the Collegium’s structure was disregarded, and it only included judges from the Supreme Court Opp.

Drawbacks of the Collegium System

Firstly, due to the lack of restrictions in the system, there is plenty of room for nepotism and partisanship when choosing the applicants for the Supreme Court Judge position. This prevents worthy and creditable candidates from being selected as Judges. Secondly, the Collegium system lacks the requirements for testing, it fails to check into the backgrounds of the candidates and is not answerable to any administrative body, all of which obviously results in the selection of flawed applicants while excluding the suitable and better candidates. Thirdly, in this system, the ‘checks and balances’ concept is shattered. It is due to the judiciary being hung up on both the executive for the appointment of Judges, and the advice and recommendation of the chief justice of the Supreme Court and the seniormost Supreme Court judges; the arrangement gives the judiciary a very large extent of power regarding the ability to name judges, making it any abuse of power possible. Finally, this system makes the court system less transparent and incoherent which is particularly detrimental to the maintenance of law and order in the state.

In the previous two months, the current Union Law Minister Kiren Rijju has repeatedly criticized the Collegium system for being “opaque” and “not responsible”, even going so far as to claim that “Judges appointing Judges”, is a system where the Judges are neglecting their fundamental duty of providing justice and are more focused on the appointment and alleviation politics. It is also said that “judges appointing judges” counters the core principles of the Constitution because it is opposed to both equality and democracy in general [5].

A well-known RTI activist, Subhash Chandra Agarwal filed a petition [6] requesting the records and correspondence pertaining to the appointment of certain Supreme Court judges as well as the disclosure of assets of such judges in a separate following application. A 5-member Supreme Court’s bench ruled that the judges’ privacy and personal information are not violated by the revelation of their assets. However, providing personal information would go against the right to privacy and secrecy, thus they are unable to do so.

Despite the Supreme Court’s enactment of the law and the Collegium’s resolution of March 10, 2017, the Supreme Court’s website only posts a statement about the said resolutions made by the Collegium and not the resolutions themselves.

Inadequacy and the Transfer of Judges

Every high court in each state should necessarily have one chief justice and other judges whom the president may think are appropriate to be appointed; this is expressly stated in Article 216 of the Constitution. The opinions of the chief justices of the high court and of the Supreme Court of India must be given significant weight by the president while determining the judge’s strength. According

to Article 224 of the Constitution, the president may appoint additional judges if the workload at the high court temporarily increases or falls behind. The high court's workload is never-endingly expanding. According to the statistical data available on the National Judicial Data Grid [7], as on the date 04.07.2022, there are a hefty 5954910 pending cases in the High Court.

As of 01.12.2022, the data available on the National Judicial Data Grid [8], the high courts were authorized to have a sanctioned strength of 1108 judges, out of which 836 were permanent judges and 272 were additional judges. Currently, the number of permanent judges of high courts in India is 630 and the number of additional judges is 148. This means that there are 206 posts vacant for the position of permanent judges and 124 vacant seats for the additional judges. There is no reason for adding jobs for additional judges while the volume of cases in the high courts is rising. It is very necessary to turn all of the high court's additional judge positions into permanent judgeships (Table 1).

Table 1. Statement showing sanctioned strength, working strength, and vacancies of judges in the Supreme Court of India and the high courts (as on 01.12.2022).

A.	Supreme Court	Sanctioned strength			Working strength			Vacancies		
		34			27			7		
B.	High Court	Pmt.	Addl.	Total	Pmt.	Addl.	Total	Pmt.	Addl.	Total
1	Allahabad	119	41	160	77	23	100	42	18	60
2	Andhra Pradesh	28	9	37	27	3	30	1	6	7
3	Bombay	71	23	94	40	26	66	31	-3	28
4	Calcutta	54	18	72	35	19	54	19	-1	18
5	Chhattisgarh	17	5	22	8	6	14	9	-1	8
6	Delhi	46	14	60	44	1	45	2	13	15
7	Guwahati	18	6	24	16	8	24	2	-2	0
8	Gujarat	39	13	52	28	0	28	11	13	24
9	Himachal Pradesh	13	4	17	10	0	10	3	4	7
10	J & K and Ladakh	13	4	17	11	4	15	2	0	2
11	Jharkhand	20	5	25	20	1	21	0	4	4
12	Karnataka	47	15	62	40	9	49	7	6	13
13	Kerala	35	12	47	28	9	37	7	3	10
14	Madhya Pradesh	39	14	53	31	0	31	8	14	22
15	Madras	56	19	75	44	10	54	12	9	21
16	Manipur	4	1	5	3	0	3	1	1	2
17	Meghalaya	3	1	4	3	0	3	0	1	1
18	Odisha	24	9	33	22	0	22	2	9	1
19	Patna	40	13	53	34	0	34	6	13	19
20	Punjab & Haryana	64	21	85	39	27	66	25	-6	19
21	Rajasthan	38	12	50	26	0	26	12	12	24
22	Sikkim	3	0	3	3	0	3	0	0	0
23	Telangana	32	1	42	31	2	33	1	8	9
24	Tripura	4	1	5	3	0	3	1	1	2
25	Uttarakhand	9	2	11	7	0	7	2	2	4
	Total	836	272	1108	630	148	778	206	124	330

