# APPOINTMENT OF HIGHER JUDICIARY IN INDIA: COLLEGIUM OR COMMISSION

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## ABSTRACT

The national debate is raging in India about the system of appointments for Supreme Court and High Court judges. The executive had primary authority over judicial appointments, when it was establishing. In 1993, the Supreme Court created by its judgment, a new system of appointments known as the collegium system, whereby the Chief Justice of India and senior judges of the Supreme Court make new appointments to the Supreme Court as well as the High Courts. In 2014, Parliament amended the Constitution and passed a bill to create a commission to appoint judges i.e. National Judicial Appointment Commission (NJAC), but the Supreme Court declared the law unconstitutional. In this background researcher has discuss the theoretical background of constitution and the provision prevailing in USA, and some European Countries. In this paper researcher has discussed some landmark cases pronounced by the Supreme Court on judicial appointment in higher judiciary in India.

***Keywords*****:** Judicial appointment, NJAC, Collegium, Supreme Court and High Court.

## INTRODUCTION

India is a democratic country and constitution is the basic law of land. Indian government is established as per the constitutional provision. Legislature, executive and judiciary are the three organs of the government. Supreme Court is nothing but the highest judicial organ. The fountain of justice starts from it. The wave of justice flows from it. Judges are treated as the God of justice who by providing fair, impartial and gains the confidence of public. But a wrong appointment to judiciary has affected the image of the court. The fountain of justice gets affected with dirty flows in it. This undermines the confidence of people in the judiciary. This situation is not a good symbol for Indian democracy.

The Constitution of India which is the fundamental law of the land has laid down the provisions for the establishment of Supreme Court and High Courts as watchdog institutions with the objective to deliver justice in the society and to make it sure that the other two organs of State i.e. Legislature and Executive do not cross their authority and that they discharge their functions strictly in accordance with the powers conferred upon them by the various provisions of the Constitution. The judiciary had played a very significant role in the interpretations of the various provisions of the Constitution as well as the other enactments passed by the legislature from time to time. It had power to struck down the executive order, if it violated the fundamental rights of the citizens or if they infringe any other law or constitution in any manner.

With the passage of time, judicial review has also been brought within the ambit of basic structure doctrine. The judiciary became so powerful that it also assumed the powers of making appointments to the Supreme Court and High Courts themselves by creating collegiums systems in Supreme Court and High Courts through judicial verdicts given from time to time. There does not exist any effective mechanism for making appointments of judges to the higher judiciary. There is no transparency in the appointment process and thus there is an urgent need to enact some effective enactment to make it accountable without touching its independence in any manner.

## OBJECTIVE OF STUDY

To understand the evolution of process of the appointment of higher judiciary in India.

## HYPOTHESIS

The National Judicial Appointments Commission is an opportunity to create transparent method of appointment to the higher judiciary in India which will lined with constitutional structure.

## RESEARCH METHODOLOGY

Research methodology adopted for this paper is doctrinal research method. Researcher has used online articles, journals, and judicial pronouncement for study.

## THEORETICAL BACKGROUND

The constitution of India is the basic law of the land. This constitution has given power, authority to all the three organs, i.e. Executive, Legislature and Judiciary, of the government. The framers of the constitution do not want to concentrate power in one hand and therefore they accept the **Theory of Separation of Power** in its strict sense. By this they had divided the basic functions of the government in these three organs accordingly. The Constitution of India being the fundamental law of the land has laid down the provisions for the establishment of Supreme Court and High Courts as watchdog institutions with the objective to deliver justice in the society and to make it sure that the other two organs of State i.e. Legislature and Executive do not cross their authority and that they discharge their functions strictly in accordance with the powers conferred upon them by the various provisions of the Constitution. This decreases the possibility of anarchy and arbitrariness in government.[i]

While accepting the separation of power theory the framers have also accepted the **Theory of Checks and Balance**. It is this theory which prevent the democracy from being ruined by the three organs of the government. All the three organs of the government are interdependent and in check of the each other.[ii] There interdependence on each other is the guarantee of effective governance. It assures the best possible functioning of the three organs of the government. It

makes them more accountable and responsible towards the establishment of good democracy. With respect to judiciary, the power of the appointment of higher judiciary and their removal is given in the hands of executive. And judiciary uses its judicial review against the other organs of the government. We found the traces of checks and balance in various articles of the constitution.

