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CHALLENGES IN JUDGES APPOINTMENT : IDENTITY, IDEOLOGY AND CONFLICT

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I. ABSTRACT

The appointment of judges in India has been a subject of intense scrutiny and debate, reflecting the nation's commitment to upholding the principles of judicial independence, accountability, and constitutional governance. This research critically analyses the evolution, challenges, and comparative aspects of India's judicial appointment mechanism, with a focus on understanding its historical background, the establishment of the Collegium System, and the dynamics between Supreme Court and High Court appointments. Drawing upon insights from international models, particularly the United States, the research seeks to propose recommendations for reforming the existing system to enhance transparency, accountability, and judicial independence. Through a comprehensive analysis of historical antecedents, judicial precedents, and comparative perspectives, this research aims to contribute to the ongoing discourse on judicial reform in India. The study underscores the necessity of a balanced approach to maintain the judiciary's integrity while ensuring meritocratic and diverse appointments.

II. INTRODUCTION

Appointment of judges in India is a pivotal aspect of its legal architecture, embodying the principles of constitutional governance and separation of powers². From the early stages of independence, India sought to establish a mechanism that would ensure the integrity, accountability, and independence of its judiciary while navigating the delicate balance between executive authority and judicial autonomy. Initially entrusting the President with the responsibility to nominate judges, the process evolved over time, culminating in the establishment of Collegium System through judicial pronouncements. This system, dominated by senior judges, assumed primacy

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² Robinson, N., 2009. Expanding judiciaries: India and the rise of the good governance court. Wash. U. Global Stud. L. Rev., 8, p.1.

in recommending candidates for judicial office, reflecting a departure from executive dominance and emphasizing the judiciary's ascendancy in the appointment process. However, despite its constitutional underpinnings, Collegium System has faced criticism for its lack of transparency and accountability, prompting calls for reform and reevaluation of the judicial appointment paradigm³.

In the quest for reform, India ventured into uncharted territory with introduction of National Judicial Appointments Commission (NJAC)⁴, aimed at institutionalizing a more transparent and accountable framework for judicial appointments. However, constitutional validity of NJAC⁵ was swiftly contested, leading to its invalidation by the judiciary and the reinstatement of the Collegium System. This tumultuous journey underscores the complexities inherent in balancing the imperatives of judicial independence, executive accountability, and institutional integrity. As India continues to navigate the terrain of judicial reform, the trajectory of its judicial appointment mechanism remains a focal point of constitutional adjudication, with far-reaching implications for the nation's democratic fabric and constitutional resilience.

The research aims to critically analyse the evolution, challenges, and comparative aspects of India's judicial appointment mechanism, with a focus on understanding its historical background, the establishment of the Collegium System, and dynamics between Supreme Court & High Court appointments. Additionally, research seeks to propose recommendations for reforming the existing system to enhance transparency, accountability, and judicial independence.

III. RESEARCH QUESTION

1. What are the historical antecedents and evolution of India's judicial appointment system, from the early stages of independence to the establishment of the Collegium System?

³ Ram, R. (2023). Analysing the Effectiveness of the Collegium System in Ensuring Judicial Independence in India. *Issue 2 Indian JL & Legal Rsch.*, 5, 1.

⁴ Abeyratne, R.A., 2021. Beyond Public Interest Litigation: Constitutionalisation and Its Effects on Judicial Performance in South Asia (Doctoral dissertation, Monash University).

⁵ Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1.

2. What are the similarities and differences between the judicial appointment processes for SC & HC in India compared to those in United States, and how do these differences impact judicial independence and accountability?
3. How does India's judicial appointment mechanism compare with that of the United States, and what lessons can be drawn from this comparison to inform potential reforms and improvements in India's system?

IV. RESEARCH METHODOLOGY

This study uses a multidisciplinary method to examine India's judicial appointment system using case studies, literature reviews, and comparative analyses. It entails a thorough examination of academic journals, court rulings, legislative records, and other pertinent information. By concentrating on significant court rulings, especially the "Three Judges Cases," it becomes easier to understand the constitutional interpretations and legal precedents surrounding the nomination process. Furthermore, a comparative analysis with the US reveals excellent practices and possible changes. Academic papers, court rulings, and legislative documents are all included in the literature study, and the case studies are chosen for their significance and applicability. Appointing authority, accountability, transparency, merit, diversity, and checks and balances are among the parameters used in a comparative study.

