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Phone : +91 73059 14348 – [info@iledu.in](mailto:info@iledu.in) / [Chairman@iledu.in](mailto:Chairman@iledu.in)



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## A KEY ISSUE OF JUDICIAL INDEPENDENCE IN THE APPOINTMENT OF JUDGES IN HIGHER JUDICIARY

**AUTHOR** – MOHD. AKASH, RESEARCH SCHOLAR, FACULTY OF LEGAL STUDIES, MAHATMA JYOTIBA PHULE  
ROHILKHAND UNIVERSITY, BAREILLY (UP), INDIA

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### ABSTRACT

*The judicial recruitment process in India, particularly for the higher judiciary, has been widely debated and scrutinised. This article goes into the complexity of the judicial appointment system, including the roles of numerous authorities and the growth of the process as evidenced by key judicial pronouncements. This study's main focus is on the contradiction between executive power and judicial independence, the influence of the collegium system, and reform ideas. The article seeks to provide a comprehensive view of the essential topic of judicial nominations in India by examining the legal framework, court decisions, and ongoing issues.*

*For a healthy judicial system, the judiciary's independence is critical in protecting the sovereignty of the constitution as well as the judiciary, which is the foundation of any democratic society, by ensuring that the judiciary remains impartial, free of external influences, and capable of upholding the rule of law. In the context of India, the Collegium System has had a considerable impact on the appointment and transfer of judges to the higher judiciary, particularly the Supreme Court and High Court. This research study examines the relationship between judicial independence and the Collegium System in India. The study begins by looking into the historical growth of the Collegium System, dating it back to court interpretations of the Constitution. It explores the constitutional provisions and landmark judgments that have shaped the framework for appointing and transferring judges, highlighting the delicate balance between the need for judicial independence and the role of the executive in the appointment process.*

**Keywords:** *judicial appointment, higher judiciary, judicial pronouncements, Collegium System.*

### Introduction

Judicial appointments to the higher judiciary in India, particularly to the Supreme Court and High Courts, are essential for ensuring the independence and effectiveness of the judicial system. However, the process has been marred by controversy over the years, raising questions regarding transparency, fairness, and the balance of power between the executive and judiciary. The framers of the Indian Constitution envisaged an independent judiciary, but the mechanisms for judicial appointments have

remained a contentious issue in the country. To sustain a just and free society, the independence of India's judiciary is critical, as it ensures that judges adjudicate fairly, based purely on facts and the law, and are immune to extraneous pressures. According to Chief Justice D.Y. Chandrachud, this autonomy extends beyond institutional independence to include individual judges' personal freedom to make independent decisions free of political, social, or personal biases. This independence is critical for maintaining the judiciary's legitimacy and creating trust among residents, allowing it

to function as a fair arbiter of disputes and dispense prompt justice. Furthermore, the judiciary's independence is incorporated in the Constitution and statutes, thus all governmental and non-governmental bodies must respect and honour the judiciary's autonomy. The Collegium System, a unique aspect of India's judicial structure, is critical to maintaining judicial independence and increasing public faith in the legal system. This system, which dates back to the Second Judges Case in 1993, now includes the Chief Justice of India as well as the four most senior Supreme Court judges. It superseded the earlier system, in which judges were selected entirely after consultation with the Chief Justice by the President of India. This mechanism ensures a democratic process for appointing and transferring judges, with the goal of maintaining an unbiased judiciary free of external influence. Despite critiques and discussions over its openness and accountability, India's Collegium System remains a pillar of the legal system, emphasising the necessity of an independent judiciary in upholding the rule of law and delivering justice for all. Despite ongoing debates over its effectiveness and transparency, the Collegium System is the primary method for appointing judges in India. Addressing shortcomings and fostering achievements remains a primary priority for those seeking to strengthen the country's legal system while upholding the essential values of judicial independence. The Collegium System in India ensures judicial independence through a variety of procedures, including confidentiality and independence, independence from political influence, and so on.

But Despite these advantages, critics of the Collegium System point to a lack of transparency, the possibility of nepotism, and concerns about breaking the notion of checks and balances. Reform efforts have been proposed to overcome these deficiencies, with a focus on timely nominations, stronger background checks, and judicial-executive collaboration. There have been various verdicts

on the matter, the most important of which being the 1993 Second Judges' Case, which established the current Collegium System. The collegium, or the five most senior Supreme Court justices, votes on the elevation of judges from lower courts, high courts to the Supreme Court, and high courts to the office of Chief Justice. There have been arguments for and against the Collegium System. The system's evolution has been marked by ongoing debates on its efficacy and transparency, with stakeholders advocating for reforms to enhance its functioning while preserving judicial independence.

