

## JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

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Keywords: Judicial Independence, Non-Politicization, Constitution, Court, Accountability

### INTRODUCTION

India has a unified judicial system with a single constitution. This means that there is only one Judiciary that is responsible for the interpretation of the Constitution. The Apex Court is the ultimate interpreter. This is a part of the basic framework of our Constitution. We are Federal with a strong Centre, unlike the United States where they follow federalism in the true sense. This was done with the view of ensuring that the various provinces while having their State Legislatures are held together by a strong Centre. This was to make sure that riots and protests do not break out in the newly formed Nation that had not only been ruled by the Britishers but had also recently witnessed a Partition that resulted in a refugee crisis as severe as the refugee crisis in Europe after the Second World War.

### JUDICIAL INDEPENDENCE

Judicial Independence is a contested concept that was coined by WB Gallie in 1956. It has a significant amount of analytical complexities behind it. As a concept Judicial Independence can mean different things to different people and changes according to the political conditions or the paradigm in which the contest is occurring.

### WHY HAS IT BEEN QUESTIONED

In *ADM Jabalpur v. Shiv Kant Shukla*<sup>1</sup>, the issue that arose whether Article 21 can be suspended during Emergency. The verdict was overwhelmingly in support of the suspension of the Right in the ratio 4:1. It was held that it was a gift of the constitution and hence could be suspended. This invariably meant that the Legislative and the Executive exercised a lot of power over the Judiciary. The independence of the Judiciary was questioned and it was known as a branch of the Executive. This trend continues in the present day in the light of cases such as the Ayodhya judgment, the

<sup>1</sup> 1976 AIR 1207

Gogoi sexual harassment case, the Kashmir issue, and the way the Supreme Court dealt with the Citizenship Amendment Act protests and Justice Murlidhar's transfer.

### **CORE IDEAS OF JUDICIAL INDEPENDENCE**

Various ideas are surrounding Judicial Independence:

Non-Politicization: the Sapru Committee and the Constitutional Assembly Debates say that the Judiciary must not be politicized. This means that any kind of intervention by another organ can be seen as overlap and this will also involve any interactions. The modern theory of Separation of Powers has laid out a process wherein each organ places limits on each other so that there may be checks and balances on the exercise of their powers. According to this, there should essentially be no interference but, involvement when natural is needed.

Fairness and Impartial Adjudication: the paper by Arghya Sengupta<sup>2</sup>lays out the discusses why Judicial Independence is necessary – the Principles of Natural justice. He talks about in six points that cover the Principles of Natural Justice:

- i. The judge should not be related to either of the parties or their agents
- ii. He should not be in a position to be influenced by the parties or their agents
- iii. He should be safeguarded from threats from the parties or their agents
- iv. He should carry on proceedings openly
- v. He should hear the parties fully and adequately
- vi. He should base his decision on reasons that are valid and relevant

Accountability: The first three points deal with the internal factors that influence the decision of the judges, therefore, dealing with independence. The next three points deal with the external factors that make up the idea of accountability. It keeps a Judge in check. This pressure is felt by the judges to ensure that the process is impartial since these are public ideas.

### **JUDICIAL INDEPENDENCE AND ACCOUNTABILITY - MAXIMISATION**

Judicial Independence and Accountability together ensure that there is impartial adjudication. Judicial Independence allows a judge to be impartial internally and Accountability ensures that the

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<sup>2</sup> Arghya Sengupta, "Judicial Independence and the Appointment of Judges to the Higher Judiciary in India" *Heinonline* (2019)

judge is not tempted by any external factors. However, there seems to be a sense of tension that exists between the two. This occurs when either one of them overpowers the other and hampers the process of impartial adjudication. This tension exists because of 'Maximisation' which is where the breadth of one of the concepts is maximized or increased to engulf or take away the value of the other. It is important to make sure that, disproportionate values are not assigned to these concepts. Previously in the United States, when the constitution was being framed, there was a set of eighty-five papers/articles that were released by Alexander Hamilton, John J, and James Madison which was called the 'federalist papers' They were essays in favor of the newly drafted constitution. On the other hand, there were the anti-federalist papers written by various authors under the pseudonym Brutus Oketo. These contained arguments against which the constitution was framed. It said that the Judiciary was too independent without any legal or popular restraint. The Judiciary was perceived as an undemocratic institution because the appointments were not made by people and hence, they were not accountable like the executive.

