

“Process of appointments to the Higher Judiciary”

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We all in our daily lives have heard the term judiciary and are aware that Judges decide cases and matters. But have you ever wondered who these Judges are, how they are appointed and given such a position of immense authority and responsibility. This a great question to ponder upon.

The significance of having meritorious, deserving and efficient judges cannot be emphasized more and is imperative for a developing economy like India. The Indian courts are overburdened with cases, backlog and Judges delivering badly reasoned and written judgments worsen the situation. The Constitution of India has provisions, which stipulate the appointment of Judges to the High Court and Supreme Court under Article 124 and 217.

Initially, Judges in India were appointed by the collegium system to the High Courts and Supreme Courts. This system was developed through three landmark cases, also named as the Three Judges' Cases. A collegium consists of the Chief Justice of India and four other senior-most judges for appointment to the S.C and two judges of the S.C. for appointment to the High court. At the first instance, this sounds just and fair. But when we delve into this more, we realize that this is very problematic as it lacks accountability and transparency. Who is the collegium accountable to? How are the judges competent for the task? Is age the only factor to be a part of the collegium? What if the collegium has arbitrary grounds for selecting judges and the judges end up delivering devastating judgments? There is no basis for it most of the times which makes it very non-transparent.

After 20 years of following the collegium system religiously, the government in power passed the National Judicial Appointments Commission Act, 2014 and also amended the Constitution of India, 1950 through the 99th Amendment. The NJAC was a body that would be responsible for the appointment and transfer of judges to the higher judiciary. The commission would consist of the C.J.I, two senior judges of the S.C. of India, The Union Minister of Law and Justice, two eminent persons.

Through this Act, the executive has authority and power to decide the panel of Judges in the higher courts along with the judiciary. In fact, the executive supersedes the judiciary when it comes to appointment of judges. Under Section 5 and 6 of the NJAC Act, the commission will have to seek approval from the executive before making the appointments. It also states that the actions undertaken by the NJAC should not violate any of the rules of the government in power. Also, while deciding the quorum of a meeting of the NJAC, the decision will be valid only if approved by the executive and in agreement with the government. Thereafter, under Section 5 (2) of the Act, the NJAC can appoint Judges of the S.C. on the basis of merit, eligibility, ability and any other criteria. The word any other criteria is very controversial and confusing. The executive, through the NJAC exercises its own wishes in setting up a criterion for appointing the Judges and surpasses the eyes of law.

But doesn't the Constitution of India under Article 124 (3) provide for the criteria for appointment of Judges? The Indian Constitution strongly believes and propagates the idea of separation of powers between the parliament, the legislature and the judiciary. But that can hardly be seen in this setup and to my surprise is more towards the contrary.

While shortlisting judges, there needs to be investigation regarding their, work, credibility, efficiency and so on. The executive has control over these investigations as the NJAC does not have an independent body for the same. This gives the executive unfettered power in evaluating the background of the judges before the appointment and can be highly biased.

The next problem with NJAC is that of the definition of eminent persons. NJAC says that the criteria and definition can be decided with the committee members during the meeting and there is no need to have a concrete definition for the same. The eminent persons could be nominated by a committee comprising of the C.J.I. and the P.M. of India and leader of the opposition in the Lok Sabha. It is not desirable that the judiciary, epitomized by the office of the CJI, is engaged in negotiating its space, views, perspectives and suitability of the persons to be appointed as 'eminent' persons with the Prime Minister and the leader of the opposition. The executive always tries to use these opportunities to further their interests. But if we look at other Acts, they specifically mention the meaning, and eligibility for being called eminent persons. So, how have eminent persons been elected till date? Arbitrarily is the answer.

Apparently the Law Minister is the only government body in the NJAC, but then the P.M along with the leader of the opposition can outvote the C.J.I. from choosing eminent persons and remain loyal to the executive. As a matter of fact, the inclusion of the law minister as the ex-officio member of the commission is infringing upon the principles of independence of judiciary. There exists no provision in the Act as well for the removal/ termination of their services before completion of three years. Similar to the eminent person terminology problem, even the word 'fit for the position' of the C.J.I. and 'merit' is not clearly defined in the Act and is open to interpretation. There are no standards or guidelines on which one can evaluate the 'merit' of the judges.

One of the biggest reasons as to why the NJAC doesn't act independently is because the control over the pay of the NJAC members is under the executive. Also, the executive has the power to appoint the members of the NJAC after their tenure to other government posts and jobs.

Just like the collegium system, the NJAC is also very non-transparent. There is no clarity on the call for applications and neither do they publish reports and journals regarding the application process and vacancies. Transparency is something very difficult for the NJAC to achieve because it is an ex-officio body and calling for thousands of applications, scrutinizing them will make the whole process slow and will lose its substance.

The NJAC has superiority over the executive only when it is unanimous. This means that for judges to veto a candidate favored by the executive, they need two votes against the candidate. But for the Law Minister (member of the NJAC) to veto a candidate dis-favored by the executive

only one vote is needed. This right of a veto given to the members of the NJAC, is very problematic. It gives arbitrary decision-making powers within the commission.

