

## **“Judicial Structure and Judicial Activism in Appointment of Judges: A Critical Study”**

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### **ABSTRACT**

Independence of Judiciary has been recognized as a basic structure of Indian Constitution in various Judgements. Though clear demarcation of separation of power is enumerated in the constitution but then also executive seeks encroachment in the name of transparency and accountability. It raises an important question that ; if the executive will play role in the appointment process, will this not lead to violation of independence of judiciary ? to highlight various issues relating to Judicial system , firstly the Article describe about the Structure of Judicial System in India from Supreme Court to Sub-ordinate courts. Controversy relating to Appointment of Judges is not new in India, so a study has been made relating to appointment of judges before and after 1993. A comparative study of various model of appointment of judges prevailing in various selected countries has been discussed. Also great controversy took place in India after NJAC judgement, which is also enumerated in the Article. But at the same time there is an inner clash going on between judges itself this raises another important question i:e is the present system of appointment of judges meets the requirement of democracy ?

**Keywords : JUDICIAL APPOINTMENT, NJAC, INDEPENDENCE, TRANSPARENCY, DEMOCRACY.**

### **INTRODUCTION**

*“If the legislature will positively enact a thing to be done, the judges are not at liberty to reject it, for that was to set the judicial power above that of the legislature, which would be subversive of all government”<sup>2</sup>*

The basic purpose of law is to held justice without any fear and favor. Judiciary is interlinked with rule of law in other words judiciary and rule of law are synonyms. As George Gurvitch says, justice is used in two senses - “faithful realization of the existing law against any arbitrary infraction of it”, and search for “the ideal element in all law,” i.e. “the ‘idea’ which the law tends to subserve.”<sup>3</sup> Judiciary plays a very important role in holding justice. The Judiciary was to be an arm of the social revolution upholding the equality that Indians had

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<sup>2</sup>William Blackstone, Justice of the court of King’s Bench, English Jurist.

<sup>3</sup>8 George Gurvitch, “Justice,” in Encyclopedia of the Social Sciences, (1934).

longed for.<sup>4</sup> In case of **Union of India v. Sankal Chand Himatlal Sheth and others**<sup>5</sup> the court stated that “judiciary is like a watching tower above all the big structures of the other limbs of State. From the top of its respective towers, the highest judiciary either by it in the State or in the Centre keeps a watch like a sentinel on the functions of the other limbs of the State as to whether they are working in accordance with the law and the Constitution, the Constitution being supreme”. It is the great tribunal which has to draw the line between individual liberty and social control.<sup>6</sup>

All Judicial appointments are currently made on the basis of recommendations made by the Collegium, which reserves the last word on appointment even though the government may have some objections, this was sought to be changed by the government through the **National Judicial Appointments Commission** (NJAC), in which the Union Law Minister and two 'eminent' persons were supposed to be equal participants in the process of selection of judges. But the Supreme Court declared the NJAC to be "unconstitutional", and said that a new MoP with some suitable changes to bring more transparency in the existing system would be enough. Incidentally, Justice Chelameswar was the lone dissenting judge on this five-judge bench who had favoured a completely new mechanism of judicial appointments.<sup>7</sup>

The Chief Justice of India, R.M. Lodha reiterated that no effort to harm the judiciary's independence will succeed as its independence is “non-negotiable”. Judicial autonomy is essential for keeping up public confidence that there is an institution which would go to their "guide and rescue in the event of any wrong committed by the executive or anyone.”<sup>8</sup>

## **STRUCTURE OF JUDICIARY: PRE INDEPENDENCE PERIOD**

Indian judiciary system is not a sudden development. It is not a creation of one man or two men or one day or two days. It is evolved from slow and gradual changes that takes place in judicial system. Indian judiciary is the oldest judiciary system in world. No other judicial system is as older as Indian judicial system. Indian judiciary has found its origin from ancient times, **Manu**, **Brihaspati**, and **Kautilya** gives **Manusmriti**, **Dharmasastras** and **Arhasastra**. Study of this books reveals the administrative and justice system present in ancient India. At that time judicial system was tied with religion it was based on varna system. Ancient meaning of justice is ‘dharma’ and dharma means ‘nyaya’, it is linked with moral values, helping peoples, giving charities etc all were considered as dharma.

The ancient aryaans faced social, economic and political problems like britishers faced in the

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<sup>4</sup>J.N. Pandey, Constitutional Law of India, (53rd ed., 2016).

<sup>5</sup>AIR 1977 SC 2328.

<sup>6</sup>Sri Alladi Krishnaswamy Ayyer, Member of Drafting Committee.

<sup>7</sup>Utkarsh Anand, SC Collegium Rejects Centre's Plea, Will Have Final say in Appointment of Judges, CNN-News 18, (Aug. 6, 2017, 1 :15 PM), <https://www.news18.com/news/india/sc-collegium-rejects-centres-plea-will-have-final-say-in-judges-appointments-1484011.html>

<sup>8</sup>Apoorva Mandhani, Judiciary has the inherent strength; no attack on its independence will succeed: CJI, Live Law, (Sep. 14, 2014, 9:20 AM), <http://www.livelaw.in/judiciary-inherent-strength-attack-independence-will-succeed-cji/>.

medieval period so aryaans developed a judicial system. This system is based on hierarchy with chief justice (**Praadvivaka**) being the head of the system. Like today, the higher courts have the power to review the decision of its subordinates. The law of evidence was quite same like today. The disputes were decided on the basis of natural justice and this natural justice was dharma. Caste panchayats decide the issues on local level they decide according to the religious rituals and customs prevailing at that time. Most of the kings deliver justice according to 'dharma' which is decided from religious text. The king's represented himself as the representative of god therefore he is the sole judge in the earth. The dictum 'king do no wrong' was applied at that time. Then some of the development takes place during medieval period one of them was completion of civil procedure code by tughlaqs.<sup>9</sup>

With the advent of britishers in India judiciary had seen a lot of development and present judiciary is an impact of common law. No judicial system in any country is immune from outside influence. Judiciary is not a sealed book it grows and develops from time to time. New laws are needed to fulfill the gaps created by previous law or for the scope of law. Demand and need of society changes from time to time like in ancient period beating wife was not an offence it doesn't amount to cruelty while today beating is a severe offence and mere gestures or words amount to cruelty so law must be flexible with amendments not rigid. At that time India was in control of Britain so it was obvious of Britain's impact in judiciary system. The judicial system today we have is a part of then British government. Four law commissions were constituted between 1834 to 1947 to give shape to the system. Other committees were also constituted between this period to give suggestions and to form structure of the system. However the Supreme Court was established in Calcutta by Regulating Act of 1773. It consists of chief justice and 3 other judges. Later the supreme court was established at Madras and Bombay. Then the high court Act of 1861 establishes high courts and abolishes native courts (sadar dewani or sadar nizamat adalat) in Calcutta, Madras and Bombay. But the highest court of appeal was judicial committee of Privy Council. The official language of High Court and Supreme Court is English which is clearly an impact of Britishers.

