



The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2026

Editor-in-Chief – Dr. Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

STRAINING THE SCALES: BALANCING JUDICIAL INDEPENDENCE AGAINST EXECUTIVE FUNCTIONS UNDER THE SEPARATION OF POWERS

~Monami Hazra

ABSTRACT

There has been a long-standing debate pertaining to appointment and transfer of judges in the higher Judiciary of India. This controversy did not arise in post-independence between the Executive and the Judiciary under the Separation of Powers but has been there ever since the colonial period when the first Supreme Court of Judicature was established in Calcutta. The Constitution of India enforced in 1950, provided the procedure for appointment of judges in the Higher Judiciary. However, different approaches have been taken in the appointment the judges in the higher Judiciary complying with the mandatory procedure enshrined in the Constitution of India. This article critically and impartially examines the processes adopted by the Executive and the Judiciary in the appointment of Supreme Court judges over the years since the enforcement of the Constitution of India in 1950. This paper also examines whether a fair balance between the independence of judiciary and the transparency in judicial appointments is maintained or if one branch is being favoured over the other in the current system.

Keywords: Judicial Independence, Transparency, Collegium System, Executive Dominance, Higher Judiciary.

INTRODUCTION

In India, the collegium system is followed for appointment and transfer of judges in the higher judiciary. The Supreme Court Collegium consists of a total member of 5 judges with Chief Justice of India and four other senior-most judges. The High Court Collegium consists of a total member of 3 judges with Chief Justice of that specific High Court and two other senior-most judges of that High Court. This is the system where judges appoint judges. However, the Constitution of India does not provide for anything called 'Collegium'. The Collegium system was adopted by the Supreme Court in a landmark case of *Supreme Court Advocates-on-Record Association v. Union of India (1993)*¹, often known as the Second Judges Case (1993). This system was adopted by the Supreme Court of India to preserve the independence of the judiciary, which forms a part of the Basic Structure Doctrine. Concerns are being raised regarding the transparency and fairness of judicial appointments through Collegium system. Critics argue that there have been favouritism and nepotism in judicial appointments in higher judiciary.

However, looking back in the years 1973 and 1977, a serious compromise in independence of the judiciary was seen due to executive overreach in the appointment of Chief Justice of India. Owing to these actions of the executive, it was of utmost necessity to uphold the independence of judiciary, which the Supreme Court did through the Second Judges Case of 1993.

This paper further examines the specific actions taken by the executive and the judiciary in the appointment process of the judges in the Supreme Court of India and how a balance between the independence of the judiciary and the transparency in judicial appointments is being maintained by these wings.

JUDICIAL APPOINTMENTS IN THE PRE-INDEPENDENCE PERIOD

In the pre-independence period, the British Crown (executive) controlled the judicial system.² Through the Regulating Act of 1773 passed by the British Parliament, the Supreme Court of Judicature at Fort William was established in Calcutta. It was composed of a Chief Justice and three other judges and all such appoints were made directly by the British Crown. The Executive used the Judiciary as its own instrument to secure political and administrative favour; one such example is 'Judicial Murder' of Raja Nandakumar in 1775. After accusing Governor-General Warren Hastings of taking bribes, Raja Nandakumar was arrested on charges of forgery, a crime which carried punishment of death under British law but not under Indian local law. However, the Supreme Court under Chief Justice Elijah Impey, found Raja guilty and sentenced him to death by hanging. Judiciary was used by the Executive to silence a political rival and therefore the trial was condemned as "judicial murder".

Later in 1937, the Federal Court of India was established in Delhi under the Government of India Act, 1935. It consisted of a Chief Justice and a maximum of six other judges who

¹ *Supreme Court Advocates-on-Record Association v. Union of India*, (1993) 4 S.C.C. 441 (India).

² M.P. Jain, *Outlines of Indian Legal History* 265 (6th ed. 2006)

were directly appointed by the British Crown. It was not the highest court of the land and its judgments could be challenged in the Privy Council in London. There was no judicial independence.

ESTABLISHMENT OF THE SUPREME COURT AND ITS INDEPENDENCE

The Federal Court was transformed into the Supreme of India in the post-independence period. On 28th January, 1950, the Supreme Court of India had its inaugural session and its first official sitting. Initially, it consisted of a Chief Justice and seven other judges. The Constitution of India makes the Supreme Court the highest court of appeal and according to Article 141, the decision of the Supreme Court is binding on all courts within the territory of India. Being the apex court of the land, its independence is necessary to preserve the federal democracy of India.