### **Constitutional Provisions and Historical Context**

The judiciary is an integral component of a country's legal system, upholding the supremacy of the law and playing a significant role in democratic governance. According to the concept of separation of powers, the judiciary, together with the executive and legislative branches, is a critical instrument of the state. While the legislative and administrative branches collaborate to formulate and pass laws, the judiciary ensures that they be followed appropriately. It also examines and applies laws in a wide range of legal circumstances. The concept of separation of powers highlights the judiciary's independence and immunity from outside interference. The judiciary's independence depends greatly on its constitutional status. The judiciary serves as the custodian of the law, protecting people's rights and maintaining the country's equilibrium through the use of laws. Its role is to monitor the legislative process. As a result, having an independent judiciary system is a vital notion in giving justice. Only when the court is free of outside influence will the public be allowed to think about justice. An independent judiciary ensures that all of the country's organs operate in accordance with the provisions and restrictions outlined in the Indian constitution. Its sole responsibility is to make and implement laws in the country and acts as the guardian of the law. Judiciary is

expected to deliver justice in an impartial manner. Which is impossible if the Judiciary is not independent. Certain constitutional provisions ensure the independence of the judiciary, such as Article 124 of the Indian Constitution, which deals with the appointment of judges by the President. Judges have a security of services until retirement (65 years for the Supreme Court and 62 years for the High Court), and they enjoy fixed salaries. The power of the Supreme Court is found in Article 138, and the power to punish for contempt is found in Articles 129 and 215. Article 50 deals with the separation of executive and judiciary, and the power of judicial review is rooted in the Constitution. India's independent judiciary conducts extensive judicial review over legislative, judicial, and administrative actions, ensuring a check on the constitutionality of various governmental acts. Judges are also somewhat impractical.

Judges are required to abstain from making decisions in matters in which they have a financial or personal stake, or in which they may be biased. The idea that no one should sit as a judge in their own case, or "nemo iudex in sua causa," is a cornerstone of judicial impartiality.

For a healthy judicial system, the judiciary's independence is critical in protecting the sovereignty of the constitution as well as the judiciary, which is the foundation of any democratic society, by ensuring that the judiciary remains impartial, free of external influences, and capable of upholding the rule of law. In the context of India, the Collegium System has had a considerable impact on the appointment and transfer of judges to the higher judiciary, particularly the Supreme Court and High Court.

### **The Evolution of Judicial Appointment Mechanism**

Case laws have led to the collegium's involvement in judge nomination. The collegium system was established as a result of the following three significant court rulings, together

referred to as the "Three Judges Case." The Indian Constitution contains no mention of it.

**First Judges Case (1982)**<sup>1344</sup> – In *S.P. Gupta v. Union of India* (1982), also referred to as the First Judges Case, the seven-judge Constitutional Bench decided that "consultation" does not imply "concurrence" and that the Indian Constitution does not contain the notion of the Chief Justice of India's primacy. Additionally, it was decided that any of the four constitutional functionaries listed in Article 217 can recommend someone for appointment to the High Court, and the Chief Justice of the High Court is not required to make this suggestion. When it came to the appointment of judges, the Judgement shifted the scales in favor of the Executive. For a span of twelve years, this continued.

**Second Judges Case (1993)**<sup>1345</sup> – The Supreme Court overruled the decision in the *S.P. Gupta Case* (1982) by a majority of 7:2 in the Second Judges Case (1993), which involved a nine-judge bench. The case was named *Advocates-on Record Association v. Union of India*. The Chief Justice of India ought to have the lead role in the selection of judges, the court noted. The court cited "primacy" and "justiciability" as the key factors influencing its ruling. After the Supreme Court ruled that "consultation" also refers to "concurrence," the collegium system for appointing judges was established. The collegiums system was established because it displays the views of senior judges who are participating in the judicial selection process collectively, as opposed to individual opinions.

**Third Judges Case (1998)**<sup>1346</sup> – In response to a request from the President in accordance with Article 143 of the Constitution, the nine-judge Supreme Court bench unanimously upheld the ruling in the Second Judges case. It further stated that the Chief Justice of India and his four most senior associates is required to make the recommendation.

<sup>1344</sup> *S.P. Gupta v. Union of India* (1982),

<sup>1345</sup> *Supreme Court Advocates-on Record Association v. Union of India* AIR 1993 SC.

<sup>1346</sup> *In Re Presidential reference*, 1998

Thus, it is established that the sole opinion of the Chief Justice is binding on the Government in the matter of appointment of the Judges of the Supreme Court and High Courts.

Following a historic judgement, the collegium system was implemented, but it is also viewed as unjust, as it fosters a hegemony of Supreme Court judges. The term "Collegium" is not explicitly referenced in the Constitution, although it has gained popularity through judicial pronouncements. The appointment method for judges is critical to preserving the judiciary's independence and increasing public trust in the legal system. The appointment of judges in India is mostly governed by Article 124 of the Constitution. The senior judges who comprise the Collegium submit recommendations for the Central Government to consider when selecting new judges. The government may also suggest candidates to it. Significant delays can arise when there are no restrictions that define a time limit.