The government of India Act, 1935 brings out too many changes in the judiciary system. It abolishes the old proportional judges system in the high courts. And Section 200 and Section 203 of The Government of India Act, 1935 establishes federal court of India. It is above the high court and below the privy council in hierarchy. The judges of this court hold office till the age of 65. The power of federal court to review laws and regulations was very limited in other words the power was only in the paper. The final authority to interpret constitution was Privy Council.

Overall it can be said that there is an imperishable impact of English legal system in Indian judiciary but the study of ancient history of India reveals that all the british laws were actually based on the legal principles that were already present in India.

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<sup>9</sup>Jayadeep Yadav, IGNOU Indian Society - India Democracy and Development, Scribd, (July 23, 2013), <https://www.scribd.com/doc/155551232/IGNOU-Indian-Society-India-Democracy-and-Development>

## **STRUCTURE OF JUDICIARY: POST INDEPENDENCE PERIOD**

After the independence there were certain inevitable changes to the judicial system in India by the constituent assembly. The members of constituent assembly were strong supporter of independent judiciary. They want judiciary to be free from outside coercion i:e from legislative or executive as judiciary acts as an guardian of democracy and the constitution. Most of the members of the constituent assembly were lawyers so they don't want to use technical phraseology which were used in English jurisprudence otherwise it would be difficult to interpret the constitutional provisions. Therefore Alladi Krishnaswami Ayer emphasized on this. Constituent assembly's ad hoc committee on judiciary (appointed to give recommendations to the structure of judiciary) and Sapru committee's report on supreme court both give a bulk of guidelines for the structure of judiciary.<sup>10</sup> B.R.Ambedkar, A.K.Ayyar, K.Santhanam, M.A.Ayyangar, Tej Bahadur Sapru, B.N.Rau, K.M. Munshi, Saadulla and played a very important roles in formation of the structure of the judicial system in India. The unitary judicial system of India was accepted without too much questioning. The Indian judicial system is an integrated system of courts with union as well as states. It has a reputation of being independent and unbiased in society. It is three tier systems, union judiciary, state judiciary and its subordinates. It can be said that it is organized pyramidically i:e hierarchical network of courts.<sup>11</sup> India is a quasi federal state with 29 states and 7 union territory and again states and union territories were divided into 707 districts. At the top the apex court which has responsibility of whole country. He is the final interpreter of law. It is the highest court to appeal and also it is a court of record. At the bottom there were several courts like panchayat courts, district courts etc. in between both of this contains various high courts. The respective high courts have the responsibility of the state concerned, it is the highest judicial authority in the state and also it is also a court of record.<sup>12</sup> In a district the district court is the highest authority and the district judge is the highest judicial authority in that district.

## **HIERARCHY OF JUDICIARY**

- Supreme Court of India
- High Court (in each of the states)
- District & Session Judges' Court (In Districts)
- Subordinate Judges' Court (Civil)
- Munsiffs' Courts
- Nyaya Panchayats
- Provincial small cause court
- Court of Session (Criminal)

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<sup>10</sup>Sir Tez Bahadur Sapru, Sapru Committee Report, Constituent Assembly debates (1945), [https://cadindia.clpr.org.in/historical\\_constitutions/sapru\\_committee\\_report\\_\\_sir\\_tej\\_bahadur\\_sapru\\_\\_1945\\_\\_1st%20December%201945](https://cadindia.clpr.org.in/historical_constitutions/sapru_committee_report__sir_tej_bahadur_sapru__1945__1st%20December%201945).

<sup>11</sup>M.P. Jain, Indian Constitutional Law 18 (7th ed., 2014).

<sup>12</sup>M.P. Jain, Indian Constitutional Law 460-471 (7th ed., 2014).

- Subordinate Magistrates' Courts
- Judicial Magistrates
- Executive Magistrates
- Panchayat Adalts
- Metropolitan Magistrate's Court (In Metropolitan areas)
- City Civil and Small cause court

## **SUPREME COURT**

Supreme Court of India was established in 28<sup>th</sup> January 1950. It is considered as most powerful court in world as it has larges jurisdiction Part V chapter IV of the constitution deals with union judiciary. Art 124 of the constitution talks about establishment and constitution of Supreme Court. Presently, it is comprised of 31 judges including chief justice of India. The qualifications to become a judge of Supreme Court are as follows:-

1. A citizen of India, and
2. Either a distinguished Jurist or has been a High Court Judge for at least 5 years, or has been an Advocate of a High Court or two or more such Courts for at least ten consecutive years.<sup>13</sup>

A judge of a Supreme Court holds his office tills he attains the age of 65 yrs. A judge may also put end to his office by resignation<sup>14</sup>. The resignation is addressed to the president. A Judge of Supreme Court may be removed by his office if found guilty of misbehavior and incapacity. The process of removing a judge is called as impeachment. The parliament issue an order addressing the president to remove a judge the order must have been supported by majority of members present at each house (not less than 2/3 members of house present at the time of voting). The manner of investigation for proving misbehavior and incapacity of a judge is described in The judges (inquiry) Act, 1968. Salary and allowances to judges are given under Article 125, though as it a matter of change so it is fixed by parliament from time to time. There is a specific The High Court and Supreme Court judge's salary and conditions of service Act, 1954 for the same.