Article 124 of the Constitution of India provides for the establishment and composition of the Supreme Court³. Initially, the judges of the Supreme Court were being appointed by the President of India after consultation with such judges of the Supreme Court as the president deemed necessary for the purpose and the Chief Justice of India was appointed through an unwritten convention rule of 'seniority' that is the senior-most judge of the Supreme Court would be the Chief Justice of India. This unwritten rule came into practice on the sudden death of first Chief Justice of Independent India, Justice Harilal Jekisundas Kania⁴. Upon his sudden death 1951, our then Prime Minister Jawaharlal Nehru along with then Attorney General M.C Setalvad, wanted to appoint some judge who did not serve as a supreme court judge, as the Chief Justice of India but objection was raised by other sitting justices of the Supreme Court and as a result, Justice M. Patanjali Sastri was appointed as the Chief of India on November 7, 1951. He became the second Chief Justice of India as he was the senior-most justice among all the seven justices of the Supreme Court during that time. This 'seniority' is not on the basis of age but on the basis of the length of time a judge has served on the Supreme Court bench.

Since the enforcement of the Constitution of India in 1950, a healthy practice had been followed and a good relationship between the executive and the judiciary existed regarding the judicial appointments in the higher judiciary until the 1970s when judicial independence was at danger.

EXECUTIVE SUPREMACY IN JUDICIAL APPOINTMENTS IN THE 1970s

A perfect balance of independence and transparency in judicial appointment was maintained until 1973 when the unwritten convention of senior-most judge being appointed as the Chief Justice of India was not followed. The landmark case of *Keshavananda Bharati v. State of Kerala (1973)*⁵, was decided by a thirteen-judge bench. The majority opinion in this case was not favourable for the government. The Dissenting

³ India Const. art. 142

⁴ Dormaan J. Dalal, *Evolution of Seniority Convention and Appointment of Chief Justice of India*, LIVELAW (Jan. 26, 2019), livelaw.in.

⁵ *Kesavananda Bharati v. State of Kerala*, (1973) 4 S.C.C. 225 (India).

opinion was given Justice A.N Ray who was with the opinion that the government should have unlimited power to amend the constitution, which evidently favoured the government. Following this judgment, Justice A.N Roy was made the 14th Chief Justice of India, superseding three other senior-most judges of the Supreme Court who had not given judgment in government's favour- Justice J.M Shelat, Justice K.S Hegde and Justice A.N Grover. This was a manifestation of executive dominance in judicial appointments which was dangerous to judicial independence.

In 1977, Justice M.U Beg was appointed as the 15th Chief Justice of India, superseding senior-most judge of the Supreme Court, Justice H.R Khanna. This appointment was followed by the judgment in another landmark case, *A.D.M. Jabalpur v. Shivkant Shukla* (1976)⁶, where the majority opinion was that Article 21 could be suspended during the Emergency, which favoured the government. Only Justice H.R Khanna was of the dissenting opinion that Article 21 could not be suspended during emergency. Despite the fact that he was the senior-most judge of the Supreme Court, he was not appointed as the Chief Justice of India as his judgment did not favour the government. Now it was a serious concern whether the judiciary was really independent or an instrument of the executive. If this practice of promoting the judges who give judgment in favour of the government continued then it will eventually dilute judicial independence and the executive would use the judiciary to fulfil its political agendas. This would lead to concentration of power in the hands of the executive and therefore threatened the democracy and the federal structure of the country.

THE FALLOUT OF THE EMERGENCY AND THE FIRST JUDGES CASE (1981)

During the Emergency period, executive dominance in judicial appointments continued and was limited not only to the appointment of Chief Justice but also extended to transfer of High Court judges irrespective of their consent. Judicial appointments became highly uncertain as the judiciary had become an instrument in the hands of the executive to secure their political objectives.

The immediate cause that led to the landmark case of *S.P. Gupta v. Union of India* (1981)⁷ was then Union Law Minister Shiv Shankar's circular to all the Chief Ministers to obtain advance, written consent from additional High Court judges stating that they were willing to be transferred to any other High Court in the country and if they refused, their temporary tenure would not be extended to a permanent position. This was seen as absolute executive control in judicial appointments. As a result, Senior Advocate S.P Gupta, along with several other prominent lawyers filed a series of writ petitions directly in the Supreme Court, challenging the validity of the Law Minister's circular.

The central constitutional issue raised in this case was whether consultation meant concurrence within the meaning of Article 124(2)⁸. The Supreme Court unanimously ruled

⁶ *ADM Jabalpur v. Shivkant Shukla*, (1976) 2 S.C.C. 521 (India).

⁷ *S.P. Gupta v. Union of India*, 1981 Supp. S.C.C. 87 (India).

⁸ India Const. art. 142

that the word 'consultation' within Article 124(2) did not mean 'concurrence'. Justice P.N Bhagwati reasoned this judgement on the basis of literal constitutional interpretation. He was of the opinion if the framers of the Constitution intended to mean that the consultation was binding then it would have been clearly inserted. Moreover, he argued that the judiciary is not publicly accountable while the executive is accountable in the Parliament, which consists of members elected through popular elections and therefore he wanted to establish democratic accountability in judiciary.

