

CHALLENGES OF JUDICIAL APPOINTMENTS

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BACKGROUND

Since the onset of the history of ancient India, the judiciary has been present in one way or the other. It is the indispensable organ of any society, as it holds the crucial role of bringing justice to its citizens, and where there are people, their people are wronged and there they seek justice, and as mentioned Indian judiciary has been omnipresent for it all. The Indian judicial system has seen its own transformation through the ages, it started off with the Vedas and the dharma shastras which were the codes of conduct for different social classes and formed the basis of the legal system. Back then, the king was the chief judge and he was assisted by brahmin priests and ministers of his court, this system was largely based on the ideals of the Nyaya¹ school of Indian philosophy which focused on justice as one of its core fundamentals. This system saw a shift with the arrival of the Mughals who went on to introduce the sharia law in the Indian subcontinent, which did co-exist with the Hindu legal system. The sharia courts² dealt with matters pertaining to personal law such as marriage, divorce, and inheritance for the Muslim population. The advent of the British started seeing the establishment of a much more orderly system of justice, with the setting up of the supreme court of Calcutta in 1774³. The British brought the concepts and legal provisions of the British common law and set up the Indian penal code in 1860, and introduced the idea of a written constitution, which was adopted by later independent India and through Chapter IV under Part V of the constitution which laid the building blocks for the union judiciary, The constitution and jurisdiction of Supreme Court is stated in detail from articles 124-147. So this has been the background of the judiciary we engage with today, it has seen years and years of transformation, and till this day leaves scope for more improvement which is one of the points this article will touch upon.

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¹ Matthew R. Dasti, "Nyāya" < <https://iep.utm.edu/nyaya/> > accessed 22nd February, 2023

² Lemons, Katherine. "Sharia Courts and Muslim Personal Law in India: Intersecting Legal Regimes." *Law & Society Review* 52, no. 3 (2018) < <http://www.jstor.org/stable/45093930> > accessed 25th February, 2023

³ Astha Mathur, "The Supreme Court of Judicature 1774" < <https://www.legalserviceindia.com/legal/article-2433-the-supreme-court-of-judicature-1774.html> > accessed 24th February, 2023

The Indian judiciary as mentioned above has, its roots in English law⁴ as well, due to the colonization by the British of the Indian subcontinent. Our legal system has been heavily influenced by the English ways, in fact, the law of torts has been adapted and inspired majorly by the English law of torts in India. Thus, the origin of the Indian judiciary finds its sub-origin in English law. Our judiciary has stood the test of time, being older than the country itself, it has seen India transform from its birth, and thus is more well-versed with the country than any other organ of the state. Judiciary is the sole guide to the constitution of this country and thus, is essential to the framework of the nation, and in exercising its power to decide on matters of justice, there are many challenges undertaken by it. Challenges are multifarious, one of the most commonly heard is the pendency of cases, others include, the overburdened courts, and the one being attempted to be discussed in detail in this article is the challenges with judicial appointments.

INTRODUCTION

The judiciary works on a hierarchal level in India⁵, the supreme court being the apex court standing at the top, with various high courts of each state coming under its belt, and at the lowest level are the district courts. These courts hold different jurisdiction which varies over the spectrum of territorial and monetary jurisdiction. The district court judges are appointed through an examination conducted by the state public service commission, and then the selected candidates are interviewed for the same by a panel of high court judges. The appointment of high court judges works on a suggestive basis, wherein the CJI of a high court initiates the proposal of a judge to the high court, then the proposal is sent to the CJI of India, for their views, then the proposal finds its way to the collegium⁶ of judges and other senior judges of the high court, and then the recommendation is passed onto the ministry of law and justice and they conduct a background check, after this screening, the recommendations are sent to the Prime Minister, and then after his approval, the recommendations are then sent to the President of India for his assent, then after this assent is obtained, a judge of the high court finally takes the oath to be a judge of the high court. In India, the appointment of high court judges is governed by the constitution of India and the “high court judges (appointment and

⁴ The bar council of India, < <http://www.barcouncilofindia.org/about/about-the-legal-profession/legal-education-in-the-united-kingdom/> > accessed 22nd February, 2023

⁵ Vijay Pal Dalmia, “Hierarchy of Courts in India” < <https://www.lexology.com/library/detail.aspx?g=49df79a8-4bd4-42a3-b68e-3a753a4eb849> > accessed 25th February, 2023

⁶ Deepshika Garg, “Collegium System in India” < <https://www.legalserviceindia.com/legal/article-3681-collegium-system-in-india.html> > accessed 25th February, 2023

conditions of service) Act, 1954”⁷. The procedure is similar to the appointment of the supreme court judges, and is governed under, "The Supreme Court Judges (Appointment and Conditions of Service) Act, 1958". Thus, this is the basic procedure of the appointment of judges in India at various levels. But, this appointment procedure over the years has been subjected to much scrutiny, problems like lack of transparency with the collegium system and the public being at a disadvantage of information because of the closed-door policy of this system have been central to the challenges of judicial appointments. There is also a fine mention of political influences in these appointments, since the assent is being obtained from all three organs of the state, there is bound to be a play of interests at hand, which allegedly can arise from either the judiciary itself or the legislature and executive. The nature of the problem at hand is of such sensitive nature that it forces the author being a law student to analyze every aspect of this issue. Another aspect this article aims to touch upon is the delay in said appointments, the judicial process has been known to be strenuous and is often stretched, but this detailed procedure is essential yes, but in today's times can be modernized using technology, which should lead to lessening the time in which judicial appointments are made. India is a fairly diverse country, it is one of our proudest assertions to call such variegated communities under a single banner of India, thus this diversity should be in every aspect of our country and the judiciary is certainly, not to be left out, thus, this article calls for the inclusion of the various marginalized communities into the judiciary.