V. LITERATURE REVIEW

This study makes use of an extensive amount of literature on comparative judicial systems, judicial activism, and Indian constitutional law. Seminal texts and important case studies are among the important works that have influenced this research

1. **"Ideology and Identity: The Changing Party Systems of India" by Pradeep Chhibber and Rahul Verma**

This book offers a thorough examination of India's political environment, examining the ways in which party systems are shaped by ideological differences and identity politics. The historical development of Indian politics is examined, with particular attention paid to influential individuals who represent a range of

ideological perspectives, including Jawaharlal Nehru, Dr. B.R. Ambedkar, and Dr. Shyama Prasad Mukherjee. Understanding the wider environment in which judicial appointments take place requires an appreciation of the book's insights into the ideological underpinnings of India's political institutions.

2. The “Three Judges Cases”

Awareness of the court rulings and constitutional interpretations that have influenced India's judicial appointment system requires an awareness of these seminal cases:

S.P. Gupta vs. Union of India (1981): Also known as the First Judges Case, this case dealt with the primacy of the executive in judicial appointments and emphasized judicial independence.

Supreme Court Advocates-on-Record Association vs. Union of India (1993): The Second Judges Case established the supremacy of the judiciary in the appointment process, significantly altering the balance of power.

In re: Special Reference 1 of 1998 (1998): The Third Judges Case further clarified the consultative process, reinforcing the judiciary's role in appointments.

3. “Judicial Activism in India: Transgressing Borders and Enforcing Limits” by S.P. Sathe

This study examines the function of the Indian court, with a focus on its proactive approach to upholding justice and safeguarding fundamental rights. Sathe offers a sophisticated viewpoint on the difficulties facing the appointment system through his examination of judicial overreach and the harmony between judicial independence and accountability.

This literature study provides a thorough overview of the ideological influences, historical development, and current difficulties of India's judicial appointment system by incorporating these important works and case studies. This research is enhanced by the comparative analysis with the United States, which highlights areas of potential reform and best practices.

VI. HISTORICAL BACKGROUND OF INDIA'S JUDICIAL APPOINTMENT SYSTEM

The evolution of India's judicial appointment mechanism since its inception has been characterized by a delicate interplay between the executive and judiciary, with significant implications for the independence and integrity of the judicial system. Initially, under Indian Constitution, the power to appoint judges to Supreme Court rested with President, who was required to consult Chief Justice of India and other relevant stakeholders. However, process lacked a clear framework for assessing the qualifications and suitability of candidates, leading to ambiguity and occasional controversies.

The dynamics of judicial appointments began to shift in the early 1980s with series of judicial opinions, notably in 1981, which asserted that while Executive had power to appoint judges⁶, recommendations of CJ were merely consultative and not legally binding. Not clearly persisted until 1990s when SC ruled that recommendations of judicial collegium⁷, comprising senior judges, were binding upon Executive, effectively establishing current appointment process. This shift marked a significant departure from executive dominance and underscored judiciary's ascendancy in appointment process. However, despite this institutional evolution, challenges remain in selection and appointment of judges, particularly to SC.

Indian Constitution outlines broad eligibility criteria for SC judges, including HC judges with five years of standing, HC lawyers having ten years of experience jurist. However, Constitution gives guidance on the precise attributes and qualifications required for post, resulting in the evolution of informal standards over time. These informal rules include age limit of 55 years and prior experience as a HC senior judge or CJ, considerations of demographic & geographic diversity⁸, have shaped the appointment process alongside constitutional rules. However, the lack of transparency and standardized criteria for assessing candidates' qualifications has

⁶ Chase, H. W. (1966). Federal Judges: The Appointing Process. *Minn. L. Rev.*, 51, 185.

⁷ Bhatnagar, V. (2021). Revisiting the Collegium System. *Jus Corpus LJ*, 2, 139.