Our constitution is partly rigid and partly flexible. Much of its portion got easily amendment by the parliament under article 368. The parliament must not misuse his power of amendment and the aim of constitution must not be vitiated by it; the framers have given the power of judicial review in the hands of judiciary so that it can stop parliament by going beyond its authority provided in the constitution. By applying this power of judicial review in the case of Keshvanand Bharathi[iii], judiciary has enacted the **Doctrine of Basic Structure of Constitution**. This basic structure doctrine puts limitation on the power of amendment of the parliament given under Article 368. Now parliament can amend the constitution without disturbing this basic structure of the constitution. But court had not has explained what constitutes the basic features of the constitution. By the passage of time judiciary enhanced the list of basic features of the constitution. One of the basic features which is needed to be discus here is the judicial independence as the researcher's aim is to study the process of appointment of higher judiciary in India. Now a days the concept of basic structure and judicial independence, in relation to the appointment in higher judiciary, has become controversial and ambiguous.

**Judicial independence** means the freedom of judiciary from the influence of the parliament or political powers or any kind of pressure which affects its decision-making capacity or create hurdle in providing justice to the citizen of the country or protecting the constitution. It means that judiciary is not answerable to the parliament nor any question is put on its decisions.[iv] But at the same time it does not mean that its power of appointment and removal of judges in the hands of executive will affect its independency. Dr. B. R. Ambedkar expressed his concern by way of uttering the following words regarding judiciary, "*there can be no difference of opinion in the House that our judiciary must be both independent of the executive and must also be competent in itself.*"[v] But in the same assembly, after studying various model used by other countries, he decides to adopt, in Ambedkar's word, "a middle course".[vi]

The judiciary had played a very significant role in the interpretations of the various provisions of the Constitution as well as the other enactments passed by the legislature from time to time. It had power to struck down the executive order, if it violated the fundamental rights of the citizens or if they infringe any other law or constitution in any manner. By using judicial review, it can declare any law, enacted by the executive, as unconstitutional. The judiciary became so powerful that it also assumed the powers of making appointments to the Supreme Court and High Courts themselves by creating collegiums systems in Supreme Court and High Courts through judicial verdicts given from time to time.

As higher judicial appointment is the constitutional aspect, it is necessary to study each and every aspect, theory and concept which is related to the present-day constitutional setup in the country. The theory of separation of power and checks and balance is the base of Indian democracy and this democracy is in great trouble because of anarchical behaviour of the judiciary. In the name of judicial independence, the judiciary has taken all the powers of appointment in its own hand and is on the basis of judicial legislation. There does not exist any effective mechanism for making appointments of judges to the higher judiciary. There is no transparency in the appointment process and thus there is an urgent need to enact some effective enactment to make it accountable without touching its independence in any manner.

## APPOINTMENT OF JUDGES OF HIGHER JUDICIARY AND CONSTITUTIONAL PROVISIONS

In the modern time, India is one of the largest democracies in the world. Any democratic Government based on three pillars i.e. the legislature, the executive and the judiciary. The Constitution of India defines the powers and functions of these organs. The primary function of the legislature is to enact law, the executive is to execute the law and that of the judiciary is to enforce the law. While enforcing the law enacted by the legislature, the judiciary assigned the important roles by the Constitution; Interpreter of the Constitution. As the protector of fundamental rights which are guaranteed by the Constitution to the people; To resolve the disputes which have come by way of appeal.

While discharging the above assigned roles, the judiciary reviews the actions of the legislature and executive. The judiciary is being empowered to struck down any law as void if any law is

ultra vires to the Constitution. In recent time, it has been a matter of hot discussion as it is reported repeatedly that the judiciary is encroaching in the affairs of the legislature and of the executive. The present article deals with the provisions regarding the appointment of judges to the higher judiciary, the law made by the legislature versus judicial response to such legislation.

It is very important at this stage to known the intention of makers of the constitution. Dr. Ambedkar summed down the three issues which prevailed with regards to appointment of judges. Firstly, the Judges of the Supreme Court should be appointed with the concurrence of the Chief Justice. Secondly, the appointments made by the President should be subject to the confirmation of two-thirds vote by Parliament; and thirdly, that they should be appointed in consultation with the Council of States. He suggested a middle way solution to this problem and it is hence that we find out the original intentions of the fathers of our Constitution. He observes that *"It seems to me in the circumstances in which we live today, where the sense of responsibility has not grown to the same extent to which we find it in the United State, it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day. Similarly, it seems to me that to make every appointment which the executive wishes to make subject to the concurrence of the Legislature is also not a very suitable provision. He was also not in favor of subjecting the appointment of judges to the concurrence of the Chief Justice of India. He opined that the Chief Justice of India is also a human being after all, liable to error, and vesting such a power singularly on him would not be desirable."*[vii]