### **INSTITUTIONAL DEPENDENCE**

Decisional independence is the ability of the judge to decide the matter impartially. Institutional independence takes decisional independence in its holds and also deals with the position of the court as a whole within the state superstructure. John Ferejohn notes that institutional dependence is prevalent. The Judiciary is dependent on the legislative and executive. He says that you can view this in the pejorative and non-pejorative sense. Institutional dependence means that the Supreme Court of the Judiciary is dependent on the Legislative or the Executive for certain kinds of constitutional procedures such as the Parliament for Jurisdiction, the total number of judges, the manner of appointment, the manner of executing decisions, the manner of overriding decisions and the funds that go to the court. By itself, this dependence is not detrimental and is natural following the modern theory of Separation of Powers. The utility of Judicial Independence is threefold: (i) for the collective good (ii) it helps protect the rule of law (iii) it helps enforce legitimate laws and strike down illegitimate laws.

### **JUDICIAL APPOINTMENTS**

Judicial Appointments are the manner and method of appointment of judges to the judiciary. In democracies, the judiciary plays a pivotal role in regulating the relationship between the state and

the individuals within its political ambit. In fulfilling this role, the judiciary is expected to be manned by those of the highest integrity and legal acumen. This necessarily requires individuals who are unbiased and capable of being independent of powerful litigants. Inarguably, the most powerful and often most frequent litigant before the Court is the State itself. Therefore, there is always some question on whether the independence of the judiciary is adversely affected when the Executive is also involved as a selector of the judges who will ultimately decide the State's disputes.

Decisional and Institutional independence needs to be protected not only after the appointment but even before a judge enters the judiciary. Some provisions protect a judge post-appointment, such as fixed tenure, fixed salary, or restricted removal through the only impeachment. But just as we pay attention to this, we must make sure that the ones undertake that roles are of the highest integrity.

### **APPOINTMENT PROCEDURES**

Appointment procedures all over the world differ primarily because each jurisdiction views the relationships between the coordinate branches differently. As we know, by itself, the involvement of the executive in an appointment process is not antithetical to the independence of the judiciary. But the extent and the nature of the involvement and at what point this becomes interference with the independence of the judiciary is assessed differently in each jurisdiction.

The process of appointment ultimately interpreted by courts, has to do with the history of the relationship between the executive and the judiciary and how the judiciary perceives not only their coordinate branches but also the citizenry. In India, the question of executive interference in judicial appointments is not only one of what is possible, but what has been proved by history to be a very real probability as evidenced by the supersession of judges following Keshavananda Bharati<sup>3</sup>. Its insistence on what is ultimately self-perpetuation is motivated by an instinctual need to self-preserve. Justice Khanna, Justice Beg, Justice Grover Justice Hegde.

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<sup>3</sup> AIR 1973 SC 1461

## **DISCRETION**

As a concept, discretionary power is one that allows the decision-maker to apply their subjective assessment in choosing between several reasonable options. As there are no technically correct choices in such a determination, the power is by its very nature is a broad one. Discretionary power, especially if capable of effecting far-reaching consequences, should not be given to just one person. In the rare instance that it is conferred on a single person, there have to be considerable checks on the person to control how it is exercised.

The power to appoint judges to the higher judiciary is also a discretionary power where decision-makers are choosing between several eligible candidates based on their subjective assessment of those candidates. Other than some objective criteria such as seniority, the suitability of an individual to be a judge is going to be a matter of the decision maker's perception. As a result, the control mechanisms informing such powers are imperative.

## **PRESIDENT AND COUNCIL OF MINISTERS**

*Article 124(2)*

*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 shall hold office until he attains the age of sixty-five years: Provided 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>

On a purely textual reading of Article 124(2), we can understand the constitutional machinery that is involved. Under Article 72 we know that when the involvement of the President is mentioned we speak of the position as advised by the Council of Ministers.

The second thing you can see is that the President is to appoint judges 'after consultation' with the judiciary. The dictionary meaning of this word denotes seeking advice or information and the appointment can only be made after such consultation has occurred. But other than this, the article

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<sup>4</sup> The Constitution of India, art. 124 (2)

does not tell you very much about the actual procedure that needs to be followed. We can't quite tell whether the President must follow the advice given by the judiciary or whether he may appoint a judge irrespective of that opinion.

In simple words, we cannot definitively tell, from only the language, who has the final word. As a result, the word consultation and the procedure that must necessarily flow from this word has been the central focus of the interpretation, implicating all the concepts and themes we spoke of in the earlier section.