⁸ Mooldijk, S. S., Licher, S., & Wolters, F. J. (2021). Characterizing demographic, racial, and geographic diversity in dementia research: a systematic review. *JAMA neurology*, 78(10), 1255-1261.

raised concerns about the fairness and impartiality of judicial appointments. Additionally, the absence of clear guidelines regarding the appointment of “distinguished jurists”⁹ further complicates the selection process. The historical context of India's judicial appointment system reveals a complex interplay of factors, including colonial legacies, constitutional debates, and judicial activism. establishment of Federal Court during colonial rule set informal quotas based on regional, caste, gender, and religious affiliations, which continued to influence subsequent judicial appointments. GOI Act,1935 introduced formal qualifications for federal court judges but lacked provisions for appointing distinguished jurists, highlighting early gaps in the appointment process.

As India transitioned to independence, debates within Constituent Assembly shaped the framework for appointing judges to the Supreme Court, with various proposals considered before the adoption of Article 124¹⁰ of Constitution. The drafting process reflected tensions between executive discretion and judicial independence, with the final provision establishing a consultative process that conferred significant influence on the judiciary.

The evolution of India's judicial appointment mechanism has been shaped by historical legacies, constitutional principles, and judicial interpretations. While significant strides have been made to enhance transparency and accountability, challenges persist in ensuring a fair and meritocratic selection process. As India continues to grapple with these challenges, the need for ongoing reforms and a robust framework for judicial appointments remains paramount to uphold integrity & independence of judiciary.

VII. ANALYSIS

A. Evolution of India's Judicial Appointment System

India's judicial selection system has taken a complicated path, affected by historical legacies, constitutional imperatives, and judicial activism. Initially vested in executive

⁹ Cotterrell, R. (2013). The role of the jurist: Reflections around Radbruch. *Ratio Juris*, 26(4), 510-522.

¹⁰ Constitution of India, 1950, Art. 124.

discretion, the process eventually turned towards judicial supremacy, culminating in the creation of the Collegium System. Despite progress, difficulties remain, notably in terms of transparency and accountability. In contrast to the United States' structured nomination procedure, India's collegium system has been criticised for its secrecy and elitism. The recent invalidation of National Judicial Appointments Commission emphasises Complex dynamics of reform. Amid cries for change, a hybrid method that balances executive engagement and judicial autonomy emerges, reflecting India's changing judicial appointment paradigm.

B. Establishment of the Collegium System and Judicial Precedents

Over time, India's judicial appointment system underwent significant transformation, leading to establishment of the Collegium System. Rooted in a series of Supreme Court verdicts known as the “**Three Judges Cases**,” the Collegium System derives legitimacy from judicial interpretations of constitutional provisions. Central to these landmark decisions was the interpretation of the term 'consultation' in Article 124 of the Indian Constitution, which delineates the process for judicial appointments. Through these rulings, Supreme Court progressively asserted judiciary's primacy in appointment process, culminating in assertion that appointments to the higher judiciary should be a collaborative decision of Chief Justice of India and a collegium comprising the four senior-most judges. This evolution reflects dynamic interplay between constitutional interpretations, judicial precedents, and the quest for a judicious balance between Executive and judiciary in India's judicial appointment mechanism.

The Collegium system in India seeks to improve judicial independence, although it has been criticised for a lack of openness and apparent favouritism. Critics claim that it departs from constitutional intent and lacks accountability. Reforms are required to address concerns such as caste diversity, gender representation, and professional backgrounds. According to comparative studies, other countries' appointment systems are more structured, ensuring transparency and accountability. Balancing judicial independence with accountability is critical to maintaining the integrity of India's judiciary.