An ad hoc committee which was established in the year 1949, was constituted by the constituent assembly to suggest the method for the appointment of judges. It unanimously recommended a panel of judicial and parliamentary members to nominate future judges. The President had to confirm these nominations. The constituent assembly did not consider these suggestions and discussed more democratic methods of appointment of judges.[viii]

Various countries have adopted various modes of appointment of judges to the higher judiciary. In Great Britain, the appointment of judges made by the Crown, which means the executive, can appoint judges without any restriction and in U.S.A. the President, appoint judges of the Supreme Court with the consent of the senate.[ix] The framers of the Indian Constitution saw difficulties in both these methods, so they adopted a middle course.

The Judges of the Supreme Court are appointed by the President under Article 124 (2), while the Judges of the High Courts are appointed by the President under Article 217 (1) of the Constitution. Art 124 (2) provides that the President shall hold consultation with such of the Judges of the Supreme Court and of the High Courts in the State as he/she may deem necessary for the purpose. Art 217 (1) provides that the President shall hold 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, the Chief Justice of the High Court Article 128 and the appointment of retired Judges as sitting Judges of the High Courts can be made under Article 224-A of the Constitution.[x]

The controversy of appointment of judges arises with the issue of J. Zafar Imam in 1968 when the then senior most judge J. Zafar Imam was not appointed as the Chief Justice of SC due to his physical and mental infirmity. Again in 1973, Justice A.N. Ray who was ranked fourth in the seniority was appointed as the Chief Justice of India bypassing the three senior judges who were then resigned from the Court in protest [Justice Shelat, Justice Grover, and Justice Hegde].[xi] The government invoked the Law commission's recommendation [14th Law Commission] which criticized the practice of appointing the senior most judges as the Chief Justice of the Supreme Court on a ground that a Chief Justice should not only be able and experienced judge but also a competent administrator and, therefore succession of the office should not be regulated by mere seniority.[xii]

The same story was repeated in 1976, The Government appointed Justice Beg as Chief Justice by-passing Justice Khanna, who was senior to him at that time. After the retirement of justice Beg, the senior most Judge, Justice Chandrachud was appointed as the Chief Justice. Since then, again the rule of seniority has been followed in the matter of appointment of the Chief justice of India.

## APPOINTMENT OF JUDGES BEFORE NJAC

After commencement of the Constitution of India, a fresh Memorandum of Procedure (MoP) for appointment of Judges to the Supreme Court and High Courts were framed. The MoP was revised in 1971 and 1983. This was further revised in 1994 and 1998 after the Judgments in the Second and Third Judges cases respectively with approval of Chief Justice of India and Prime

Minister. Currently, all appointments to the Supreme Court and the High Courts are made as per the MoP framed pursuant to the Supreme Court Judgment of 6.10.1993 read with the advisory opinion of 28.10.1998.[xiii]

The system through which the judges of the Supreme Court or High Courts are appointed and transferred is called "Collegium System". The Collegium system is one where the Chief Justice of India and a forum of two senior-most judges of the Supreme Court recommend appointments and transfers of judges, till 1998. After second judges' case the members of collegium was increase to four senior most judges. Collegium system is a process through which decisions are taken related to appointments and transfer of judges in supreme court and high court and not according to Art. 124(2), Art. 217(1) and Art. 222(1) of the Constitution. A High Court collegium is led by its Chief Justice and four other senior most judges of that court. Names recommended for appointment by a High Court collegium reaches the government only after approval by the CJI and the Supreme Court collegiums.

The Collegium sends the recommendations of the names of the judges to the Central Government. Similarly, the Central Government also sends some of its proposed names to the Collegium. The Central Government thus investigate the names and resends the file to the Collegium. Collegium considers the names or suggestions made by the Central Government and resends the file to the government for final approval. If the Collegium resends the same name again then the government has to give its assent to the names. But time limit for this process is not fixed to reply.

Once the collegium makes a recommendation to the president, the president can either accept it or send it back to the collegium for reconsideration. If the collegium once again recommends the same candidate for appointment, the president is bound by the recommendation. The final position is thus that even though the formalities need to be performed by the president, actual decision-making power rests with collegium only.