### **THREE JUDGES CASE**

We will now discuss the popularly known Three Judges Case to see how the appointment of judges in India. Discretionary Powers should be distributed and should be made out of available options. Discretion is the power to choose the alternatives in the absence of predetermined parameters. It is the power to choose or select amongst the various available alternatives, subject to rules of reason and justice. This indicates that autonomy has to be exercised within the predetermined parameters. However, where the power to choose is not aligned with the requirements of reason, justice, or even the law, then that practice would threaten the freedoms of individuals and would result in the subversion of the Rule of Law. Discretion is not absolute and should be exercised on a case to case basis. Discretion is always subject to controls as it is limited to controls such as the controls given by the legislature and executive.

### **SP GUPTA V. UNION OF INDIA**

The first judge case was S.P.Gupta v.Union of India<sup>5</sup>. In this case, it was decided that the final word will be the President. Consultations bring different stakeholders into the system of appointment of judges. They can confer but need not concur. The government has the power to override the appointment of the Judiciary with relevant considerations that are not malafide. Judicial review is a system to check the actions of the Government. Primacy is given to the President. The Chief Justice of India cannot be seen as above the other constitutional functionaries. Such elevation of one of the offices is not allowed and there exists no hierarchy. The Chief Justice of India and the Chief Justices of the various High Courts are equal in stature. Consultations do

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<sup>5</sup> AIR 1982 SC 149

not equal equivalence. The direct link as far as accountability is concerned is with the Executive as the Judiciary is not the elected representative of the people.

### **SUPREME COURT ADVOCATES ON RECORD V. UNION OF INDIA (1993)**

#### **AND IN RE SPECIAL REFERENCE**

In the Second Judges case<sup>6</sup> and In Re Special Reference<sup>7</sup> it was held that, consultation equals consultation and that the final word will lie with the Judiciary and not the Executive. The question of the primacy of the role of the Chief Justice of India in the context of the appointment of Judges in the Supreme Court and the High Courts must be considered in this backdrop for the proper picture of the constitutional scheme to emerge from the mixture of various hues, to achieve the constitutional purpose of selecting the best available for composition of the Supreme Court and the High Courts, so essential to ensure the independence of the judiciary, and, thereby, to preserve democracy.<sup>8</sup>

When the Constitution was being drafted, there was general agreement that the appointments of Judges in the superior judiciary should not be left to the absolute discretion of the executive, and this was the reason for the provision made in the Constitution imposing the obligation to consult the Chief Justice of India and the Chief Justice of the High Court. This was done to achieve independence of the Judges of the superior judiciary even at the time of their appointment, instead of confining it only to the provision of security of tenure and other conditions of service after the appointment was made. It was realized that the independence of the judiciary had to be safeguarded not merely by providing security of tenure and other conditions of service after the appointment, but also by preventing the influence of political considerations in making the appointments, if left to the absolute discretion of the executive as the appointing authority. It is this reason which impelled the incorporation of the obligation of consultation with the Chief Justice of India and the

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<sup>6</sup> AIR 1993 SC 864

<sup>7</sup> AIR 1999 SC 1

<sup>8</sup> AIR 1993 SC 864

Chief Justice of the High Court in Articles 124(2) and 217(1).<sup>9</sup> There should not be an unabridged executive decision in the appointment of judges.

### **EFFICIENCY ARGUMENT**

The person who is best equipped to make a decision is the Supreme Court and its judges. There arises no question as to who the most effective, appropriate, and the only body must be while dealing with such appointments. It is the Supreme Court.

### **APPOINTMENT PRINCIPLES**

It is a Participatory Consultative Procedure. Consensus is the first hurdle, primacy must be dealt with later. Primacy is necessary in cases of a stalemate. Primacy need not be given to only one person. The collective opinion of the members of the Collegium that confer with the Chief Justice of India is held to be the opinion of the Chief Justice of India. The Chief Justice can veto and has primacy.

1. For Supreme Court Appointments: CJI Opinion = CJI + 4 Senior Most Judges + Senior Most from Home HC/other reason
2. For High Court Appointments: CJI Opinion = CJI + SC judges conversant in affairs of HC + (CJHC(Home) = CJHC + 2 senior-most HC judges))
3. Recommendation Stage: Originates at CJI in consultation with the Collegium. If two judges within the collegium disagree with a recommendation, the CJI ideally should not persist with it.
4. All opinions are in writing. The file is sent to the Executive.
5. Final Appointment of Candidate:
  - a. CJI must finally personally agree with the appointment.
  - b. Collegium by the majority is on board.