After 1993, in the case of **S.P. Gupta vs. Union of India**¹¹, which is also popularly known as the first judges case, wherein the Word “Consultation” was interpreted by 7 judges bench and it was said that the consultation from CJI is not binding on the central government and it was said that it must be noted that, “it is only consultation which is being provided by way of fetter upon the power of appointment vested in the central government and this consultation cannot be equated with”

Following this, in the case of **Supreme Court Advocated on Record Vs Union of India**¹², which is popularly known as the second judge’s cases, it was said that the constitutional supremacy of CJI in the appointment should not be ignored, and the government should not be given discretionary absolute power in appointment of judges. . In basic terms, SC reversed first judge's case by a 9-judge bench and declared that the administration should not have absolute discretion over the nomination of judges in S.C. and H.C.

Furthermore, the court here suggested that it should not be CJI only who should give the recommendation, but it should be the collegium of judges who should appoint the judges, and later on Supreme Court had issued an advisory opinion on the request filed by the president, which is known as 3rd judges case¹³, wherein it was advised by S.C that while making recommendations for the appointment of judges, the CJI should consult with Senior Judges of the Supreme Court as a result of the formation of S.C is added for the appointment of Judges in S.C & H.C. So Since then, the Involvement of Government is Restricted.

The **Sankal Chand Sheth Case**¹⁴, heard by a constitutional panel of Supreme Court of India in 1977, raised critical issues concerning the transfer of high court justices. It highlighted that such transfers do not require a judge's approval, and that, while the President is not bound by the Chief Justice of India's advice, consultation must be meaningful. court emphasised that transfers must be in public interest rather than

¹¹ S.P. Gupta v. Union of India, AIR 1982 SCR365

¹² 1993 (4) SCC 441

¹³ In Re: Under Article 143(1) Of the Constitution of India vs Unknown AIR 1999 SC 1

¹⁴ Chandrachud, A., 2020. The informal constitution: Unwritten criteria in selecting judges for the Supreme Court of India. Oxford University Press.

punitive, with Justice Y. V. Chandrachud distinguishing between legal transfers for misconduct and unlawful transfers designed to punish judges for findings against the government. This judgement introduced safeguards against arbitrary transfers, such as genuine consultation and the possibility of invalidation if outside circumstances impact the decision.

C. JUDICIAL APPOINTMENT MODEL OF INDIA

The judicial appointment process in India has been a subject of prolonged scrutiny and debate, characterized by the evolution of various models over time. Presently, the prevailing collegium system has encountered criticism owing to its opacity and susceptibility to nepotistic tendencies. Despite endeavours to rectify these deficiencies through initiatives such as National Judicial Appointments Commission (NJAC)¹⁵, the imperative for a balanced approach persists.¹⁶ Notwithstanding the judiciary's fervent advocacy for its independence, it is imperative to recognize that executive involvement in appointments does not ipso facto derogate from judicial autonomy. Rather, a meticulously structured framework incorporating both judicial and executive engagement stands to fortify accountability and forestall potential encroachments upon institutional integrity.¹⁷ Nonetheless, a contextual appreciation of the historical trajectory of judicial appointments in India, from executive ascendancy to judicial hegemony, is requisite to ensure that any reformative endeavours remain consonant with the constitutional ethos.

Drawing upon insights gleaned from international jurisprudential paradigms such as those prevailing in the United States, South Africa, and Britain, India may discern salutary benchmarks to refine its appointment regimen. Paramount among these benchmarks is the primacy accorded to transparency and equity, whereby appointments are predicated upon meritocratic criteria rather than predilections of personal or political provenance. A proposed composite model could encompass

¹⁵Jain, A., & Maheshwari, K. (2020). Case Commentary on the National Judicial Appointments Commission (NJAC) Judgment. *Issue 3 Int'l JL Mgmt. & Human.*, 3, 1045.

¹⁶ Dey, N., Roy, A. and Swamy, R., 2020. *We the people: Establishing rights and deepening democracy*. Penguin Random House India Private Limited.

¹⁷ Hilliard, N., 2017. *The accountability state: US federal inspectors general and the pursuit of democratic integrity*. University Press of Kansas.

executive participation in the selection mechanism alongside safeguards such as a circumscribed executive veto and a collegium apparatus governing transfers and elevations within the judiciary. Such a model aspires to achieve equipoise between the exigencies of the judicial branch and the executive authority, thereby fostering an ecosystem imbued with accountability and expediency in the adjudication of appointments, all while steadfastly upholding the imperatives of judicial independence.

