

“Comparative Analysis: Appointment of Judges of Superior Courts of India in Comparison with US and UK”

**Rubasha Perween
The ICFAI University
Dehradun*

***Dr. Avishek Raj
The ICFAI University
Dehradun*

Abstract

Judicial independence is a crucial pillar of democracy and the rule of law. This article undertakes a comparative analysis of judicial independence across three democratic countries. The countries analyzed include the United States, the United Kingdom and India. The article assesses the constitutional and statutory measures designed to protect the judiciary from interference. Additionally, it delves into the repercussions of court rulings on public policies and events. The Conclusion provides for a insight gained and proposes desirability of reform to fortify the independence principle. This Article aims to enhance scholarly comprehension of the judiciary’s status, operation and the reforms requirements within the democraticsystem.

Introduction

The institution of judiciary, for a democratic nation, is at the helm of public welfare. The essential significance of it cannot be undermined, in light of its vested power and the responsibility to administer justice and maintain the subsistence of the rule of law, rather than rule of men. It acts as the custodian of constitutional values, is bestowed with the duty for its promulgation and has been defined as the cornerstone of democracy¹. It is manifest in the judicial documents and the history that it holds, the role played by this institution in shaping thenation's policy and guiding the shift towards the modern welfare nation that India is.

An independent judiciary is essential for a free society, a constitutional democracy and to ensure the rule of law and realization of human rights and also the prosperity and stability of a society². Judicial independence is not an end in itself but merely a means to an end³. However, this exerciseof grant of independence also raises the threshold of its accountability towards the citizens and thesystem. Accountability is the concept of ethics and is often used synonymously with responsibility, answerability or with the expectation of account giving.

¹ *All India Judge's Association. v. Union of India*, (2002) 4 SCC 247.

² MP Singh, “Securing the independence of judiciary: The Indian experience” 10 IND. INT’L & COMP. L.REV 1-2 (2000).

³ Roger Warren, *Judicial Accountability, Independence, and Fairness*, 5 The Court Review (2006).

APPOINTMENT MECHANISM FOLLOWED IN INDIA

Background

India is a federal republic with a bicameral legislature, an indirectly elected President who is Head of State, and a Prime Minister who is Head of Government. The superior courts are the High Courts of the states and the Supreme Court of India.

Introduction

Tracing the history of appointment process before India's independence, we can ascertain that Crown under the government of India Act 1919 and Act 1935, enjoyed the paramount discretion in the appointment of judges. Subsequent to India's independence and with the abolition of Privy Council Act, there was an end to the broad jurisdiction of Privy Council and the same got vested in the federal court⁴. The Supreme Court of India was established on 26 January, 1950, which is now the highest court of competent jurisdiction.

The High Court appointments were also subjects of vigorous debate in the Constituent Assembly. The main issue before the Assembly was to incorporate a mechanism which would guarantee independence of judiciary⁵. If we go through the debates of the assembly, we would find that the debates culminated in giving power of appointment to the executive. However, since the drafters were acquainted with the fact that giving unrestricted discretion to the executive in the matter of judicial appointment had been a nightmare for Britishers, therefore checks and balances are if at all the discretion has to be given to the executive.

This would ensure that judges, in **Pt. Nehru's** words, would be *“people who can stand up against the executive government and whoever may come in their way”*⁶.

It was decided by the constituent assembly that promoting legislature's role in appointment would only make it an object of political bargain. A viable option highlighted was that legislative role in the appointments should be minimized to commensurate level and the president would appoint judges in consultation with the Chief Justice of India⁷. The Constituent Assembly agreed on a system by which the President would appoint judges, albeit after mandatorily consulting the Chief Justice of India.

However, **Dr. Ambedkar** himself, speaking in the Assembly, was careful to stress that

⁴ The Federal Court of India was a judicial body, established in India in 1937 under the provisions of the *Government of India Act 1935*, with original, appellate and advisory jurisdiction. It functioned until 1950, when the Supreme Court of India was established. The seat of the Federal Court was at Delhi. There was a right of appeal to the Judicial Committee of the Privy Council in London from the Federal Court of India.