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<sup>9</sup> ibid

c. If the Executive asks for reconsideration and the collegium and the CJI recommend the candidate again unanimously, after taking cognizance of the Executive's concern, the appointment should be made.

#### 6. Final Non-Appointment of Candidate:

- a. If the CJI in their capacity disagrees with the appointment.
- b. If two or more collegium judges recommend withdrawal of the recommended and the Executive accepts reasons.
- c. If on the Executive asking the CJI and the Collegium to reconsider, anyone judge does not want the appointment i.e. the candidate is not recommended again unanimously.

These are the possible combinations:

Executive(Y) + CJI(N) + Collegium(Y) = No Appointment = Primacy of CJI Operating

Executive (N) + CJI(Y) + Collegium(Y) = Appointment = Primacy of Judiciary Operating

Executive (N) + CJI(Y) + Collegium(N) = No Appointment = Discretion Control Operating

Executive (N) + CJI(N) + Collegium(Y) = No Appointment = Primacy of CJI Operating

Executive (Y) + CJI(Y) + Collegium[(N)(at least two)] = No Appointment = Discretion Control Operating<sup>10</sup>

### **APPOINTMENT MODALITIES**

1. The primacy of the judiciary is an independence measure
2. The primacy of the Chief Justice is an Efficiency and Independence Measure
3. The Collegium is a Discretion Control Measure<sup>11</sup>

### **JUDICIAL REVIEWS AND TRANSFERS**

“The primacy of the judiciary in the matter of appointments is the judicial element in the process, and therefore, judicial review is not required which is ordinarily needed as a check against possible

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<sup>10</sup> ibid

<sup>11</sup> ibid

‘executive’ excess or arbitrariness.” The argument here is that whereas the judicial element has to be inserted in executive actions to check it, here the primacy of the judiciary is already present in the process, thus dispensing with the need for further judicial review. In other words, there is no scope for arbitrariness where the judiciary is in charge of the process, especially when a plurality of judges is in charge.<sup>12</sup>

### **ELIGIBILITY**

1. The primary consideration for an appointment is merit.
2. In keeping with the legitimate expectation of judges, inter se seniority within a High Court and combined seniority on an all-India basis is of significance and must be maintained unless there is any strong reason to depart from it.
3. Proper representation of all sections of people from the country.

Seniority is seen as merit and the number of working years and not solely on the number of working years. It is also dependent upon the integrity of the Judge. High Court judges usually have ‘Legitimate Expectations’ in being appointed to the Supreme Court. Legitimate Expectations is when you expect the benefit to be given to you although you may not have a right to it. Merit is given more weightage than Seniority. Seniority cannot be a reason to choose someone over a meritorious judge. It must represent the diversity of the nation.<sup>13</sup>

### **SUPREME COURT ADVOCATES ON RECORD V. UNION OF INDIA 2015**

This is not an ordinary judgment. Surrounding this case was an intense tussle between the NDA government and the judiciary, and in many ways, the judgment felt to a lot of its readers as unnecessarily political and sometimes, even personal – almost like a flexing of judicial power. It struck down the 99<sup>th</sup> amendment and the National Judicial Appointments Commission (NJAC) as unconstitutional. The lack of accountability and openness was quoted to be the reason. The word ‘Consultation’ was removed. Article 124A, 124B, and 124C were introduced.

- Article 124A set up the composition: CJI + 2 judges of the Supreme Court + Law Minister + 2 eminent persons.

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<sup>12</sup> AIR 1999 SC 1

<sup>13</sup> *ibid*

- Article 124B laid out the duties of the NJAC: it would recommend people to be judges in the High Courts and Supreme Court.
- Article 124C said that: The Parliament can create law for appointing judges.

In this case, all the participants have a veto. If any two people dissent then, the recommendation will not go through. The recusal order of Justice Dave and Justice Khehar is important to note in this case. It was so, so that there may not be any personal or institutional bias. Recusal is a personal matter and cannot happen on the mere ground that a litigating party anticipates bias. The Doctrine of Necessity says that the Judiciary must be the decision-makers.

After going through all the various cases that have defined what Judicial Independence and Accountability means, a bill can be framed in a hypothetical scenario.