D. APPOINTMENT OF JUDGES IN INDIA: SUPREME COURT VS. HIGH COURT

In India, process of appointing judges in Supreme Court and High Courts is enshrined in the Constitution, with distinct procedures outlined for each. Article 124 of the Constitution governs the appointment of judges to the Supreme Court, emphasizing a consultative approach involving President, Chief Justice of India, and other relevant judges. This consultative process ensures a collective decision-making mechanism, underscoring the importance of judicial independence and integrity in the selection of Supreme Court judges. Conversely, Article 217¹⁸ delineates the appointment process for High Court judges, mandating consultation between the President, the Chief Justice of India, the Governor of the concerned state & CJ AND HC. This multi-tiered consultation mechanism seeks to ascertain the suitability of candidates for judicial office, considering factors such as legal acumen, integrity, and regional representation.

While both processes involve consultation with relevant stakeholders, notable differences exist between appointment of judges to SC & HC. Firstly, consultation for Supreme Court appointments involves Chief Justice of India and other Supreme Court judges, highlighting the national significance and scrutiny associated with appointments to the apex court.¹⁹

Conversely, High Court appointments necessitate consultation with CJI, Governor, and the Chief Justice of High Court, reflecting a more localized approach to judicial

¹⁸ Constitution of India, 1947, Art. 124.

¹⁹ Naskar, S.K., 2023. A Critical Analysis of Judicial Appointments in India (with respect to Higher Judiciary). Blue Rose Publishers.

selection. Furthermore, appointments to Supreme Court typically receive heightened attention due to its pivotal role in interpreting constitutional matters and setting legal precedents at the national level, whereas High Court appointments, though equally important, may attract relatively less national scrutiny while playing a critical role in ensuring effective administration of justice at the state level.

VIII. COMPARATIVE ANALYSIS OF JUDICIAL APPOINTMENT SYSTEMS: UNITED STATES VS. INDIA

The judicial appointment system in United States, as prescribed by the Constitution, vests President with authority to nominate individuals for positions such as SC justices, court of appeals judges, and district court judges. These nominations are contingent upon confirmation by the United States Senate. Although the Constitution does not delineate specific prerequisites for judgeships, informal criteria have been developed by members of Congress and the Department of Justice.²⁰

Recommendations for potential nominees often originate from senators or House members affiliated with the President's political party. Confirmation hearings for each nominee are typically conducted by the Senate Judiciary Committee. Following appointment, judges hold lifetime tenures. This procedural framework underscores the principle of separation of powers, with President exercising the nomination prerogative and the Senate conducting oversight through confirmation proceedings.

In contrast, India's judicial appointment system has undergone significant transformation, notably with the advent of the collegium system. Initially, executive authority predominated in appointments, but this dynamic shifted towards judicial ascendance subsequent to seminal judicial pronouncements.²¹ The collegium, comprising senior judges, assumes a central role in judicial appointments, with minimal executive involvement. Nevertheless, critiques concerning opacity, nepotism, and partiality have been levelled against the collegium system. The recent

²⁰ Vermeule, A., 2004. The constitutional law of congressional procedure. *The University of Chicago Law Review*, 71(2), pp.361-437.

²¹ Heydebrand, W. and Seron, C., 1990. *Rationalizing justice: The political economy of federal district courts*. State University of New York Press.

endeavour to introduce NJAC was invalidated by the Supreme Court, thereby underscoring the intricacies and impediments associated with reforming India's appointment mechanism.

Comparatively, the United States' framework offers a more structured regimen and distinct delineation of powers, with nominations emanating from the President and subject to Senate confirmation. Although susceptible to political influence, the Senate Judiciary Committee's oversight and public confirmation hearings furnish a degree of transparency and accountability.²²

In India, the collegium system has faced censure for its lack of transparency and perceived elitism, prompting calls for reform. The proposed hybrid approach in India, advocating for executive involvement while safeguarding judicial independence through mechanisms like a constrained executive veto and a collegium system for transfers and promotions, seeks to strike a harmonious balance between judicial and executive interests. Nonetheless, the implementation of such reforms within India's intricate political and legal milieu presents formidable challenges.