LACK OF TRANSPARENCY

Judicial appointments are a subject of utmost importance for the public and for the state. these officials are people who are going to be the deciders of the fate of many, who come at the hands of the judiciary in seeking justice. Thus, judicial appointments being unfair in any way and means is going to harm the people in more ways than one, the very people whose welfare the judiciary works for. Lack of transparency in the discharge of many duties of the collegium has been a subject of much-heated debate in recent times, and to say these claims are entirely unfounded is being sheerly biased in favor of the apex committee responsible for appointing a lot of judges in this country. The major accusations have been on the basis that the collegium has never provided criteria for the appointment of judges to the higher courts in India, when asked, claims about it being on a seniority basis or on similar grounds have been vehemently

⁷ “HIGH COURT JUDGES (CONDITIONS OF SERVICE) ACT 1954”

<http://www.commonlii.org/in/legis/cen/num_act/hcjosa1954386/> accessed 24th February, 2023

denied by the officers of the apex court and the ones part of the collegium. The reasons cited for this gated behavior were usually vague arguments like shielding sensitive information. The fabric of our country's democracy has been based on the citizenry of this nation asking the right questions and raising their voices against unjustness, and to take the defense of sensitivity and guard yourself against this accusation is something that simply doesn't suit the celebrated judiciary of this nation. We have had provisions of RTI (Right To Information)⁸ being incorporated in our country solely to be the protectors of the very fundamental ask of openness to the public which at the moment the collegium highly lacks. The meetings conducted for judicial appointments are never really outed to the public and the information again remains guarded by the ones who produced it. Thus, the lack of transparency in judicial appointments has become a matter of serious concern and should be addressed with utmost sincerity.

NATIONAL JUDICIAL APPOINTMENTS COMMISSION (NJAC)

In the conquest to establish a fairer judiciary in 2014-15 a proposal came for the NJAC⁹, or the National Judicial Appointments Commission. It was a proposed constitutional amendment in India that sought to replace the existing collegium system for the appointment of judges to the higher judiciary. This proposed committee was to constitute six members, including the Chief Justice of India, two senior-most judges of the Supreme Court, the Union Minister of Law and Justice, and two eminent persons nominated by a committee consisting of the Prime Minister, the Chief Justice of India, and the Leader of Opposition in the Lok Sabha (lower house of parliament). This committee was a proposal to tackle the issue of transparency and accountability on part of the collegium, but this was scrapped on the grounds of separation of powers, but the idea of NJAC was yes, unconstitutional but it was for a noble cause of bringing regularity in the conduct of the collegium by eliminating it, but the idea of the NJAC, has certainly opened the avenues for deliberation on this particular issue.

PROBLEMS WITH THE COLLEGIUM SYSTEM

The collegium system has been a helpful instrument in appointments, but as with any institution comes with its own set of issues, which are named as follows:-

⁸ "Right to Information" < <https://rti.gov.in> > accessed 24th February, 2023

⁹ "The National Judicial Appointments Commission Bill, 2014" < <https://prsindia.org/billtrack/the-national-judicial-appointments-commission-bill-2014> > accessed 24th February, 2023

Lack of accountability: Since the appointment of judges is largely in the hands of senior judges, there is little accountability for their decisions. The collegium system has been central to the judiciary, thus, to hold someone accountable for any fallacious decision is next to impossible, thus, to ask for accountability in the decisions of the collegium is not entirely unfounded.

Inefficiency: The collegium system can be slow and inefficient, leading to delays in appointments and a backlog of cases. The collegium system requires a very detailed procedure to be followed, whilst deliberation is acknowledged, but if it is hindering the process of appointing valuable judges to higher courts then this procedure has to be put up for reconsideration.

Exclusion of diverse voices: the collegium system is formed of the senior judges of the supreme court with the CJI, historically, our judiciary has not seen active inclusion of women and marginalized communities, thus, since its inception, the representation from these sects of the society has been heavily absent, even today the collegium is running on those archaic ideals and the appointment of these marginalized communities is still a topic of debate. In the recent case of the appointment of senior advocate Saurabh Kirpal¹⁰, to the bench of Delhi high court, we saw the arbitrary basis, provided for not appointment, some of them being contentions about his “supposedly biased” views on LGBTQIA+ since he identifies himself as gay, others were since his partner is a Swiss national it could harmful to the integrity of the nation. The basis given by the authorities were issues of minuscule importance, but this was experienced by a learned advocate who just belonged to a community that has been successively oppressed for ages and this is the inclusion the author calls for.

CONCLUSION

Judicial appointments are an issue of prime importance and through the aspects analyzed above, the procedure of this humongous task should be regulated to suit the best interests of this nation, and the way the collegium works should be reformed, the challenges are real, and require the attention of jurists nationwide and need to be revolutionized. Thus, we require an efficient judiciary and that is only possible by extending our concerns to the right people and bringing to notice, the issues that persist in the system.

¹⁰ Malvika Prasad, “Who is Saurabh Kirpal, whose name as HC judge objected to by government” <<https://indianexpress.com/article/political-pulse/who-is-saurabh-kirpal-name-delhi-hc-judge-objected-government-supreme-court-collegium-8395462/>> accessed 23rd February, 2023