⁵ The key discussions on the issue of appointments were held between the 24 & 27 of May, 1949. See Constituent Assembly Debates, Vol. VIII (New Delhi: Lok Sabha Secretariat, 2003) 229-399.

⁶ Constituent Assembly Debate Vol. VIII, 246-247 (24th May 1949) available at: https://eparlib.nic.in/bitstream/123456789/763277/1/cad_15-06-1949.pdf (Last visited January 11, 2024).

⁷ *S.P. Gupta v. Union of India*, 1981 Supp SCC 87: AIR 1982 SC 149.

*“consultation did not amount to a veto being exercised by the Chief Justice of India, since that would result in an untrammelled power being vested in a single person, a constitutionally unwise precedent”*⁸. Thus, the constituent assembly in a way tried to maintain balance in the process of judicial appointment by involving multiple authorities in previously mentioned process that a mutual checks and balance would operate.

Appointment of Supreme Court and High Court judges in India

Appointment of judges to the Supreme Court of India and High Courts is provided for in **Article 124(2)** and **Article 217(1)** of the Constitution, respectively. These article(s) provides that power of appointment for a Supreme Court judge vests with the President, in consultation with the Chief Justice of India. In the case of appointments at the concerned High Court, it is in consultation with the Governor of the concerned state, Chief Justice of the concerned High Court and also Chief Justice of India.

The other Judges of Supreme Court and High Courts was appointed by the president after *“Consulting the CJI.”* This in effect meant that the final decision in matters of appointment rested with the council of ministers. What then was the status of the consultation with the Chief Justice? This matter came up before the Supreme Court repeatedly between 1982 and 1988.

In the **First Judges Case** which is popularly known as *S.P. Gupta v. President of India and Ors.*⁹ Supreme Court held that Supreme Court and High Court judges appointed by President and Chief Justice of India recommendation to the President can be refused for strong reasons. So, in the *“first judge case”* the supremacy of executive over the judiciary in the appointment and transfer of the judges.

In 1993 **Second Judge Appointments Case**¹⁰ where nine judges of the Supreme Court decided held that, no appointment of any judge to the Supreme Court or High Court can be made unless it is conformity with the opinion of the Chief Justice of India. The Second Judges Appointment Case brought into existence the system of appointment of judges popularly as the “Collegium” system of appointments of judges.

In 1998, the **Third Judges Appointments Case**¹¹ improved on existing “Collegium” system of judicial appointments. In 2014, the National Judicial Appointment Commission bill was introduced to the Lok Sabha and it was enacted on December 31, 2014 as *“The National Judicial Appointments Commission Act”*. Along with NJAC Act, the parliament also passed the Constitution 121st Amendment Bill, 2014 that inserted Article 124A into the Constitution. NJAC Act was enacted to replace the Collegium system with a new NJAC system for

⁸ Union of India v. Sankalchand Sheth (1977) 4 SCC 1935.

⁹ AIR 1982 SC 149.

¹⁰ Supreme Court Advocate on Records Association v. Union of India (1993) 4 SCC 441.

¹¹ In Re: Special Reference No. 1 of 1998, (1998) 7SCC 739.

appointment of judges to the Supreme Court and High Courts.

But suddenly it was challenged on October 16th, 2015 before Supreme Court, **in the Fourth Judges Appointment Case**¹² five judges of the Supreme Court held that the NJAC Amendment unconstitutional as violating of the basic structure of the Constitution. So, for Appointment and transfer of judges of Supreme Court and High Courts from 2015 to till now we are following the same collegium system in Judiciary.