**Original Jurisdiction:** under Article 131 supreme court has original jurisdiction. It is power of Supreme Court to hear a case for first time; under Article 32 supreme courts hear various writ petitions under this jurisdiction. Disputes relation to the election of president and vice president are also included in this. Although original jurisdiction has certain limitations like it can't question any convention, treaty etc executed before the commencement of the constitution of India.

**Appellate jurisdiction:** Supreme Court is the apex court so it is the highest court of appeal. Under constitutional scheme there are three types of appellate power namely constitutional

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<sup>13</sup>India Const. art. 124, Cl. 3.

<sup>14</sup>India Const. art. 124, Cl. 2.

appeals, appeal regarding criminal cases, appeal regarding civil cases.

Advisory jurisdiction: under Article 143 supreme court has advisory jurisdiction. Supreme Court gives advice to president under this article.

There are several others power of Supreme Court like it has power to review its own judgments under Article 137. It also makes own rules and regulations for practice and procedure. Under Article 146 constitution gives power to Supreme Court to appoint its own officers. Passing derogatory statements against the judgment or against any judge is contempt of court<sup>15</sup>. In other words Supreme Court controls entire judicial system in India. It is the apex of integrated judiciary.

## HIGH COURT

Chapter V of part VI of the constitution of India provides for constitution of High Court in each state in India. There may be a common High Court for more than two states<sup>16</sup> (like Calcutta High court is a common high court for both West Bengal and Andaman & Nicobar). All the High Courts are of equal status. The High Court is termed as court of equity. It plays a very important role in administration of justice. It consists of Chief Justice and other judges; it changes from time to time as president deems necessary. Fixation of the strength of judges in the High Court is an executive function of centre. No Court can issue a writ of Mandamus commanding the Government to fix any number of judges for High Court or directing how many additional or permanent judges should be appointed.<sup>17</sup> The qualifications to become a judge of High Court are as follows:

- A citizen of India.
- Either he should have been a judicial officer in the territory of India or should have been an advocate of high court(s) for 10 years.<sup>18</sup>

A judge of High Court holds his Office till he attains the age of 62 years. A judge may also put end to his office by resignation.<sup>19</sup> The resignation is addressed to president. A judge of High Court may also be removed from his office if found guilty of proved misbehavior and incapacity. The process of removal is same as of judge of Supreme Court as mentioned above. Salary and allowances of judges is mentioned in second schedule so it needs constitutional amendment to change, it is fixed by parliament from time to time.<sup>20</sup>

High court enjoys criminal, civil, ordinary as well as extraordinary jurisdiction. On civil appellate jurisdiction an appeal to High Court is either first appeal or Second appeal. On criminal appellate jurisdiction an appeal lies to High court from the decision of:

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<sup>15</sup>India Const. art. 129.

<sup>16</sup>India Const. art. 231.

<sup>17</sup>S.P Gupta v. Union of India, AIR 1982 SC 149.

<sup>18</sup>India Const. art. 217.

<sup>19</sup>Id.

<sup>20</sup>India Const. art. 221.

- A session judge or additional session judge, where the sentence exceeds 7 years imprisonment;
- An assistant session judge, Metropolitan Magistrate or other judicial magistrate in certain certified cases other than 'petty' matters.

The High Court issue writs when there is violation of Fundamental as well as any other legal rights. Earlier, only High Courts of Calcutta, Bombay and Madras have power to issue Prerogative writs under Art. 226 but now every High Court enjoys the Power to issue Prerogative writs.

Power of superintendence: under article 227 of the constitution of India every High Court is authorize to Has Superintendence over every all courts and Tribunals present in its territory. The power of superintendence doesn't mean that High court can direct the courts subordinate to it. High Court also has the power to transfer cases to itself from Subordinates court.

### **SUBORDINATE COURTS**

In hierarchy of the judicial system, the courts which lie subordinate to the High Court are considered as subordinate court. Each state of India is divided into district and each district has a district court. The highest judicial authority in a district court is District Judge, when he hears a civil case he is known as district judge and when he hears a criminal case he is known as Sessions judge. There are several different courts below district court as mentioned above (like Munsiffs' Courts etc.) the name of these courts are different in different states.

### **APPOINTMENT OF JUDGES IN SUPREME AND HIGH COURTS**

*"A right appointment "would go a long way towards securing the right kind of judges who would invest the judicial process with significance and meaning for the deprived and exploited sections of humanity"*<sup>21</sup>

*"Judicial incompetence takes the form of ignorance of legislative history, ignorance of the provisions of the Constitution, ignorance of well settled principles of interpretation, ignorance of the meaning of ordinary English word"*<sup>22</sup>

Article 124 of the constitution of India talks about appointment of judges. The President Appoint the judges of Supreme Court. Article 217 of the Constitution of India talks about appointment of Judges in High Court and Article 222 provides for transfer of Judges from One High Court to another. The constitutional provision relations to sub-ordinate judiciary are contained in Article 233 to 237. Though these provisions are subject to rules made by Governors in respective High Courts as per under Article 309 of the Constitution of India.

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<sup>21</sup>Justice PN Bhagwati, S.P Gupta v. Union of India, AIR 1982 SC 149 at p. 204.

<sup>22</sup>3 H.M. Seervai, Constitutional Law of India, 2939 (4th ed., 2005).

Under Art. 124 (2)<sup>23</sup> the President, in appointing other Judges of the Supreme Court is bound to consult the Chief Justice of India. But in appointing the Chief Justice of India he is not bound to consult anyone.<sup>24</sup> The word 'may' used in Art.124 makes it clear that it is not mandatory on him to consult anyone. He may consult such different Judges of the Supreme Court and High Courts as he may esteem essential.

### **APPOINTMENT OF JUDGES BEFORE 1993**

Before 1993, the president's power to appoint judges was purely of a formal nature, for, he would act in this matter, as in other matters, on the advice of law minister and the views expressed by chief justice were not binding.<sup>25</sup> The common practice was to appoint senior most judge of a Supreme Court as the Chief Justice of India. This practice was criticized by the law commission in 1958 on the ground that a chief justice should not only be an able and experienced judge but also a competent administrator, and, therefore succession to the office should not be only regulated by mere seniority.<sup>26</sup> However government didn't follow this report and continued the practice of appointing senior most judge as Chief Justice.