### **FRAMING OF THE BILL**

#### Introduction, Method, and Reasoning

The Collegium and the NJAC have seen the constant tussle between Judicial Independence and Primacy and Accountability. The entire process has been viewed as a Participatory Consultative process. While accountability becomes pertinent, the Executive if allowed to overstep the Judiciary would, ironically suppress the voice of the people that they so vociferously claim to protect. Although appointments fall under the purview of the Executive, the recommendations have to be made by a party who is in the best possible position to do so. Quoting Locke, the judiciary must have a known and unbiased judge. It is this idea that maintains the integrity and independence of the judiciary and is what must be base on the appointment system.

In my opinion, the role of the executive must be minimal. The President must be the titular head to make appointments. While recommendations can be made the weight that these would carry would be lesser but the mere weight of these recommendations is not reason enough to fail them. They will be regarded as secondary recommendations and will go through the same vetting process. A system where a veto is not given to either party would prove disastrous as that would mean that Judges would have to be directly elected as we have seen how indirect representation is disastrous. The Judiciary is the only and the most appropriate body to make decisions and a question of bias would therefore not be valid. In essence, only he who is involved in the nitty-gritty of the work will know the temperament required to run such an organization effectively. The

effectiveness of the judiciary is directly linked to its perceived legitimacy in the eyes of the public. The accountability of the judiciary is tested against the decisions it makes. Does it truly represent a public opinion or does it fall prey to biases affecting accountability and independence?

I am not giving into anarchy, allowing the judiciary to make any decision that it deems fit. A set of restrictions will be imposed on the nature of the candidates. This ensures that the recommendations itself are filtered. The role of the executive will be to ensure that the personal opinion of no single judge is given priority. The recommendation will fail if 50% or more do not agree with the recommendation. The executive can ask for a second consideration on the name but will be forced to pass it if the majority prevails again. This process is not demeaning the role of the executive but is highlighting the importance of what it means to be a part of the judiciary. Finding a middle ground proves to be increasingly difficult as one branch will eventually have to give in to the other.

The executive has to pass a bill that: allows for transparency, has checks and balances, reasonable criteria for recommendations, outlines procedure for appointing judges in the Supreme Court and the High Court, determines the composition of the body that makes such appointments, guarantees judicial primacy not exclusivity and reflects diversity.

I have tried to create a system that allows for judicial primacy and independence but allows for interference from the executive thereby curbing judicial exclusivity. This system ensures the selection of competent judges. Biases are inevitable but we can create a feasible system that brings down the probability of these biases interfering in the final decision to a minimum.

Text of the Bill

- (1) The judicial body that appoints the judges shall consist of the Chief Justice of India and three senior judges of the Supreme Court. They will be assisted by the preceding three Chief Justices.
- (2) The members will each have a vote. The recommendations given will be tested based on their seniority (integrity + merit + working years)  
Provided seniority cannot have precedence over meritocracy
- (3) The recommendations have to have been equally distributed among varying fields. A total of 30 recommendations will be made.

- (4) The recommendation will not be considered if 4 of the members voted against it. There exists no hierarchy among the members.
- (5) Diversity in portfolios, regions, and gender will be considered while making appointments.
- (6) The executive will contribute to the recommendations and can ask for reconsideration in case an application gets rejected.  
Provided that the candidate had more working years, would favor diversity and if there were legitimate expectations that this person had in being chosen.
- (7) If the recommendation is still not selected by the body, then the Executive will have to make the appointment.
- (8) The process will be transparent in terms of revealing the recommendations that are submitted but will not reveal the reasons for not choosing or choosing certain recommendations.
- (9) This judicial body has primacy and has the deciding vote, but no single person is vested with this deciding vote.

## CONCLUSION

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I have attempted to create a body that works in tandem with the Executive to make appointments to the High Court and Supreme Court Judges. Keeping in mind Articles 124 and 217 of the Indian Constitution, I have retained the ability of the Executive to make appointments. Intending to reduce the impact of biases on the appointments made, I have introduced significant restrictions on the recommendation and selection process.

I feel that this system will function better than the Collegium system wherein the opinion of the Chief Justice is taken a vote and is also taken as a part of the vote of the Collegium. In this system, all the judges are placed on equal standing and therefore all their votes carry equal weight. The Executive is also given a say but only on grounds of the candidate having had more working years, if the decision favor diversity and if there were legitimate expectations that the candidate had in being chosen..