But the tenure of the NJAC was long. On 16th October 2015, the Constitutional Bench of the S.C. by a 4:1 majority upheld the collegium system to appoint judges and struck down the NJAC as being unconstitutional. The NJAC was tampering the basic structure of the constitution in which the parliament played a big role. The judges feared that 'eminent persons' on the panel would sway because of gratitude and compromise on the judiciary. The S.C. thereafter wanted to bring in greater transparency than the previous collegium. They decided to fix an eligibility criterion for a person to be considered suitable for appointment as a judge, ascertain a process to receive and deal with complaints against judges without compromising on judicial independence, debate on whether a separate, independent secretariat is required and if yes, its powers.

After upholding the collegium system again, it has been noticed that the President is the one making the appointments. The citizens, rest of the judiciary and parliament have no knowledge and say whatsoever, in the appointment of judges. Coming to Article 124 of the Constitution, the term used is consultation and not concurrence which makes the approval of the President vital. In *S.P. Gupta v. U.O.I* also known as the first judges case, it was held that the word consultation doesn't mean concurrence and primacy of the C.J.I. is nowhere mentioned in the Constitution of India. The judgment did not strike a balance rather tilted towards the executive. Having given power, the judiciary did misuse and in 1993, the third judges case was decided and a nine-judge bench overruled *S.P. Gupta*. It also held that in the interest of protecting the integrity and guarding the independence of the judiciary, primacy should be given to the C.J.I. in making appointments. In usual cases, the recommendation of the C.J.I. should be given effect by the President. In 1998, the judgment was affirmed with a slight variation, wherein the C.J.I. would send recommendations not with his two senior colleagues but with four senior most members of the S.C.

To make the appointment of judges' fair and to strike a balance between the powers of the judiciary and executive the first step is to make it independent. The appointment of judges can be democratic in nature. The process should not remain secretive and then only will it become credible. Nobody from outside the collegium is aware of what is going on. By formulating a framework of regulations and sharing it with all relevant people will make a difference. The current judges of the High Court along with their current C.J.I. should decide upon the new appointments. They should float applications well in advance which should be open to all. A background check should be conducted by the respective High Court's administration body since they are in a better position than the executive to know about the individual applications. This shall be presented before the President and he should then accept the findings of the Judicial body unless there is some major wrong in it. Over the past few years, the S.C. has never appointed a 'distinguished jurist' as a judge of the Supreme Court. There also needs to be a well defined application process which maybe a nominations process. This will ensure better participation and competition. These applications should be assessed as per the criterion mentioned in the Constitution and decided unanimously by the judiciary and law ministry. The High Court judges should vote anonymously, that way, there wont be any need to stick to their loyalties and show gratitude as well.

Most of the times, senior most judges are involved in the appointment of judges which takes up a lot of their judicial time and makes them less productive and inefficient and is also a waste of resources. There should be an independent administrative body which will specifically look into the applications and complaints regarding the same. They should act in judicial capacity without being partisan solely on the basis of knowledge and understanding of the law.

The second step should be diversity. It took 37 years for the S.C. to appoint its first female judge. Out of 649 judges in the Supreme and High Courts, only 51 were female which is a terribly low number. A deserving and qualified woman should be a part of the commission/collegium making decisions regarding appointments of judges. They should also encourage woman to be elevated to higher courts at an earlier age so that they have considerable time to function in the judiciary.

The third step should be competence of the individuals seeking to be judges at the higher courts. There should be a selection criterion which should be concrete and cannot be escaped. There should be no exercise of arbitrary powers in selecting individuals.

The fourth step is to ensure no conflict of interest. There were various complaints filed against the previous collegium where the collegium had alleged conflict of interest with the individuals they selected to become judges. There needs to be strict policy regarding the same setting out some basic grounds on which individuals cannot be selected for a particular post. In India, the politicians and judges are often colleagues and personal friends or part of the same social circle which acts as returning of favor if appointed as a Judge.

Lastly, the collegium should hold regular meetings which are fair and transparent by way of minutes of the meeting, reports etc.

After repealing the NJAC, the collegium should satisfy few basic requirements like constitutional scrutiny, independence of judiciary, non-arbitrariness and expectations of transparency. Constitutional Scrutiny is imperative. S.C. has held that Parliament is empowered to amend all provisions of the Constitution so long as it doesn't affect the basic structure of the Constitution. Judicial independence is another criterion which was undermined by the NJAC framework. The presence of the CJI in the three-member selection committee to select two "eminent persons" puts the CJI in an awkward situation. Then to remove arbitrariness, there should be clear and definite meanings to words and there should be clarity on words mentioned in the legislations. Lastly, expectations of transparency are to be achieved through democratic nature of appointing judges.

To reach the above mentioned standards, live up to the separation of powers and have a fair system of appointing judges, there should be a separate body consisting of the C.J.I, all the S.C. judges at the center, and in the state, the C.J.I. along with all the judges of that particular court. There should also be another administrative at the center and all the states exclusively for the call of applications, background checks, addressing complaints and so on. During the appointments of the judges to the S.C., the body at the center through its administrative office should call for applications, have background checks and then allow them to proceed towards the appointment.

All the judges along with the C.J.I. of that court shall vote anonymously for the applicants wherein, the C.J.I. should have the last say in case of draws or ties in the results of the voting. The same process should be followed by the S.C. as well. After the voting concludes, a final list is decided upon by the Court, the President should supervise the procedure in reaching the conclusion and unless he finds a major problem in procedure or bias, he shall approve the list.

This will make the current system much more transparent and accountable.

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