Article 222 of the Indian Constitution affirms regarding the transfer of judges between different high courts. It the president of India after ensuing sufficient dialogue and deliberation with the chief justice of India, may transfer a judge from the high court of one state to any other high court of any other state. This means that a judge could be transferred by the government executive, but only after the consultation with the chief justice of India. It was rejected by the Apex Court in *Union of India v.*

Sankalchand Himatlal Sheth [9], that high court judges may only be transferred with their approval. It was reasoned that the transfer of power could only be used for the good of the public; secondly, the president was required to duly consult with the chief justice of India, which meant that all relevant and applicable information had to be presented to him; and thirdly, chief justice of India had the right and obligation to obtain additional information from the judge in question or from other source.

When it comes to the attention of the bar or certain segments of the public that the decision to transfer a judge from a high court of one state to any other high court has a punitive component to it and the transfer orders become contentious. The Supreme Court and the administration customarily withhold the rationale for a transfer; that is, the reason behind the transfer is kept confidential. Because the revelation of the reason for transfer would have an impact on the judge's performance and independence in the court to which he is transferred if the reason is because of any unfavorable opinion about how the judge is operating. On the other side, when there is no explanation, it can sometimes lead to conjecture about whether the decision was made as a result of complaints against the judge or as a form of retaliation for decisions that caused the executive to be inconvenienced. One of the recent examples is where the union government announced in February 2020 that Justice S. Muralidhar, a Delhi High Court judge, was transferred just one day after he chided the Delhi Police. This transfer was the consequence after criticizing the Delhi Police while hearing the Delhi riots case. The Delhi High Court Bar Association objected to this prejudiced move and expressed their "shock, fury, and dismay" in a resolution.

HM Servai, a renowned scholar of Constitutional law, wrote a letter to the Chief Justice of India in 1995 stating that the high court judges were getting very transferred frequently from one high court to another and this had the effect of lowering them to the level of a district judge.

Transferring judges from the high courts has always been a difficult topic. Even Bombay High Court Chief Justice MC Chagla turned down a 1949 appointment as a Supreme Court Judge. This was because, early on chief justice of high court preferred to stay in that position rather than advance to the position of junior Supreme Court judges. Recently, a debate over whether judicial transfers are conducted solely for administrative purposes or to include any element of "punishment" has been sparked by the transfer of Chief Justice of Madras High Court Sanjib Banerjee to the Meghalaya High Court. The Madras Bar Association passed a resolution expressing "great concern" over the transfer's "opacity" and requesting that the choice be re-evaluated. In a letter to the Collegium, 237 attorneys enrolled under the Madras High Court said that the widespread use of "punishment transfers" or the element of punitiveness during the emergency had impeded the independence of the judiciary.

It is also a zero hour for the Collegium to establish a policy outlining requirements for chief justice transfers. A chief justice must serve in a high court for a considerable amount of time because, in addition to his judicial duties, he also makes a lot of administrative decisions. Therefore, the administration of justice is harmed when chief justices are moved from one high court to another continually.

THE NATIONAL JUDICIAL APPOINTMENT COMMISSION

On four different occasions, the parliament suggested amending the Constitution for setting up a committee solely for the appointments of the judges called the National Judicial Appointment Commission (NJAC). In accordance to the Constitution (67th Amendment) Bill of 1990, a National Judicial Commission (NJC) comprised of the chief justice of the Supreme Court of India, two superior judges from the bench of Supreme Court, the governor or the chief minister of the respective state, the senior most judge from the high court bench of the respective state was to be established. Due to the dissolution of Lok Sabha in May 1991, the bill was not given a chance to be considered.