In 1973, the government suddenly departed from this practice and appointed as Chief Justice a judge [Justice A.N Ray] who was fourth in order of seniority, the three senior judges were by-passed, who then resigned from the court in protest.<sup>27</sup> Although the government followed the recommendations made by the law commission in 1958 and, again, in 1976 Justice Beg was appointed as chief justice of India by-passing Justice Khanna senior to him. Then after that again seniority rules prevailed and on the basis of this Justice Chandrachud, senior most judge becomes Chief Justice of India.<sup>28</sup>

In 1982, the matter regarding appointment of Supreme Court and High Court judges came before the Supreme Court, in the famous case of **S.P Gupta v. Union of India**<sup>29</sup> also known as first judges case. In this case the majority<sup>30</sup> view was that, the opinion of the Chief Justice of India and the Chief justices of High Court were merely consultative and that "power of appointment resides solely and exclusively in the central government" and that the central government could override the opinions given by the Constitutional functionaries (viz. the chief justice of India and the chief justice of concerned High Court).<sup>31</sup>

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<sup>23</sup>Ind. Const. art. 124, Cl. 3. 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>24</sup>1 D.D.Basu, Shorter Constitution of India 531 (15th ed., 2018).

<sup>25</sup>M.P. Jain, Indian Constitutional Law 380 (7th ed., 2014).

<sup>26</sup>LAW Comm., XIV Rep., 39-40 (1958).

<sup>27</sup>Kuldip Nayar, Suppression of Judges (1st ed., 1973).

<sup>28</sup>M.P. Jain, Indian Constitutional Law 381 (7th ed., 2014).

<sup>29</sup>AIR 1982 SC 149.

<sup>30</sup>Bhagwati, Fazal Ali, Desai and Venkataramiah, JJ. The Bench consisted of Five Judges.

<sup>31</sup>Supra, 16.



In 1991 the Judgment of S.P Gupta was criticized by the bench of Subhesh Sharma v. Union of India<sup>32</sup> the bench emphasized that an independent, non political judiciary was crucial to sustain the democratic political system adopted in India, the bench opined that primacy be given to the views of the chief justice of India in the matter of selection of Judges. The court stated that this would improve the judicial system; therefore, they suggested reconsideration by a larger bench of this aspect of the process of appointment of Judges.<sup>33</sup>

### APPOINTMENT OF JUDGES AFTER 1993

In 1993, the question of the appointment of judges again came before the Supreme Court in the case of **Supreme Court advocates on record bar association v. Union of India**<sup>34</sup>, popularly known as second judges case, where a majority<sup>35</sup> in the 9-judge bench came to the conclusion that ‘consultation’ would mean ‘concurrence’ or ‘consent’, it was held that no appointment of any judge to the Supreme Court or any High Court can be made unless such appointment is in conformity with the opinion of Chief Justice of India.<sup>36</sup> The court has observed:

The sign is that in the decision of a candidate fit for appointment, the view of the chief justice of India should have the greatest weight, the selection should be made as a result of participatory consultative process in which the executive should have power to act as a mere check on the exercise of power by the chief justice of India, to achieve the constitutional purpose. Subsequently, the executive component in the appointment procedure is decreased to the minimum and any political impact is dispensed with. It was for this reason that the word 'consultation' instead of 'concurrence' was used, but that was done merely to indicate that absolute discretion was not given to any one, not even to the Chief Justice of India as individual.<sup>37</sup>

In 1999, the ruling of Supreme court in second judges case was further explained by the 9 Judges bench in the case of **In Re: Presidential Reference**<sup>38</sup> the court held that although the opinion of chief justice of India has “primacy” in the matter of appointment of judges, it is not solely the opinion of the chief justice of India alone yet it is “reflective of the opinion of judiciary which implies that it should essentially have the element of plurality in its formation.”<sup>39</sup>

In 2014, The Indian Parliament created the NJAC (National Judicial Appointment Council) through 99<sup>th</sup> Constitutional Amendment Act in response to criticisms of the existing

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<sup>32</sup>AIR 1991 SC 631.

<sup>33</sup>Id., at 645.

<sup>34</sup>AIR 1994 SC 268.

<sup>35</sup>Majority Judgment was delivered by J.S. Verma, J., on behalf of himself and Yogeshwar Dayal., G.N. Ray, A.S. Anand and Bharucha, JJ.

<sup>36</sup>Supra, 33, at 429.

<sup>37</sup>Supra, 33, at 430.

<sup>38</sup>AIR 1999 SC 1, at 19-22.

<sup>39</sup>Id.

“collegium” system, in which senior Supreme Court Judges had the last word on appointments to the higher judiciary.<sup>40</sup> Article 124 A provide that The NJAC comprised the Chief Justice of India, two other senior Justices, the union minister of law and justice, and two eminent persons.<sup>41</sup> Article 124B set forth the duties of the NJAC, which include: (1) recommending persons to be appointed to the Supreme Court and high courts; (2) recommending transfers of judges from one high court to another; and (3) ensuring that recommended nominees are “of ability and integrity.”<sup>42</sup> Article 124C permitted Parliament to both regulate appointment procedures and empower the NJAC to enact those regulations necessary to carry out its functions.<sup>43</sup> The NJAC Act, accompanying the Ninety-ninth Amendment, did precisely this. It specified that the NJAC could issue regulations to “carry out the provisions” of this Act,<sup>44</sup> and largely left it to the Commission to determine the procedures for judicial appointments and transfers.<sup>45</sup>

In 2015, Supreme Court advocates on record association filed a petition before Supreme Court questioning the constitutional validity of NJAC Act, **Supreme court Advocates on Record v. Union of India**<sup>46</sup>, the petitions alleged, inter alia, that the NJAC violated the basic structure of the Constitution by compromising the judiciary’s independence.<sup>47</sup> The bench consists of five judges, Justice Khehar, Justice Lokur, Justice Goel, and Justice Joseph were in the majority, and Justice Chelameswar gave the dissenting opinion.<sup>48</sup> The majority’s view was that:

- (i) The constitution requires judicial primacy is judicial appointments<sup>49</sup>
- (ii) Judicial primacy is part of the unamendable basic structure as it is integral to the independence of the judiciary<sup>50</sup>
- (iii) The presence of law minister on the NJAC undermined judicial independence and separation of powers another tenet of the Constitution’s basic structure, although the minister exercised no veto power or determinative vote.<sup>51</sup>

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<sup>40</sup>Arghya Sengupta, *Judicial Primacy and the Basic Structure: A Legal Analysis of the NJAC Judgment*, 48 *Econ. & Pol. Wkly.* 27 (2015).