Because of its lack of openness, the collegium system is rife with prejudice. In exchange for small favours, each member of this well-preserved system watches out for the other. Given the current challenges, the collegium appears to be unaccountable to the Indian people. Judges are not required to explain their decision to accept or reject a candidate's name. The public does not have access to the Collegium's proposal to the President. If the President rejects the recommendation, the Collegium, led by the Chief Justice of India, will have to reconsider its decision. However, if the Collegium repeats its proposal to the President, the President is forced to select the nominated judges. Although it has been an unwritten norm to appoint/elevate judges based on seniority, the collegium has disregarded the convention numerous times in recent years without providing a reasonable explanation. The fundamental cause for this unaccountability is the lack of legislation, regulations, or processes to govern the collegium's operations. There is an urgent need to legitimise the collegium system, which holds each member accountable to the

people for his or her activities. There is also a need to create a system similar to the checks and balances, so that, the other two branches viz., the executive and the legislature, can keep a check on the administrative functions of the judiciary.

There have been recent developments in the collegium system, as of the latest information, the Supreme court has affirmed the continuity of this system for the appointment of the judges. They emphasized that there is a need to have improvement rather than a complete overhaul. The court also accepted that the collegium system had flaws and requested recommendations from a range of parties, including the legal community, lawyers and members of the public.

As an alternative, the National Judicial Appointment Commission was adopted, and it was observed that India used the NJAC System to appoint judges, and it consists of the Chief Justice of India as Chairperson, two other senior Judges of the Supreme Court next to the Chief Justice of India as Members, the Union Minister in charge of Law and Justice as Member, and two distinguished individuals as members, chosen by the committee made up of the House Leader of Opposition, the Chief Justice of India, and the Prime Minister. Its purpose was to make improvements to the processes for appointing and transferring judges to higher courts. It would have been in charge of suggesting suitable candidates for the offices of chief justice of India, judges of the supreme court, chief justice of high courts, and other judges of high court. It would also make it easier to transfer Chief Justices and other High Court Judges from one High Court to another as needed, as well as ensure that the individual recommended for nomination meets the required criteria, which include ability, merit, and other qualifications outlined in the act's regulations. This method also had problems, which led to its abolition. This was accomplished through the 4th judge case (2015), in which the constitutional legality of both the Ninth Constitutional Amendment and

the NJAC Act, 2014, was challenged in the Supreme Court on April 15, 2015. In a judgement dated October 16, 2015, a constitutional bench of five justices with a 4:1 majority declared these two enactments unlawful and void. This has become known as the Fourth Judges Case. The primary reasons why the supreme court struck down the NJAC Act were that it gave the executive a significant involvement in the choice of judges, did not provide for any openness or accountability in the appointment of judges, and also did not provide any safeguards to protect the independence of the judges.

### **Key Issues and Challenges**

Several critical issues surrounding judicial appointments in India have emerged over time:

*Transparency and Accountability:* The collegium system is often criticized for its opacity. The lack of publicly available criteria for appointments and the non-disclosure of deliberations have led to concerns about favoritism, lack of merit-based selection, and the exclusion of deserving candidates.

*Judicial Independence vs. Executive Role:* The tension between the judiciary's autonomy and the executive's role in appointments has been a persistent issue. While the judiciary asserts its independence in the selection process, critics argue that the absence of executive participation may undermine the principles of democracy and checks and balances.

*Diversity and Inclusiveness:* The composition of the higher judiciary has been a subject of criticism, particularly with regard to gender, regional, and socio-economic diversity. The lack of representation from marginalized communities, including women and lower-caste individuals, has raised concerns about the inclusiveness of the judiciary.

*Merit vs. Seniority:* The criteria for judicial appointments are often debated. While the collegium system emphasizes seniority, concerns have been raised about whether this ensures the appointment of the most qualified

individuals. Some argue that a merit-based system, rather than a purely seniority-driven one, would lead to a more competent judiciary.

### **Proposals for Reform**

Various suggestions have been put forward to address the existing flaws in the judicial appointment system:

*Constitutional Amendment or New Legislation:* Some experts advocate for a reformation of the collegium system or the introduction of a new mechanism that ensures a balanced representation of both the executive and the judiciary. Proposals to reintroduce the National Judicial Appointments Commission (NJAC) with modifications to address concerns regarding judicial independence have been discussed.

*Transparency and Public Involvement:* To improve transparency, there is a call for making the selection criteria and reasoning behind appointments public. This would enhance accountability and reduce the potential for nepotism or bias.

*Diversity and Inclusivity:* Reform proposals include setting aside quotas for underrepresented groups, including women, scheduled castes, and scheduled tribes, to ensure that the judiciary reflects the diversity of Indian society.

*Merit-Based Appointments:* There is a growing demand for appointing judges based on merit and competence rather than just seniority. Some argue that a transparent evaluation of a candidate's legal skills, experience, and contributions to the legal field should be the primary criteria for selection.

### **Conclusion**

The issue of judicial appointments in India remains a critical aspect of ensuring an effective, impartial, and independent judiciary. The balance between executive and judicial powers, transparency in the selection process, and ensuring diversity and merit-based appointments are central to resolving the challenges currently faced by the system. While

the collegium system has served as a mechanism for judicial appointments, its shortcomings, particularly in terms of transparency and inclusiveness, highlight the need for reform. Ultimately, the goal should be to establish a fair, transparent, and accountable process that upholds the independence of the judiciary while fostering public trust in the judicial system.

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