## VIEWS OF SUPREME COURT ON JUDICIAL APPOINTMENT

The appointment of judges to the Supreme Court and High Court in India has been a matter of intense conflict between the judiciary and executive over the years. It is necessary for securing

the independence and objectivity of the judiciary that judges be selected on merit and political elements should be reduced in the process of selection of judges. The Constitution does not lay down a definite procedure for the appointment of judges to the Supreme Court or the High Court. The Constitution merely says that the President will appoint Supreme Court judges in consultation with the Chief Justice of India and such other judges of Supreme Court, as he may deem necessary. It was not clear from the above provisions as to whose opinion was finally to prevail in case difference of opinion among the concerned persons. This question was considered by the Supreme Court in several cases:

1. ***S. P. Gupta v. Union of India***[xiv]

The main question for consideration before the Supreme Court in this case was: of the several functionaries participating in the process of appointment of judges to the Supreme Court and the High Court, whose opinion should have the final say in the process selection. The bench constituting Justice Bhagvati, Justice Fazal Ali, Justice Desai and Justice Venkstarmiah took the view that the opinion of Chief Justice of India and the Chief Justice of the High Court were merely consultative and that, "The power of appointment resides solely and exclusively in the President" and the Central Government could override the opinion given by the Constitutional functionaries.

2. ***Subhash Sharma v. Union of India***[xv]

The decision of Supreme Court in S. P. Gupta v. Union of India was criticized by the Supreme Court in this case. The Supreme Court in this case emphasized that an independent, non-political judiciary was crucial to sustain the democratic political system adopted in India. The bench expressed the view that the role of the Chief Justice of India be recognized as of crucial importance in the matter of appointment to the Supreme Court and High Court of the states. The Supreme Court said that primacy be given to the views of the Chief Justice of India in the matter of selection of judges to the Supreme Court and High Courts. This would improve the selection of judges.

3. ***Supreme Court Advocate-on-Record Association v. Union of India***[xvi]

In this case the Supreme Court gives a wider meaning to the Constitutional provisions concerning the judiciary. The word 'consultation' in article 217 (1) was given a wider meaning. The majority insisted that the main concern of the Constitution is the selection of the most

suitable persons for the superior judiciary. The Supreme Court held that, "In the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight as he is best suited to the worth of the appointee." The court also expressed that the initiation of the proposal for appointment of the High Court judges must be by the Chief Justice of the concerned High Court.

### *4. Re: Presidential Reference*[xvii]

The ruling of Supreme Court in Supreme Court advocate on record case regarding appointment of the High Court judges was elaborated further by another nine judge's benches in this case. The Supreme Court laid down the following propositions with regard to the appointment of the Supreme Court judges:

> (i) The Chief Justice of India must make a recommendation to appoint a judge of the Supreme Court in consultation with the four senior most puisne judges of the Supreme Court.
>
> (ii) The Chief Justice of India is not entitled to act solely in his own capacity without consultation with other judges of the Supreme Court in respect of materials and information conveyed by the Government of India for the appointment of judges.
>
> (iii) If the majority of the collegiums is against the appointment of a particular person, that person shall not be appointed. The court also laid down that, "if any two of the judges forming the collegiums mention good reasons that are adverse to the appointment of a particular person, the Chief Justice of India would not proceed for such appointment.

## NATIONAL JUDICIAL APPOINTMENT COMMISSION

The parliament passes the 121st Constitutional amendment Bill 2014 with a view to replace the collegiums system with regard to the appointment of judges to the Supreme Court and High Court. The bill seeks to enable equal participation of judiciary and executive and ensure that the appointment to the higher judiciary is more participatory, transparent and objective. The bill amends article 124 (2) of the Constitution to provide a commission to be known as the National judicial Appointment Commission (NJAC).[xviii]

***Composition of NJAC***

The NJAC would consist of six members out of which Chief Justice of India as a chairperson, two senior most judges of the Supreme Court, union minister of law and Justice, two eminent persons (to be nominated by a committee consisting of Chief Justice of India, prime minister of India and leader of opposition in Lok Sabha). Of these two eminent persons, one person would be from SC/ST/OBC or minority community or a woman. These eminent persons to be nominated for a period of three years and shall not be eligible for re-election.[xix]

***Functions of NJAC***

The bill assigns following functions to the NJAC:

i. Recommends the persons for appointment as Chief Justice of India and other judges of the Supreme Court and High court.
ii. Recommends the transfer of Chief Justice and other judges of the High Court's from one High Court to another.
iii. Ensures that the persons recommended by them is capable of maintaining the dignity of judiciary.

