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# APPOINTMENT OF JUDGES: ACCOUNTABILITY VS INDEPENDENCE

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## ABSTRACT

The Supreme Court itself invented the distinctive aspect of how judges of the Supreme Court and High Courts are appointed in that principal appointing body. The Supreme Court's ruling in the Second Judges' Case<sup>1</sup> gave rise to the judicial collegium, which has had the final say on judge nominations for the past twenty-five years. The collegium is not mentioned in the provisions of the Constitution.

Several moments of intense conflict between the administration and the judicial system came before the collegium's founding. Although the collegium's founding was considered as a declaration of judicial independence, it has generated a number of issues due to its murky operation, dubious decisions, and blatant lack of participation from interested parties.

The appointment process for judges in India is stimulating. It functions as an alert that creating an appointment system for judges, solicitors, and parliamentarians in India is a difficult process involving a number of political and legal elements. Considering there exists no "right" way to nominate judges for these courts, it additionally acts as an indicator to other nations that may be having issues with judicial nominations.

This paper will explain that how under the garb of judicial independence, judicial accountability has taken a back seat and constant invalidation of the constitutional principle of division of powers being normalised.

**Keywords:** Supreme Court, appointment, collegium, judicial independence, constitution, judicial accountability.

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<sup>1</sup> Supreme Court Advocates on-record Association & another. V. Union of India (1993) 4 SCC 441

## **INTRODUCTION**

Humanity has always wished for wise, compassionate judges who could distinguish between truth and lies. The method of selecting wise individuals to serve as judges was experimented with by mankind. No procedure is flawless. Experience reveals the flaws in each selection method that is used. Hence, the experiment continues. It is said that democracy is characterised by independent judges. Yet there are several more qualities that contribute to creating a good judge. Efficiency and integrity are them. The effectiveness of a judge is based on their understanding of not only the law but also numerous other academic disciplines. The likelihood of efficiency increases with information breadth. Yet information alone does not constitute knowledge. To turn pertinent information into knowledge, one must possess the capacity for methodical information analysis. In the modern world, various societies have adopted various forms of judge appointment selection procedures. As India became a republic, it selected a model. Yet, the model was substantially inspired by previous colonial practises. The need to periodically review the model was felt by succeeding administrations as well as the civil society due to changing times and economic and political reasons. The Constitution (99th Amendment) Act of 2014 served as the most recent attempt, and it was invalidated by the Supreme Court in the case that is known as the National Judicial Appointments Commission (NJAC) Case<sup>2</sup>. The show's continued existence is evidence that society is alive and well. One of the essential components for the survival of democracy is vibrancy.

## **JUDICIAL ACCOUNTABILITY VS JUDICIAL INDEPENDENCE**

Consistent accountability standards are crucial since the judiciary is widely relied upon by the Indian public to resolve many of their conflicts. While a responsible judicial system can only result in better governance and a more stable political environment, a lack of judicial accountability reduces the court's authority. It is also acknowledged that, if taken too far, judicial accountability can gravely undermine judicial independence. For this reason, it is crucial that we find the right balance between the two.

The need for judicial independence was acknowledged by the drafters of the Constitution decades ago, and it has since been upheld by the courts as one of the Constitution's fundamental principles. It is well known that laws must change in order to meet the demands of a constantly changing society. Similar to this, it is important to consider judicial independence in the context

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<sup>2</sup> Supreme Court Advocates-On-Record Association & Anr. Vs. Union of India (2016) 5 SCC 1, (2016) 2 SCC (Ls) 253

of societal change. Judicial accountability and independence must coexist in order for the institution of justice to achieve its genuine purpose.

Transparency is promoted in a variety of circumstances via accountability. When one is held legally liable, it can be achieved most effectively. As a result, judicial independence and accountability are two of the most important aspects that may help to reduce conflict between the legislative and the judiciary since they enable the government to function effectively and avoid the establishment of judicial authoritarianism.

The legislative, executive, and judicial branches make up India's three levels of government. The three essential responsibilities of creating rules, enforcing rules, and adjudicating rules are each performed by them. Such a division of duties is motivated by the "Separation of Powers" principle, which encourages accountability, restrains the government, and safeguards human rights and liberties. People can be corrupted by power, and ultimate power corrupts absolutely.

The judiciary reviews the legislation that the legislature has approved, and if they violate the constitution, the court deems them to be invalid. Additionally, the general electorate holds the legislature accountable. It follows that the judiciary is the institution responsible for upholding the constitution and safeguarding basic rights. Recent cases demonstrated the institution's lack of responsibility. This is significant because we define justice social, economic, and political justice in the preamble.

Any authority with some form of authority over the public is obligated to respond to the people in a democracy. The truth is that under a "Democratic republic," individual accountability and authority are necessary to prevent a democratic system's collapse. It is important to remember that in order to fully comprehend the notion, judicial responsibility and judicial independence must be studied simultaneously.