<sup>41</sup>India Const. art. 124. Amended by The Constitution (Ninety-ninth Amendment) Act, 2014. Two eminent persons will be nominated by committee led by Prime Minister of India, the CJI, and the Leader of the Opposition in the House of the People.

<sup>42</sup>*Id.*

<sup>43</sup>*Supra*, 40.

<sup>44</sup>National Judicial Appointments Commission Act, 2014, No. 40, Acts of Parliament, 2014 (India), art. 12

<sup>45</sup>*Id.* at 5-6, 9.

<sup>46</sup>(2016) 4 SCC 1.

<sup>47</sup>Mohit Singh, *NJAC Act and 99th Constitutional Amendment Faces Challenge at Supreme Court; Petitions by AoR Association and Senior Advocates, One L. St.* (Jan. 10, 2015), <http://onelawstreet.com/2015/01/njac-act-and-99th-constitutional-amendment-faces-challenge-at-supreme-court-petitions-by-aor-association-and-senior-advocates/>

<sup>48</sup>*Supra*, 45.

<sup>49</sup>*Supra*, 45, at 325.

<sup>50</sup>*Id.*

<sup>51</sup>*Supra*, 45, at 369.

(iv) Therefore, NJAC was held unconstitutional for violating the must requirements of judicial primacy and Independence of judiciary<sup>52</sup>

## **DIFFERENT MODEL OF APPOINTMENT OF JUDGES**

Mainly there are four models of appointment of judges namely (i) Self appointment model (ii) Appointment by judicial council (iii) Appointment by political institution (iv) Appointment by electoral model.

### **1. SELF APPOINTMENT MODEL**

China and Saudi Arabia follow system of self-appointment model. A system of self-appointment is one which the judiciary itself appoints its judges, without the need for approval from any of the other political institutions or popular election.<sup>53</sup> Proponents of this model argue that such a system guarantees the greatest amount of independence needed by judges.<sup>54</sup> They are not only independent from other political institutions but also independent from the public.<sup>55</sup> The main criticism of this model is that lack of accountability it has.<sup>56</sup>

In China, the Chief Justice is appointed by the People's National Congress to term 5-year term, limited to two consecutive 5-year terms, other judges are nominated by the chief justice and appointed by the Standing Committee of the People's National Congress.<sup>57</sup>

In Saudi Arabia the High Court chief and chiefs of the High Court Circuit are appointed by royal decree following the recommendation of the Supreme Judiciary Council, a 10-member body of high level judges and other judicial heads.<sup>58</sup> New judges and assistant judges have to serve 1- and 2- year probation period, separately, before permanent appointment.<sup>59</sup> At the end of the probation period the judges are reviewed by yet another panel of judges.<sup>60</sup> In addition to adopting more modern technology the Saudi government aims to appoint more judges as well as an intensive training programs and the introduction of electronic monitoring to ensure transparency.<sup>61</sup>

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<sup>52</sup>Supra, 45, at 437–38.

<sup>53</sup>Judicial Appointments and Judicial Independence, United States Institute of the Peace, (Jan. 2009), [www.usip.org](http://www.usip.org)

<sup>54</sup>Id.

<sup>55</sup>Id.

<sup>56</sup>Id.

<sup>57</sup>Greg R. Avino, China's Judiciary: An Instrument of Democratic Change, 22 Penn. ST. INT'L L. Rev. 369, 379 (2003).

<sup>58</sup>Saudi Arabia Const. Chapter 6, the Authorities of the State, art. 52. The appointment of judges and the termination of their duties are carried out by Royal decree by a proposal from the Higher Council of Justice in accordance with the provisions of the law.

<sup>59</sup>Supra, 56.

<sup>60</sup>Abdullah Fakhry Ansary, Saudi Judicial Reform and the Principle of Independence, Carnegie endowment for International Peace, (May 5, 2009), <http://carnegieendowment.org/sada/23059>

<sup>61</sup>New regulations to strengthen Kingdom's judicial system, Arab News, (Nov. 26, 2013).

## 2. APPOINTMENT BY JUDICIAL COUNCIL

In this model an independent council creates the shortlist of nominees for judgeship, those lists are then given to either of the political institutions (Legislative or Executive) designated with the authority to make an official nomination.<sup>62</sup> Appointment by judicial council is currently the most popular model used around the world; about 60% of the countries use this version of the model or a modification of it.<sup>63</sup>

Appointment in England and Wales. **The Constitutional Reform Act 2005** (the Constitutional Reform Act), and **Crime and Courts Act 2013** (Crime and Courts Act), overhauled the process and procedure for judicial appointments in England and Wales.<sup>64</sup> The JAC is composed of a chairman (who must always be a lay member), and such number of other Commissioners as the Lord Chancellor specifies by regulations made with the agreement of the Lord Chief Justice.<sup>65</sup> The JAC is responsible for selecting judicial officers for appointment up to and including the High Court, and contributes members to the selection panels for the Court of Appeal, Supreme Court and heads of jurisdiction.<sup>66</sup>

The Selection Commission must have an odd number of members not less than five, and the members of the commission must include:

- at least one member who is non-legally-qualified
- at least one judge of the Court
- at least one member of the JAC
- at least one individual from the Judicial Appointments Board of Scotland and
- at least one individual from the Northern Ireland Judicial Appointments Commission.<sup>67</sup>

Although more than one of the requirements may be met by the same person's membership of the commission.<sup>68</sup> This composition is intended to achieve a balance between judicial, independent and executive roles, and reduce the risk that candidates are appointed based on a 'likeness' to the members of the selection panel.<sup>69</sup>

Argentina also follow this model for Judicial appointments. Incorporated into the

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<sup>62</sup>Supra, 52.

<sup>63</sup>Id.

<sup>64</sup>Alexander Horne, The role of the Lord Chancellor, House of Commons Library, (Mar. 26, 2015), <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN02105>

<sup>65</sup>Supra, 63.