The establishment of a National Judicial Commission with five members comprising of the following members: the union minister for law and justice, the chief justice of India, the two other distinguished Supreme Court judges, and one distinguished individual all of whom would be proposed by the president following appropriate engagement with the chief justice of India; this was recommended in the 2002 report of the National Commission to Review the Working of the Constitution (NCRWC), to which MN Venkatachaliah served as the presiding chairman, who was also the former chief justice of India.

Later again, bills on two occasions were introduced; one in 2003 and another one in 2013 for the formation of the National Judicial Commission (NJC) and the National Judicial Appointment Commission (NJAC) respectively. The Constitution (98th Amendment) Bill, 2003, could not be passed due to the dissipation of Lok Sabha in March 2004. Then again, the Constitution (120 Amendment) Bill of 2013 was actually passed by the Rajya Sabha or the Council of States, but the Bill could not be sent to Lok Sabha for its consideration as it was dissolved.

Eventually, both the houses of the parliament approved the Constitution (121st Amendment) Bill of 2014, and the majority of the state legislative assemblies sanctioned it. The Constitution (99th Amendment) Act of 2014 went into effect on April 13, 2015, after receiving the consent of the president.

Article 124 of the Indian Constitution was revised by the Constitution (99th Amendment) Act, 2014. The said amendment stipulated that the nominations of the judges and their transfers would be recommended by the National Judicial Appointments Commission. The chief justice of India, two other superior Supreme Court judges, the minister for law and justice at the union level and two eminent persons will make up the NJAC, which will be established under the provisions of the newly added article 124-A [10]. One of these two nominees must be a member of the following groups which are, women, minorities, OBC, SC, and ST. The individuals in the said commission will be nominated by a committee made up by the chief justice of India, prime minister of India, and parliament's leader of the opposition.

The NJAC Act and the 99th Constitutional Amendment Act, 2014, were both overturned by a 5-member judges panel comprising of Justice Madan Lokur, Justice Kurian Joseph, Justice Adarsh Kumar Goel, Justice JS Kehar, and Justice Chelameshwar in a 4:1 ratio decision. The NJAC Act was declared unconstitutional and was repealed due to how it interfered with the judiciary's independence. The 5-judges panel in the famously known as the 4th Judges case [11], decided to overthrow the NJAC Act in 2015. Despite the fact and pointing out that the Collegium system is erroneous and that the procedure of "judges nominating judges" should be looked into, the 5-judge bench concluded that the Collegium system would be the best method to be used in the appointments and nomination of Judges.

In the *Kesavananda Bharati Case* [12], the Apex Court affirmed that Article 368 of the Indian Constitution prohibits the parliament from changing the fundamental framework and provisions of the Constitution which was called the basic structure of the Constitution. Therefore, it will be determined that an amendment act never existed even if it violates the fundamental design of the Constitution rather than just a specific clause. As a result, even if it violates the fundamental design of the Constitution rather than just a specific clause, it will be determined that an amendment act never existed. Hence, it was decided that the pre-amendment provision would take effect if a constitutional amendment were to be declared illegal. Since the court held that the NJAC Act was unconstitutional, the provisions that were existed before the Act, i.e., the Collegium system would be reinstated as it was before the amendment, since the court found breaches in the Constitution's fundamental principles.

Some of the important rulings in the judgement are as follows. The fundamental aspect of the judicial independence and a component of fundamental structure is the procedure of judicial

appointments, which is the main tenet of the majority ruling. In the second place, the fundamental structure includes judicial precedence during the process for selection. Furthermore, Collegium system preserves the judicial supremacy while permitting executive participation. Lastly, through its veto provisions, the judicial supremacy which is the fundamental framework is undermined by the NJAC.

It was determined by the majority that Article 124-A does not give the judicial component of NJAC “enough representation” and that NJAC is “insufficient to retain the judiciary’s primacy” in terms of judge nomination and allocation. The concepts of rule of law that is the “independence of the judiciary” and “separation of powers” are gravely contravened by presence of the union minister of law and justice as an ex officio member of the NJAC. In the same way, it is ultra vires for two “eminent individuals” to serve on the NJAC.