Accountability, in its simplest form, refers to accepting responsibility for your choices and actions. In general, it refers to having accountability to any external entity; however, others claim that accountability should be to one's own ideals or to one's own self rather than to any authority with the potential to criticise or punish. Since Article 235 of the Constitution lists accountability as one of the aspects of independence, it is a necessary provision. The fact that the High Court has "control" over the lower courts' judiciary shows that there is an efficient system in place to compel responsibility.

As a result, giving the High Court control over the lower courts preserves its independence

because it is not answerable to either the government or the legislature. The tough impeachment procedure is offered as a means of achieving this objective. The constitution's founders believed that "settled norms" and "peer pressure" would serve as sufficient checks, with the exception of extreme circumstances. This is why there is no system for the higher judiciary. However, because the judiciary is neither democratically responsible to the people nor to the other two institutions, it did not entirely occur in that fashion.

Transparency is facilitated via the accountability process. It has the greatest impact when one is held legally accountable. Because the current system of accountability is ineffective, rising corruption is eroding this branch of democracy's foundations.

### **THE REQUIREMENT FOR JUDICIAL ACCOUNTABILITY**

The maintenance of any democratic system in a "Democratic republic" depends on the use of authority with individual responsibility. Accountability should be universal, encompassing not only elected officials but also judges, bureaucrats, and anyone else with authority. Every authoritative figure has to remain answerable to the citizens of the nation, who are the source of political supremacy, since with power and position comes accountability.

The legal framework regulates the operation of law via the utilisation of judiciary. The people who run the courts are called judges. They serve as genuine officials of the courts rather than just being outward symbols. The way judges carry out their responsibilities affects both the integrity of the legal system and how well-regarded the courts are. Since ancient times, judges have been regarded in great regard in India. But recently, as a result of certain bad incidents, people are gradually losing trust in the judicial system and turning to self-government. It is quite unfortunate. Making the court accountable is necessary because it is cost-prohibitive for the judiciary to deviate from moral principles than it is for any other branch of government because it is responsible for protecting our constitution.

The idea of judicial responsibility and judges being held to account is not new. A number of nations guarantee the judiciary's accountability in their constitutions. Its purpose is to avoid the consolidation of power in the hands of one state organ, particularly in nations like India where it is said that judicial activism intrudes on the authority of other institutions.

However, judiciary autonomy is also a need for every judge, whose oath of office obliges him to respect the legal and constitutional framework of the nation and to operate without intimidation, favourable treatment, or animosity.

The NJAC was an enduring system. Including people from outside the ambit of judicial framework in the appointment process was the proper move. However, it ought not have been carried out in a manner that suggested political hegemony. Many had anticipated that the judiciary would give Parliament the respect it deserved, recognise that the current system is seriously flawed, and perhaps even create safeguards by slightly reading down the law. Rewriting legislation entails an overreach of sorts, thus doing this is always a tough thing to undertake. However, the Supreme Court went the full distance and ruled the NJAC unconstitutional by a 4-1 margin<sup>3</sup>.

### **INDIA'S LEGAL SYSTEM LACKS ACCOUNTABILITY: OPINION**

The founders of the Indian constitution could never have predicted that the Indian judiciary would become perhaps the most dominant organ of the nation within few years of its adoption. In addition to providing justice, the Constitution of India introduced the Hon'ble High Courts and the Supreme Court as guardian institutions, distinct and autonomous from the executive and the legislature, to make sure that they did not go beyond the scope of the power granted to them by the constitution. As a result, the judiciary was given the authority to interpret the law and the constitution as well as to invalidate executive actions that broke the law or violation of fundamental rights.

It possesses the power to determine whether laws passed by parliament corresponded with the constitution and to annul them if they did not. The Hon'ble Supreme Court thereby gained the authority to revoke constitutional modifications even when the court found that they violated the fundamental principles of the constitution in 1973<sup>4</sup> by applying an inventive meaning to the clause allowing the legislature to make changes to the constitution. Throughout this time, the courts have invalidated a number of legislation and certain constitutional changes.

Every one of these factors has led to the Indian judiciary being perhaps the most formidable in the world, with almost imperial-like & uncontrolled power. It is criticised that while judicial review of executive measures and even legislation was frequently possible, the court's orders, sometimes given without even informing the parties involved, were considered final and had to be followed by all executive officers under penalty of disdain of court. Naturally, these authorities were frequently and sensibly used to address flagrant presidential inactivity.

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<sup>3</sup> Supra

<sup>4</sup> Kesavananda Bharati Sripadagalvaru & Ors. V. State of Kerala & Anr AIR 1973 SC 1461

Notably, there is no consideration given to assessing the background or credentials of judges in terms of their mental obedience to the constitutional values of a secular, socialist democratic republic or their comprehension of or responsiveness towards the ordinary citizens of the nation who are poor, marginalised, and unable to litigate their rights in court. In brief, it is additionally criticised that Indian courts have practically unrestricted authority that is unmatched by any other court in the world.