<sup>66</sup>Judicial Appointments comparative study, Judicial Conference of Australia, 63 (April 2015).

<sup>67</sup>Constitutional Reform Act, 2005 (UK) s 27(1B) as inserted by the Crime and Courts Act, 2013 (UK) sch 13, para 4.

<sup>68</sup>Id.

<sup>69</sup>Crime and Courts Bill - Fact Sheet: Judicial Appointments and Flexible Judicial Deployment, Ministry of Justice, (Jan. 2013), <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/98435/fs-cj-appoint-deploy.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/98435/fs-cj-appoint-deploy.pdf)>.

constitutional reform of 1994, Argentina adopted the appointment by judicial council model.<sup>70</sup> El Consejo de la Magistratura de la República Argentina (Counsel of Magistrates of the Republic of Argentina) is an integrated multispectral constitutional organ, responsible for making the shortlists of candidates to the judicial branch, they are also responsible for the sanctioning and firing of judges.<sup>71</sup> Regulated by Article 114 of the National Constitution, it requires that The Counsel be integrated in such a way that all branches of the government are represented; it is therefore comprised of a thirteen-member council of judges, legislators, lawyers, and law professors.<sup>72</sup>

Prof. Shibban Lai Saksena of the members of Constituent Assembly had suggested that appointment of Judges should be confirmed by 2/3<sup>rd</sup> majority of the Parliament.<sup>73</sup>

Paraguay also uses a judicial counsel.<sup>74</sup> In Spain, a parliamentary democracy, the General Council of the Judiciary, a 20-member body chaired by the monarch and includes presidential appointees, lawyers and jurists elected by the National Assembly proposes the judges to be appointed by the King to the Supreme Court.<sup>75</sup>

### 3. APPOINTMENT BY POLITICAL INSTITUTION

The appointment by political institution model, one of the branches of government [either the executive or legislative branch] or political institutions has the authority to appoint judges.<sup>76</sup> Appointments are typically made upon the recommendation of an organization like the American Bar Association (ABA) or other similar affiliated organization.<sup>77</sup> Once that recommendation is made either the executive or legislative branch, whichever has the authority, nominates the individual. Upon the confirmation or approval of the other political

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<sup>70</sup>Dr. Enrique Hidalgo, Consejo de la Magistratura. Honorable Cámara de Diputados de la Nación: República Argentina, Instituto de Capacitación Parlamentaria.

<sup>71</sup>Consejo de la Magistratura – Poder de la Nación,  
<http://www.consejomagistratura.gov.ar/index.php/features/iquees-el-consejo>

<sup>72</sup>Arg. Const. Chapter III, § 114. The Council of the Magistracy, ruled by a special law enacted by the absolute majority of all the members of each House, shall be in charge of the selection of the judges and of the administration of the Judicial Power. The Council shall be periodically constituted so as to achieve the balance among the representation of the political bodies arising from popular election, of the judges of all instances, and of the lawyers with federal registration. It shall likewise be composed of such other scholars and scientists as indicated by law in number and form. It is empowered:

1. To select the candidates to the lower courts by public competition.
2. To issue proposals in binding lists of three candidates for the appointment of the judges of the lower courts.
3. To be in charge of the resources and to administer the budget assigned by law to the administration of justice.
4. To apply disciplinary measures to judges
5. To decide the opening of the proceedings for the removal of judges, when appropriate to order their suspension, and to make the pertinent accusation.
6. To issue the rules about the judicial organization and all those necessary to ensure the independence of judges and the efficient administration of justice

<sup>73</sup>Constituent Assembly Debate, (May 24, 1949).

<sup>74</sup>Consejo de la Magistratura de la República de Paraguay. – <http://www.consejodelamagistratura.gov.py/>

<sup>75</sup>Spain Const. art. 123, Supreme Court, ¶ 2. The President of the Supreme Court shall be appointed by the King at the proposal of the judicial branch in the manner determined by law.

<sup>76</sup>Supra, 52.

<sup>77</sup>Id.

institution the individual is then officially appointed to the bench.<sup>78</sup> Some of the important countries which follow this model are United States of America, South Africa, Australia, Belgium, Brazil and Mexico.

Article II Section 2 of the United States Constitution, grants the President the authority to nominate a judge with the advice and consent of the Senate.<sup>79</sup> Upon the nomination of the President the Senate Judiciary Committee, a sub-committee of the Senate, holds a hearing in which the nominee has the opportunity to give their testimony as well as be questioned by the members of the committee.<sup>80</sup> Once approved by the Senate Judiciary Committee nominees are then referred to the Senate for full consideration.<sup>81</sup> If a majority of the Senate votes in favor of a nomination, the nomination is then confirmed by the President.<sup>82</sup>

In Brazil justices are appointed by the president and approved by the Federal Senate; upon appointment can serve until mandatory retirement at the age of 70.<sup>83</sup> some Countries which have monarchy system also appoints judges by political institution model. In Belgium the King appoints Justices of the Peace, judges of the superior courts, and judges of the court of Cassation.<sup>84</sup>

#### **4. APPOINTMENT BY ELECTORAL MODEL**

Electoral systems gained popularity in the 19th century as a way to enhance accountability for judges that were considered to be too elitist and disconnected from society.<sup>85</sup> There are two main types of election systems: popular election (partisan or non-partisan) and election by the legislature.<sup>86</sup>

After the amendment of constitution, Bolivia changes system of appointment of judges from judicial council to electoral system. Article 182 Number I, of the Bolivian Constitution, grants the people of Bolivia the power to elect its judges.<sup>87</sup> As a result of this referendum Bolivia held its first judicial elections in 2011.<sup>88</sup> Judges of the Supreme Court and the Plurinational Constitutional Tribunal are elected from a list of pre-selected candidates made

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<sup>78</sup>Judicial Nominations and Confirmations, United States Senate Committee on the Judiciary, <http://www.judiciary.senate.gov/nominations/judicial.cfm>.

<sup>79</sup>U.S. Const. art. II, § 2. The Executive Branch: He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

<sup>80</sup>Supra, 77.

<sup>81</sup>Id.

<sup>82</sup>Id.

<sup>83</sup>Braz. Const. art. 101, 104, 111-A.