***NJAC Struck Down as Unconstitutional***

The validity of NJAC was challenged before the Supreme Court in Supreme Court Advocates-on-Record v. Union of India[xx]. In a landmark judgment, a five judge's bench of Supreme Court by 4:1 majority struck down the 99th Constitutional amendment as unconstitutional. The bench held that NJAC sought to interfere with the independence of the judiciary, of which appointment of judges and primacy of the judiciary in making such appointments was indispensable. However, Justice J. Chelemaswar, gives a dissenting judgment and held that the ever-rising pendency of cases warranted a "comprehensive reform of the system" and upheld the validity of NJAC. Differing with the majority, he said that primacy of the Chief justice of India is not a basic structure of the Constitution and judiciary's power over appointments was not the only means for the establishment of an independent and efficient judiciary.[xxi]

The key Holding of the Judgment:[xxii]

i. Judicial appointments being an integral facet of judicial independence are the part of the basic structure.

ii. Judicial primacy in judicial appointments with executive participation is also the part of basic structure.

iii. The collegiums allow for the executive participation by maintaining the judicial primacy through the collegiums.

iv. The NJAC violates the basic structure by doing away with judicial primacy through its veto provisions.

Subsequently, Supreme Court vide its order dated 16.12.2015 directed Government to supplement the Memorandum of Procedure for appointment of Judges of Supreme Court and High Courts (MoP) taking into account factors like eligibility, transparency in the appointment process, establishment of Secretariat and Complaint mechanism in consultation with Supreme Court Collegium/Chief Justice of India. The MoP are under finalization in consultation with the Chief Justice of India.[xxiii]

## COMPARATIVE ANALYSIS OF JUDICIAL APPOINTMENT IN USA, SOME EUROPEAN COUNTRIES AND INDIA

The framers of the constitution had study and analysed constitution of number of countries with a view to create perfect constitution for the nation. It proves significant for proper development of law in the country. In recent time, across the world considerable movement found to bring the transparency in the appointment of higher judiciary. The purpose of comparative law is to see, how the other countries interpret their constitution and to see whether our practice conforms the larger international standards. With respect to the judicial appointment, almost all country is in favour of the merit base selection. It is only India, where the appointment of higher judiciary is made by the judiciary itself and executive has very minimal role.

According to Section 2, Article II, the United States Constitution, the President shall nominate, and by and with the advice and consent of the Senate, shall appoint Judges of the Supreme Court and all other Officers of the United States". In other words, in USA appointment are held by president.[xxiv]

In European countries, there is no fixed rules for the appointment of judges. In many countries the executive and legislature play very important role in the appointment of judges. The good thing about these country's process of appointment is that they strictly make appointment on the basis of merit.

In Germany federal judges are appointed by federal president, though it is not free from complete political influence but have checks and balance in Judges Election Committee. There is effective control over the judicial appointment process to protect their judicial culture of judicial independence.[xxv]

In France, judges are recruited through competition or on the basis of special qualification. The president on advice and proposal of judicial service commission makes appointment of judges. This commission comprises of the president, 12 judicial members and 8 other additional members. the decision of commission is binding.[xxvi]

In UK after 2005 the appointment of higher judicial is governed by The Constitutional Reform Act, 2005. The Act has provision relating to formation of commission for appointment of judges to supreme court and other court. For appointing Supreme Court judges, commission consists of president and deputy president of Supreme Court and representative of commission. The process involves the mandatory consultation with the senior Judges, the Lord Chancellor and the executives. Once the suggested name is rejected by Lord Chancellor the commission cannot proposes again.[xxvii]

## CONCLUSION

The National Judicial Appointments Commission, though being rejected by a number of leading advocates, still most of the people were in favor of it, who demands transparency in the procedure of appointment of the judges. The Collegium System which is followed in India, though provides full independence of the judiciary, is an opaque or non-transparent system of appointment of the judges. The middle path for the appointment of judges, between collegium and commission, can be not only giving the power to judiciary but also making them more responsible and accountable for their work. The trust of Indian people can be won only if there is transparency in the system.

By going through the comparative analysis, I found that India is the only country who follows the collegium system and executive has no effective role in the appointment of higher judiciary. In USA, UK, France and Germany higher judiciary is appointed by the commission and executive play an important role in it.

The idea of NJAC, if implemented properly, will bring the law on topmost positions of the country and/or if we remove the loopholes of collegium system. The basis of appointment of higher judiciary must be the capability and knowledge based and not by mere opinion of someone. The judge who is appointed as the Chief Justice of India must have the power of knowledge. The judgment pronounced by the Supreme Court and High Court affects the common people. Supreme Court is the fountain of justice For this important function of the government, the system has to be transparent and the judiciary needs to be more and more efficient.

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