It is particularly crucial in such a context that judges of the upper judiciary be held responsible for their performance and behaviour, regardless of whether it be in terms of corruption or for disregarding constitutional the principles and rights enjoyed by citizens. As some rightfully believe that sanctity and primacy of the judicial fraternity has been eroded and to some extent the system is compromised.

Unsurprisingly, neither the constitution nor any additional legislation has ever established a structure or organisation especially to review claims against judges or to evaluate their efficacy. According to the constitution, judges of the High Court and Supreme Court can only be dismissed by impeachment. Complexity of the impeachment procedure has fostered a perception among judges that they could engage in any wrongdoing, including criminal activity, without fear of repercussions such as criminal charges or dismissal.

Additionally, the force of scorn shielded them from the worry of being exposed in public. All of this has created a troubling picture of India's higher judiciary's lack of accountability. According to some, it would be impossible to take any punitive action and criminal prosecution of judges who engage in misbehaviour or criminal activity. The danger of disdain increases when they are exposed to the public. The absence of accountability might result in judicial system abuse.

## **JUDICIAL INDEPENDENCE**

A pillar of the rule of law is independence. It's crucial that judges use their independence while interpreting the law and making rulings in court to ensure that the law is applied equitably to all people of the nation. Judges may face intimidation and coercion from parties involved in litigation, including the criminal element of society. Most democratic nations uphold the widely acknowledged ideal of judicial independence.

Indeed, judicial independence is critical in sustaining the sanctity of justice in the framework

of society and gaining public trust in the upkeep of justice.

The tenets of "Separation of Powers" are the foundation upon which the idea of "Independence of the judiciary" is built. The doctrine stresses that the judiciary must be free from interference from the executive and legislature because it has the authority to interpret the law and render judgements. Judges' independence is essential to the proper functioning of the judiciary because it is possible that they may occasionally be subjected to improper influence, inducement, pressures, threats, or interference by litigants or other criminal elements of society. The judiciary is the yardstick by which one may assess the state's true level of progress.

Given that power is concentrated in one hand and there is a complete probability that it will be abused if the court is not independent, it is the first step towards a totalitarian type of government. The independence of judges from any outside influences may be summed up as the idea of judicial independence which hinder their ability to carry out their duties impartially. Consequently, it is possible to regard the independence of the court to be independent of institution that makes up the judiciary, as well as the judges' independence.

In order to guarantee judicial independence, which is designed for the benefit of the public rather than their own personal interests, the constitution granted judges immunity. In conclusion, it can be claimed that these immunities provide people unrestricted and unlimited authority, which increases the likelihood that these fundamental rights would be used arbitrarily and unfairly. However, more lately, the judiciary has been urged to adopt more accountability.

## **CONCLUSION**

There has been a lot of discontent with how the collegium structure has operated over the past 20 years. The collegium was seen as a way to safeguard the autonomy of the judiciary and shield judicial nominations from administrative meddling. Though justices may be substantially independent of the administrative, has the collegium's operation raised the fundamental question of whether or not justices, particularly those on the Higher Court, have operated completely independently, including from pressures within the judiciary itself? Additionally, a number of the collegium's picks have been plagued by problems with the calibre of the nominations and a lack of transparency in how it operates.

The main contention here is not that the collegium structure necessarily creates fewer deserving applicants, which is a matter of opinion, but rather that it actually permits fewer deserving people to pass through. While the reasons for substantive nominations and non-nominations

are completely opaque, making it impossible to criticise the affair, some egregious nominations have exposed serious flaws in the procedure or lack thereof the collegium used to make nominations.

Two specific aspects of the collegium structure's operation, in my opinion, are harmful. First, agreements are reached inside the collegium. Members frequently have preferred candidates and are prepared to accept those of other members if it means their own can be designated or promoted. Merit frequently stops being the most crucial factor as a result. It is supplanted by caste, ideology, community representation, or simple familiarity. The importance of seniority in Apex Court nominations appears to be strategic at the same time. While seniority is frequently perceived as a factor that prevents the nomination of qualified justices, it is also sometimes recognised as a criterion that can be disregarded.

Together, the 99th Amendment and the N J A C Act intended to create the N J A C, the result of nearly three decades' worth of reform ideas. By including members other than judicial members in determining decisions and retaining judicial preponderance, it aimed to broaden the basis for the nomination affair. However, the Apex Court's ruling in the N J A C Case<sup>5</sup> has invalidated both the 99th Amendment and the N J A C Act, returning us to the collegium structure of nomination.

A comprehensive overhaul of the previously dysfunctional nomination's structure is necessary since the collegium's ongoing ethical and operational flaws cannot be fixed by tweaking existing procedures.

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