EMERGENCE AND EXPANSION OF THE COLLEGIUM SYSTEM

The Supreme Court through the judgment of the First Judges Case of 1981, showed its faith in executive's appointment in the higher judiciary. However, the executive failed to remain a neutral and fair appointing body, the appointments made by the executive were politically motivated. Now, the judiciary realised that it was high time that it should secure its own independence. In the landmark case of *Advocates-on-Record Association (SCARA) v. Union of India (1993)*⁹, the Supreme Court overturned the decision taken in the case of *S.P. Gupta v. Union of India*. In the Second Judges Case (1993) it was decided that consultation meant concurrence within the meaning of Article 124(2) and used Justice Bhagwati's original 1981 concept of a multi-member panel for appointment of judges in higher judiciary which ultimately led to the formation of the Collegium System. In the First Judges Case (1981), Justice P.N Bhagwati comprehensively wrote a section explaining how leaving the power of judicial appointments in the hands of one single individual—whether it was the Prime Minister or the Chief Justice of India (CJI)—was dangerous and prone to personal bias. To solve this problem, he explicitly recommended that India should form a collective, multi-member advisory body to recommend judges. He wrote that this body should consist of a panel of senior judges and legal experts. This exact idea of a "collective panel of judges" is the definition of a collegium, which was finally adopted in the Second Judges Case of 1993. A three-member body was formed, consisting of the Chief Justice of India and two other senior-most judges. This body was responsible for appointment of judges of the Supreme Court.

Under Article 143¹⁰, president K.R Narayanan consulted the Supreme Court in 1998, famously known as Third Judges Case (1998). Through this Presidential Reference, the Supreme Court expanded the Collegium from three-member Collegium to five-member Collegium. At present, the Collegium for the appointment of Supreme Court judges consists of the Chief Justice of India along with four other senior-most judges of the Supreme Court.

LACK OF TRANSPARENCY AND EMERGENCE OF THE NJAC

The Collegium System was highly criticised for lack of transparency in the judicial appointments and questions regarding practice of nepotism and favouritism was raised.

⁹ *Supreme Court Advocates-on-Record Association v. Union of India*, (1993) 4 S.C.C. 441 (India).

¹⁰ India Const. art. 143

However, there were certain incidents that raised questions on transparency, accountability and fairness in the elevation and appointments in the higher judiciary.

All these concerns led to the formation of the National Judicial Appointment Committee (NJAC) through the 99th Amendment Act of the Constitution of India. Through this amendment, Article 124A was inserted which formally established the NJAC as a permanent constitutional body and lists its six-member composition to ensure the judiciary no longer held a secret monopoly. The NJAC was supposed to be composed of the Chief Justice of India (as the ex-officio Chairperson), two other senior-most judges of the Supreme Court, the Union Minister of Law and Justice and two "eminent persons" from civil society (chosen by a committee of the Prime Minister, the CJI, and the Leader of the Opposition). Further, the 99th Amendment deleted the first proviso of Article 124(2), which stated that in case of appointment of other judges of the Supreme Court, the Chief Justice of India shall always be consulted.

THE REBOUND OF JUDICIAL MONOPOLY WITH THE FOURTH JUDGES CASE OF 2015

The Supreme Court reviewed the constitutional validity of the NJAC in the case of *Advocates-on-Record Association v. Union of India*¹¹, also known as the Fourth Judges Case. The court held that NJAC would compromise the Independence of the Judiciary, which is an unalterable part of Basic Structure Doctrine of the Constitution. The Supreme Court declared the 99th Amendment to be unconstitutional and restored the Collegium System¹².

CONCLUSION

In India, the largest democracy of the world, the judiciary remains the sole protector of the rights of the people. The judiciary acts as an important check upon the executive and the legislature, especially in a parliamentary form of government where there is chance of concentration of power in a single wing of the government. It also harmonises the relationship between the Union and the States. The Supreme Court being the apex court of the judiciary, is vested with several significant functions, the most important being the guardian and final interpreter of the highest law of the land. The Supreme Court of India is the highest court of appeal and its decision is binding on all courts within the territory of India. Therefore, it is of utmost importance that judges of the Supreme Court and the High courts are appointed in an independent, transparent, fair and accountable way. It should neither be politically motivated nor be opaque to an extent that questions its fairness in judicial appointments.

¹¹ *Supreme Court Advocates-on-Record Association v. Union of India*, (2016) 5 S.C.C. 1 (India).

¹² *Supreme Court Advocates-on-Record Association v. Union of India*, (2016) 5 S.C.C. 1 (India)