<sup>84</sup>Belg. Const. art. 151, Cl. 1, ¶ 4.

<sup>85</sup>Supra, 52.

<sup>86</sup>Akkas Sarkar Ali, Appointment of Judges: A Key Issue in Judicial Independence, 16 BLR. (2004).

<sup>87</sup>Bol. Const. art. 182. Number I: The Magistrates and Judges of the Supreme Court shall be chosen and elected by universal suffrage.

<sup>88</sup>Amanda Driscoll & Michael J. Nelson, The 2011 judicial elections in Bolivia, Electoral Studies. 628-632 (2012), [http://myweb.fsu.edu/adriscoll/CV\\_files/DriscollNelson2012ESBolivia.pdf](http://myweb.fsu.edu/adriscoll/CV_files/DriscollNelson2012ESBolivia.pdf)

by the Legislative Assembly, those that win serve 6 year-term.<sup>89</sup>

Cuba, a country with a one-party system also used a form of judicial election, in a model in which the legislative branch elects judges.<sup>90</sup> Article 75 (o) of the Cuban Constitution grants the Asamblea Nacional del Poder Popular (National Assembly of People's Power) the power to elect judges to serve 2.5-year terms.<sup>91</sup>

## PRESENT SCENARIO

On December 16, 2015 that the Constitution Bench of the Supreme Court had directed the Government to draft a new Memorandum of Procedure [MoP] for appointment of High Court and Supreme Court Judges, the MoP has since been getting tossed back and forth between the Centre and the collegium, with both the sides being adamant on their stands on several issues.<sup>92</sup>

The Centre's recent assertion was tabled as an answer in response to a question raised by MP Tejpratap Singh Yadav, who had sought to know whether the existing judicial system lacked transparency, especially when it came to appointment of Judges, he had further demanded to know the status of the MoP and the effect that its pendency has had on judicial appointments.<sup>93</sup> in response Mr. P.P chowdhury<sup>94</sup>, submitted that "as the process of finalizing the supplementation of the existing Memorandum of Procedure (MoP) was likely to take time", the existing MoP is being relied on to make judicial appointments.<sup>95</sup> He further presented that "predominant tested confronting the Judiciary is to a great extent to be tended to by the Judiciary as it is an autonomous organ under the Indian Constitution, the Government is focused on the freedom of Judiciary and does not mediate in its working."<sup>96</sup>

In november 2017 a three Judge Bench of the Supreme Court headed by Chief Justice Dipak Misra dismissed a petition filed by R.P. Luthra<sup>97</sup> which sought an explanation from the Centre for the delay in finalizing the memorandum of procedure (MOP) for appointment of judges to the Supreme Court and High Courts( CJI Misra felt the delay in the MoP did not need to be taken up through a judgment) and which also questioned continuing appointments even when mop had not been finalized.<sup>98</sup>

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<sup>89</sup>Id.

<sup>90</sup>Gerard J. Clark, *The Legal Profession in Cuba*, Suffolk Transnat'l L. Rev. 413, 424 (2000).

<sup>91</sup>Cuba Const. art. 75. The National Assembly of People's Power is invested with the following powers: (o) electing the president, vice presidents and other judges of the People's Supreme Court.

<sup>92</sup>Apoorva Mandhani, *Finalization Of MoP For Appointment Of Judges Will Take More Time: Govt In Lok Sabha*, Live Law, (Feb. 8, 2018, 2 :37 PM).

<sup>93</sup>Id.

<sup>94</sup>Minister for State of Law and Justice and Corporate affairs.

<sup>95</sup>Supra, 91.

<sup>96</sup>Id.

<sup>97</sup>R.P. Luthra v. Union of India Ministry of Law and Justice, MANU/SCOR/47054/2017.

<sup>98</sup>Supreme court dismisses plea which questioned the dealy in MOP and appointment of judges before it's finalization, Live Law News Network, (Nov. 8, 2017, 4 :28PM), <http://www.livelaw.in/breaking-sc-dismisses-plea-which-questioned-delay-in-mop-and-appointments-of-judges-before-its-finalisation/>

On 12<sup>th</sup> January 2018, four senior-most judges in the Supreme Court after the Chief Justice – Justices Jasti Chelameswar, Ranjan Gogoi, Madan Lokur and Kurian Joseph – deciding to hold a press conference against how the Supreme Court was functioning, the rot in the judicial system, stemming from its opacity, is now out in the open.<sup>99</sup> What is fascinating here is that Justice J Chelameswar has been a long-term pundit of the collegium – he was the solitary nonconformist when the NJAC judgment was struck down and even quit going to meetings of the collegium in 2016 when TS Thakur was CJI.

In January 2018, collegium had made recommendations to elevate Justice K.M Joseph and Indu Malhotra together as the judge of Supreme Court, the centre cleared the appointment of Indu Malhotra as a judge of the Supreme Court but refused to elevate Justice K.M. Joseph and asked the collegium to reevaluate the recommendation of Justice KM Joseph from the Uttarakhand High Court.<sup>100</sup>

Justice MB Lokur, a member of the collegium that nominates judges to the apex court, was part of a bench that reprimanded the government for sitting on suggestions from the collegium on judicial appointments the first run through an member from the collegium has stood up over the remain off between the collegium and the government on the appointment of judges.<sup>101</sup> The bench, of Justices Lokur and Deepak Gupta told Venugopal that this did not give the government the freedom to sit over names sent long back, not content with that, Justice Lokur then asked Venugopal to tell the court regarding what number of collegium proposals were pending with the government.<sup>102</sup> At the point when the AG answered he didn't have the information, the bench shot back: "this is the issue with you, with regards to assaulting the judiciary, you have the information. However, with regards to the government then you state you don't have the figures"<sup>103</sup>

Since the times of NJAC judgment, the relation between the judiciary and executive has always been going south; neither is willing to loosen its grip over the process of appointment of judges to the higher judiciary, where the collegium, on one hand, believes in its own supremacy on the issue of appointment of judges on the ground of independence of judiciary; the government, on other hand trusts that it has a better job than play in such appointments.<sup>104</sup>

The rule of Separation of Powers, which has been held to be a part of the basic structure of our Constitution, educates us that one limb of democracy cannot infringe upon the other, one

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<sup>99</sup>Sunil Jain, Judges press conference: Judicial system rot now out in open, Financial Express, (Jan. 12, 2018, 6 : 43 PM), <https://www.financialexpress.com/opinion/judges-press-conference-judicial-system-rot-now-out-in-open/1012716/>

<sup>100</sup>Apoorva Mandhani, Centre and SC lock horns over Judicial appointments in open Court, Live Law, (May. 5, 2018, 12:25 PM), <http://www.livelaw.in/centre-and-sc-lock-horns-over-judicial-appointments-in-open-court/>

<sup>101</sup>Bhadra Sinha, Centre seeks 6-month notice by collegium, draws Supreme Court's wrath, HT, (May 4, 2018).