APPOINTMENT MECHANISM FOLLOWED IN UNITED KINGDOM (UK)

Background

The UK is a constitutional monarchy with a bicameral legislature. The Queen is the Head of State and the Prime Minister the Head of Government. There are distinct court systems in England and Wales, Scotland, and Northern Ireland. The UK Supreme Court is the final court of appeal for all UK civil cases, and criminal cases from England, Wales, and Northern Ireland. A High Court and Court of Appeal are established in England and Wales and in Northern Ireland. In Scotland, the superior courts are the High Court of Justiciary and the Court of Session.

Constitutional legislations regarding Appointments of Judges in UK

Constitutional Reform Act 2005 (CRA); Senior Courts Act 1981; Supreme Court (Judicial Appointments) Regulations 2013; Judicial Appointments Commission Regulations 2013; Judicial Appointments Regulations 2013; Judicial Discipline (Prescribed Procedures) Regulations 2013; Judicature (Northern Ireland) Act 1978; Justice (Northern Ireland) Act 2002; Judiciary and Courts (Scotland) Act 2008; Scotland Act 1998

Appointment of Judges in United Kingdom

In the United Kingdom, the appointment of judges is made by the monarch on the advice of the Lord Chancellor, who receives recommendations from independent selection commissions.¹³

Judicial Appointments Commission (JAC):¹⁴

The JAC is an independent body established in 2006. It is responsible for selecting candidates for judicial office in England and Wales, Scotland, and Northern Ireland. The JAC aims to ensure that the judiciary is diverse, merit-based, and free from political influence. The objective of this commission is to establish the Judicial Appointments Commission as part of

¹² Supreme Court Advocates-on-Records Association v. Union of India (2016) 5 SCC 1.

¹³ Appointment of Justices, The Supreme Court, available at: [https://www.supremecourt.uk/about/appointments-of-justices.html#:~:text=The%20process%20for%20selecting%20Justices,\(Judicial%20Appointments\)%20Regulations](https://www.supremecourt.uk/about/appointments-of-justices.html#:~:text=The%20process%20for%20selecting%20Justices,(Judicial%20Appointments)%20Regulations)

¹⁴ Constitutional Reform Act 2005, Part 3, Section 60.

broader efforts to enhance the independence and transparency of the judiciary in the UK. The Act reflects the commitment to a merit based system for the appointment of judges, with the JAC playing a key role in the selection process.

Tenure of Judges

Judges retire at the age of 70 years [Judicial Pensions and Retirement Act 1993, s 26]¹⁵, and provisions are in place to secure judicial salaries against reduction other than by Act of Parliament (Senior Courts Act 1981, s 12).

The United Kingdom places a significant emphasis on upholding an independent judiciary to actively support the rule of law. Judicial independence is not only considered a fundamental prerequisite for the rule of law but is also deemed essential in ensuring fair trials. Judges are duty-bound to maintain and demonstrate this independence, both at an individual level and within the institutional framework.

In a notable legal case, *R v Secretary of State for the Home Department, Ex parte*¹⁶, Clive Pierson challenged the Home Secretary's authority to establish minimum terms of imprisonment under the Crime (Sentences) Act 1997. Pierson contended that allowing the executive Home Secretary to determine minimum terms violated the fundamental principle of the separation of powers, asserting that sentencing should be within the purview of the judiciary, while the executive should focus on administration.

The House of Lords, in its deliberation, concurred with Pierson's argument, finding that the Home Secretary's authority to set minimum terms indeed breached the separation of powers and the rule of law principles. These principles mandate that the judiciary retains complete discretion over sentencing.

In summary, impartiality stands as a cornerstone in the effective discharge of the judicial office, and the UK's commitment to maintaining an independent judiciary is a testament to its dedication to the rule of law and the preservation of constitutional principles.