In addition to the Judge’s individual ratio decidendi, each of the judges provided a detailed justification for their decision. The central argument of each of their rulings was that the executive and legislature should refrain from participating in the selection of judges and maintain the judiciary’s independence from them. According to Justice JS Khehar, “the civil society’s organic evolution has not yet adequately advanced”. A different line of argument and reasoning was held by Justice Jasti Chelameshwar; the Justice held that “the court cannot be capable of defending the liberties of the people”. The other judges agreed with Justice Khehar’s revelation.

The dissent judgement was given by Justice Chelameshwar, who spoke out strongly in favor of the NJAC Act; whereas the other four judges who had given their concurrence, considered the National Judicial Appointments Commission Act to be illegitimate and unconstitutional. He deemed the NJAC Act to be constitutional and legitimate. Justice Chelameshwar believed that the NJAC Act was an ideal replacement for the current Collegium structure. The advantages of the Act were outlined by Justice Chelameshwar in vehemently worded dissent ruling.

‘Transparency’, in words of Justice Chelameshwar, is a crucial component of the constitutional governance. It becomes more crucial throughout the appointment process, he reasoned. The NJAC Act was praised by the judge for incorporating an easy and a transparent mechanism to appoint judges. He bluntly stated that the Collegium system is opaque, since the public cannot view its proceedings, which results in a lack of transparency. Justice Chelameshwar agreed with Advocate General Mukul Rohatgi’s contention that the Constitution’s fundamental design is destroyed when the element of checks and balances is excluded.

The presence of the union law minister in the commission, according to Justice Chelameshwar, who stated that, the executive branch is capable of making significant and useful assistance to the selection process due to its extensive administrative infrastructure.

In an inaugural statement to the Council of States on December 07, 2022, the Vice-President of India and the Chair of Rajya Sabha, Shri Jagdeep Dhankar launched harsh criticism over the Supreme Court for its 2015 ruling that invalidated the NJAC Act, 2014. “There is no parallel democratic history where a properly legitimized Constitutional prescription has been judicially undone”, according to Dhankar, who called it an instance of “serious compromise of legislative sovereignty [13]”. Dhankar has thus joined the recent ongoing discussion between the executive and the judiciary regarding the selection of judges for higher courts. The Union Law Minister Mr. Kiren Rijiju also has joined the vice president in calling out the Apex Court for overturning the NJAC without providing a better replacement, asserting that it is the government’s duty to choose judges.

CONCLUSION

The judges are the most important units in the judiciary, so ensuring that they are qualified to deal with the numerous challenges that arise on a daily basis is critical. The selection of judges must be

done carefully, as must the appointment of judges. Judges must be transferred only when there is a valid reason, which means that transfers should be avoided unless, absolutely necessary. Judges should not be moved for political or personal reasons. As a result, the government and judiciary must regard the appointment of judges as a critical process that must be handled with care.

The author has provided some suggestions to clear the impasse over the appointment and the transfer of judges to both Supreme Court and High Court, which constitute the Indian higher judiciary:

- All the resolutions and verdicts of the Supreme Court and the High Court Collegium must be posted on the corresponding websites.
- The Supreme Court has ruled that speedy trial and time-sensitive justice is a basic right on numerous occasions. Only when there are enough judges available can cases be resolved quickly. Every two years, the number of High Court judges must be evaluated and assessed, and all the decisions made following that review, along with all the pertinent justifications, must be obligatorily posted online at the Ministry of Law and Justice's website.
- The system of Collegium that is currently in existence for the procedure for the appointment and for the transfer of judges should be well preserved. The justification for this is that it would prevent presidential meddling and preserve the independence of the court.
- With due diligence, a memorandum of procedure should be created, taking into account five fundamental principles. The five fundamental principles should include "eligibility criteria for any appointments, transparency either in appointment process or the transfer process, the establishment of Secretariat for management of selection process, a proper mechanism to deal with complaints against those who are being considered for appointment, and finally to look into miscellaneous issues involving either the appointments or regarding the transfers" [14].
- To ensure transparency and accountability, information about that process of selection of judges must be made available to the public after appointments are made, under the RTI Act. The proposed method reduces the possibility of nepotism, favoritism, and partisanship, while also facilitating better judicial appointments [15].

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