<sup>102</sup>Id.

<sup>103</sup>R. Balaji, Judge tells suddenly data-less centre: This is your problem, The Telegraph, (May 5, 2018).

<sup>104</sup>Devashish Bharuka, Judicial Emergency, Live Law, (May. 6, 2018, 7:47 PM), <http://www.livelaw.in/judicial-emergency/>



miracles whether in the current circumstance of legal crisis, can these different organs legislature and executive take up the job of judiciary regardless of whether they need to.<sup>105</sup>

In August 2016, Justice Thakur propelled the most keen over open assault on government government by asking whether the Centre expected to convey the whole legal foundation to a "pounding end" by sitting on recommendations of the Collegium for appointment and transfer of judges to High Courts.<sup>106</sup> In full perspective of the members from the Supreme Court Bar, prosecutors and the media, Justice Thakur forewarned the government that if matters proceeded in a similar strain, the court would be "constrained" to judicially mediate and require each record of each recommendations sent by the Collegium to the government for approval.<sup>107</sup>

On November 2018, The Supreme Court has dismissed the review petition filed against the judgment dated October 16, 2015, of the Constitution Bench that struck down the National Judicial Appointments Commission (NJAC) Act of 2014 and upheld the collegium system for appointment of judges.<sup>108</sup> The court while dismissing the Review Petition stated that The review petition is liable to dismissed on the ground of delay alone. Even otherwise, we have carefully gone through the Review Petition and considered the merits. We did not find any merit in the same".<sup>109</sup>

Judicial emergency has reached its pinnacle; it is not just about mounting arrears alone, it is not just about delay in getting justice, it is something much more fundamental, it is about restoring the faith of the common man in the system itself<sup>110</sup>. If the situation is not controlled quickly, it would have a cascading and devastating effect, which would require decades to reverse.<sup>111</sup>

## CONCLUSION

The role of a well-functioning judiciary is one that aids in the protection of human and property rights while enforcing the legal frameworks that support optimal market function.<sup>112</sup> The single most important factor needed in a judicial system is that of an independent judiciary; what every country needs is are fair, effective, and independent judges that have a clear grasp of what the law is and will interpret it accordingly, the manner in which governments achieve this is directly related to the form of government it has, its

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<sup>105</sup> Id.

<sup>106</sup> Writ Petition (C) No. 295 of 2016.

<sup>107</sup> Krishnadas Rajgopal, Judicial Appointments: Supreme Court recalls order to take up delay in Memorandum of Procedure, *The Hindu*, (Nov. 8, 2017).

<sup>108</sup> SC Dismisses Review Petition Against NJAC Judgment, *Live Law*, (Dec. 01, 2018, 04:52 P.M.), <https://www.livelaw.in/sc-dismisses-review-petition-against-njac-judgment/>.

<sup>109</sup> National Lawyers Campaign for Judicial transparency and Reforms v. Supreme Court Advocates on Record Association, Writ Petition (Civil) No. \_ of 2018 (Diary No. 6578/2017) in Writ Petition (Civil) No. 13 of 2015.

<sup>110</sup> *Supra*, 105.

<sup>111</sup> Id.

<sup>112</sup> Laura Patallo Sanchez, *The Role of the Judiciary in Post- Castro-Cuba: Recommendations for Change*, Institute for Cuban and Cuban-American Studies University of Miami, (2003).

history and path to democracy, and lastly what they prioritize more: accountability or independence.<sup>113</sup> The ideal system is one that allows judges to be independent and not worry about the repercussions their holding might have on their careers, at the same time the ideal system needs to provide a level of accountability which would allow for recourse should judges overexert their power.<sup>114</sup>

The clash that is going on between judiciary and other organs of government also within judiciary is not good for democracy as in democracy each organ is separation by other by the doctrine of separation of power and if one organ of government encroaches upon other then it will violate the basic structure of the constitution. The judiciary must be independent from the other limbs of state otherwise it will affect the smooth functioning of judicial system but at the same there is a need of regulatory system which is independent which will check and balance the appointment process.

If judiciary is too much interfered by other organs of government then the judicial system will lose its soul as the work of judiciary is to administer justice and it is not possible with the interference of executive or legislative as they try to impose their own ideas. The faith and believe of people on justice system will die if executive or legislative interferes into the judicial system. We need an appointment process that is open and transparent while adhering to objective criterion not only in accord with the court and political institutions with the general public itself.<sup>115</sup> The appointment of judges must be by the judiciary and before appointing nominee to a judge of supreme court or High Court there must be a check and balance done by some independent agencies to check criminal history of nominee, bankruptcy checks, disciplinary checks etc. as like in Queensland (Australia)<sup>116</sup> to ensure that nominee is entitled to become a judge of the supreme court or a high court. Also there should be a provision that newly appointed judges must serve a probation period of 6 to 12 months before appointing him/her permanently as like in Saudi Arabia.

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<sup>113</sup>Iveth A. Plascencia, *Judicial Appointments: A Comparative Study of Four Judicial Appointment Models Used by Sovereigns around the World*, Law School Student Scholarship, (2015).

<sup>114</sup>Id.

<sup>115</sup>Supra, 111.

<sup>116</sup>When the need for a judicial appointment arises, the convention is that the Attorney-General consults directly with the Premier, the relevant head of jurisdiction, the Bar Association of Queensland and the Queensland Law Society before making a recommendation for the appointment of a judge or magistrate to the Cabinet and the Governor in Council. DJAG also performs criminal history and bankruptcy checks, and disciplinary checks with the Legal Services Commission for new nominees for appointment to all courts.