APPOINTMENT MECHANISM FOLLOWED IN UNITED STATES OF AMERICA (US)¹⁷

Background

The United States is a constitutional federal republic, in which the president (the head of state

¹⁵ Appointment of Justices, The Supreme Court, available at: [https://www.supremecourt.uk/about/appointments-of-justices.html#:~:text=The%20process%20for%20selecting%20Justices,\(Judicial%20Appointments\)%20Regulations%202013](https://www.supremecourt.uk/about/appointments-of-justices.html#:~:text=The%20process%20for%20selecting%20Justices,(Judicial%20Appointments)%20Regulations%202013) (Last Visited January 11, 2024).

¹⁶ [1998] AC 539.

¹⁷ Judgeship appointment by President, United State Courts, available at: <https://www.uscourts.gov/judges-judgeships/authorized-judgeships/judgeship-appointments-president#:~:text=Supreme%20Court%20justices%2C%20court%20of,as%20stated%20i> (Last visited January 11, 2024).

and head of government), Congress, and Judiciary share powers reserved to the national government, and the federal government shares sovereignty with the state governments.

Section 2, Article II, the United States Constitution¹⁸:

The President shall nominate, and by and with the advice and consent of the Senate, shall appoint Judges of the Supreme Court and all other Officers of the United States, Justices of the Supreme Court, Judges of the Circuit Courts of Appeals, and the District Courts all are appointed by the President of the United States with the advice and consent of the Senate. These justices and judges are appointed for life, and they can only be removed through impeachment by the Congress.

Appointment of Judges in United States

Appointment processes of a Judge in the Supreme Court in the US are done by the US President after obtaining approval of the US Senate¹⁹. The involvement of the Senators in the nomination and election of the Supreme Court is less. The power of the President of the United States to appoint the Supreme Court Judge is protected under Article 2 (Section 2) of Constitution of United States.²⁰

1. The tenure of a Supreme Court judge is not fixed and there is no predetermined and definite retirement age in USA opposite to the procedure followed in India. The procedure adopted in USA for appointing a Justice in the Apex Court involves considerable amount of politics as a lot of powers is vested in the hands of the President.
2. In addition to this, there is no written and prescribed Statute or any eligibility criteria for Judicial Members in the Apex Court on in the federal court of the country.
3. The independence of the judiciary in the United States is fundamentally rooted in the preservation and equilibrium of the principles of checks and balances. A notable case illustrating this principle is *United States v. Wil*²¹, which centered around Congressional statutes rescinding previously approved executive pay raises for judges. In response, judges contended that this constituted direct interference with judicial independence.

The Court underscored the necessity to shield judicial independence from political influences and shifting public sentiments. Laws perceived as undermining the safeguarding of judicial independence were deemed unconstitutional violations of the separation of powers. In essence, the ruling reinforced the principle that the judiciary must be insulated from political pressures

¹⁸ Constitution annotated analysis and interpretation of US Constitution

<https://constitution.congress.gov/browse/article-2/section>

2/#:~:text=The%20President%20shall%20be%20Commander,any%20Subject%20relating%20to%20the (Last visited January 11, 2024).

¹⁹ Article II, Section 2, The Constitution of the United States.

²⁰ Article 3, The Constitution of United States.

²¹ 449 U.S. 200 (1980).

to uphold its independence effectively.

CONCLUSION

The Indian system of appointment of Judges has evolved over years from the entire power being vested in the Executive till 1993 to the birth of Collegium system after Second Judges Case to the National Judicial Appointment Act and now constant attempts to reach to a Memorandum of Procedure which accommodates proposals of both; the Judiciary and the Executive. But there is no such tussle or confusion in appointments in the USA since in United States of America, the President nominates judges and appoints them with the approval of the Senate (House of Parliament)

In *United Kingdom*, Previously Judges were appointed by the Queen on the advice of Lord Chancellor, which made those appointments appear subject to political influence. The Constitutional Reform Act 2005 created the Judicial Appointments Commission. This independent Commission proposes a candidate, and the Secretary of State for Justice can only say Yes or No. This will increase the feeling that judicial appointments are being made on merit rather than on political grounds.