IX. NEED FOR POLICY CHANGE

The change from India's Executive appointment system to the Collegium system was intended to strengthen judicial independence by reducing political involvement.²³ However, the Collegium concept has been criticised for its lack of openness, apparent favouritism, and deviation from constitutional values. Critics claim that decisions made behind closed doors by a small handful of judges undermine accountability and meritocracy. Furthermore, there are ongoing concerns about the underrepresentation of marginalised communities, women, and people with various professional backgrounds in judicial nominations.

Reforming the Collegium system requires resolving these flaws by encouraging transparency, meritocracy, and diversity in the judiciary. Efforts to improve caste diversity, gender representation, and professional backgrounds are critical for

²² Judgeship Appointments By President, USA.

²³ALAM, A.A., 2023. POLITICS OF JUDICIARY: THE ORIGIN AND DEVELOPMENT OF COLLEGIUM SYSTEM. *A LANDMARK ON THE INDIAN CONSTITUTION*, p.315.

ensuring that the judiciary reflects the variety of Indian society. Comparative analysis reveals that nations such as the United States have more structured appointment processes involving several departments of government, which may provide insight into revamping India's judicial appointment method. Finally, integrating judicial independence with transparency and accountability is critical to maintaining the integrity and legitimacy of India's judiciary.

X. METHOD TO REFORM

To enhance India's judicial appointment mechanism, transparency should be prioritized by publishing clear criteria for candidate evaluation, disclosing reasons for selections or rejections, and conducting public hearings. Inclusive representation must be promoted by considering candidates from marginalized communities, diverse professional backgrounds, and underrepresented regions. Meritocratic criteria should guide selections based on legal acumen, integrity, and professional experience. Striking a balance between executive involvement and judicial autonomy through a hybrid model, while safeguarding independence with collegium mechanisms, is essential. Constitutional or legislative reforms should be explored to institutionalize a transparent, accountable, and merit-based process, guided by principles of separation of powers and judicial independence. Implementing these methods can fortify India's judiciary, instilling public confidence and upholding the rule of law.

The appointment of judges in India stands as a cornerstone of its legal framework, embodying constitutional principles of governance and the separation of powers. From the nascent stages of independence, India has grappled with establishing a mechanism that upholds the integrity, accountability, and independence of its judiciary while balancing the roles of the executive and judiciary. Initially vested in the President, the process evolved over time, leading to the establishment of the Collegium System through judicial pronouncements. This system, dominated by senior judges, emerged as the primary entity recommending candidates for judicial office, marking a departure from executive dominance and emphasizing judicial ascendancy in the appointment process.

However, despite its constitutional foundations, the Collegium System has faced criticism for its lack of transparency and accountability, prompting calls for reform and reevaluation of the judicial appointment paradigm. The research aims to critically analyse the evolution, challenges, and comparative aspects of India's judicial appointment mechanism, with a focus on understanding its historical background, the establishment of the Collegium System, and dynamics between Supreme Court and High Court appointments. Additionally, the research seeks to propose recommendations for reforming the existing system to enhance transparency, accountability, and judicial independence

XI. CONCLUSION

In conclusion, growth of India's judicial appointment mechanism, which culminated in the formation of the Collegium System, displays a dynamic interaction of constitutional principles, historical legacies, and judicial activism. While the Collegium System was intended to strengthen judicial independence, its opacity and susceptibility to nepotism have drawn criticism, leading calls for reform. A comparison with international models, particularly the United States, highlights the need for increased transparency and accountability in India's selection process. The recent invalidation of National Judicial Appointments Commission demonstrates the complex problems of altering India's appointment paradigm. Moving forward, a balanced strategy that balances executive engagement with judicial authority is required to maintain the judiciary's integrity and independence.

It is critical to rebalance the appointment procedure to comply with constitutional imperatives while encouraging diversity and meritocracy in the court. Thus, reform attempts must navigate the complicated terrain of judicial selections while remaining true to constitutional norms and democratic government principles.